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A large part of our law deals with business problems. Its purpose, and its just standard of criticism, can only be the economic welfare of the society whose law it is. Lawyers who care about the results of the rules which they administer must at a thousand points decide what constitutes the welfare of the economy that those rules govern and which of the competing rules promotes that welfare.

But when lawyers set out to be amateur economists they meet at once two major troubles—the disagreement of the learned and the unreality of so much economic writing. Neither should surprise us, for we are accustomed to the same phenomena in our own field. But they do force us to select among economists and between conflicting economic doctrines.

To come down to particulars, what is the function of saving in the American economy in 1935? Who makes monetary savings? What do they make them for? How do such savings get translated into demand for materials and labor? Do they all get so translated? If not, what happens to the balance? Is the country already overbuilt, and is further saving and investment undesirable? Or does the attainment of a reasonable standard of living still require that we devote substantial portions of our annual supply of commodities and labor to the creation of additional productive plant? Have we in past prosperous years used the existing plant to its capacity? If not, why not? Might the existing plant be used more fully if the income resulting from its use were distributed in other ways?

* "The Distribution of Wealth and Income in Relation to Economic Progress," Brookings Institution (1934-1935). The four divisions of the study under this general title are as follows: Edwin G. Nourse and associates, *America's Capacity to Produce* (1934); Maurice Leven, Harold G. Moulton, and Clark Warburton, *America's Capacity to Consume* (1934); Harold G. Moulton, *The Formation of Capital* (1935); same author, *Income and Economic Progress* (1935).

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And might such fuller use show up more obsolescence, and disclose the need of new construction? Can consumption and new capital investment both expand at once, or is it inescapable that we go hungry first, in order to build bakeries before we eat? Have we built anything important during the recent hungry period? Was everyone reasonably well fed during the "new era" of the '20s? "Is there adequate reason to suppose that the economic activities of our people could be organized on a sustained level which would permit ample food, adequate clothing, comfortable housing, and a reasonable minimum of education and recreation for all members of society? If so, what is the type of economic organization and, more particularly, what are the ways of conducting the affairs of an economic society so organized which would assure the attaining of such a permanent high standard of material well being?"¹ These are, as the French say, major words.

Upon the answers to these questions may depend the constitutional validity, and will certainly depend the legislative wisdom, of many statutes and more bills. But when hopeful lawyers turn for answers to the experts in the field we find almost as many answers as economists, and we find the answers vitiated, often, by unprovable assumptions as to how people act in given situations—assumptions some of which are contradicted by the actual business behaviour that we meet in practice. All we can do is to try to reach our own conclusions, hoping meanwhile for more light from those who know the most about the subject.

To one in such a state of mind the publication of the Brookings Institution's series of studies on the general problem is important. Here is, for three volumes, a study starting with observable phenomena, containing an integrated development of theory, and reaching conclusions consistent with each other and with the underlying facts. If the recommendations of the final volume seem at some points inconsistent with the findings of the other three, the materials at least are here by which they can be judged.

I

The first volume of the Brookings' study² deals with the plant itself. It seeks chiefly the answers to three questions: (1) Has plant capacity in the United States, in the period 1900-1930, shown a tendency to accumulate so fast as to outrun opportunity for its productive use? (2) Was full productive capacity utilized in the peak year 1929, and if not how much latent productivity was available unused? (3) Was there any unutilized

¹ Nourse and associates, *America's Capacity to Produce* 2 (1934).

² Nourse and associates, *ibid.*

labor in 1929, and if so was it adequate to man the unutilized plant and bring it to full production?

These questions are approached only partly on an engineering basis. The study resolutely declines to base its estimates on new technologies, on a different economic order, or even on the adoption in all plants of the methods and equipment of the most efficient. The figures are based squarely on the actual plant as it existed in 1929, with the then existing business methods, labor force (including hours and holidays), and techniques of production, including failures of machinery, shutdowns for repairs, and seasonality of operations. The question put is simply what that plant upon that basis could be expected to produce, not in short spurts, but continuously, if the demands of the market should be such as to call forth its full capacity.³

Capacity has to be studied industry by industry. There is always, therefore, danger of enthusiastic figures resulting from the failure to appreciate some bottle-neck resulting from conditions in some other line. If we wish to double the production of canned peas, we need only run the canneries twenty days instead of ten. But it is not so easy to spread out the dates of local harvest. Nor, in other lines, can we assume two shifts instead of one, unless we are certain that operatives are available without embarrassing some other industry. The present survey makes a careful effort to ascertain these bottle-necks, and to limit all its estimates to "practical, sustained simultaneous operation."

The industries studied in the survey divide into three groups. First come the raw materials, under which the chapter heads are Agriculture, Coal and Coke, Petroleum (and its main products), Copper and other Non-Ferrous Metals, and Cement and other Earth Materials. A conspicuous but wholly justified omission is iron ore, because the bottle-neck in iron and steel is clearly not the mines. After raw materials come the group of fabricating industries. Here we meet first Food Products (meat packing, the dairy industry, fruit and vegetable canning, beet sugar, and flour), Textiles and Clothing (cotton goods, woolens and worsteds, silk and rayon, knit goods, clothing, and boots and shoes), then Automobiles and Tires, Paper Making, Printing, Publishing, Iron and Steel (pig iron, steel, rolled products, tin plate, terneplate, and wire), and Other Manufactures (locomotives, textile machinery, machine tools, building materials, and chemicals). Finally come Services, including electric power, transportation (railroads, waterways, highways, and pipe lines), mer-

³ Nourse and associates, *id.*, at 21-28, 120-127, 170-176, 177-186, etc.

chandising (including storage, etc.), money and credit, and the labor force.

The book will stand extended study. It is of course impossible to reproduce its data and methods here.⁴ All that can be said now is that the promises of the introduction as to method are fully carried out in the detailed discussion of particular industries. The resulting estimates show percentages of "practical capacity" utilized (in 1925-1929) running all the way from forty in the case of locomotives to ninety-seven for full fashioned hosiery. The very difficult task of putting these diverse results together into a composite picture is performed in the last chapter,⁵ and the whole tested against the wartime efforts to increase production. The main findings can be summarized as follows:

1. Except in transportation, the percentage of our plant unutilized did not increase substantially between 1900 and 1929. There were particular instances of overbuilding, and others of sudden obsolescence and reduced demand, but on the whole the plant was as well utilized in 1929 as thirty years before.⁶

2. There was substantial unused plant capacity in the peak year, 1929. The slack was sufficient to produce in that year 19 per cent more goods and services than were in fact produced, without new technologies or methods, and on a basis of "practical, sustained, simultaneous operation," had the demands of the market been such as to call forth full supplies. For the whole period 1925-29 the figure is twenty-one per cent.⁷

3. Available labor was not all utilized in 1929. Among the unemployed, the partially employed, and those whose time was only partly useful though they were rated as full-time employes, was sufficient unused labor power to man the plant and bring it to capacity. The idle men were not all in the right places. "Many small shifts would be required between different branches of the several industrial divisions, but comparatively few between the major divisions themselves."⁸

From these findings two conclusions follow:

1. It is not true that the production of 1929 could readily be doubled. People who speak of increases of that magnitude are either taking 1932 as a base instead of 1929, or they are assuming new technologies or a new economic order, or both. On the basis of 1929 techniques about one hun-

⁴ Summaries of each of the first three volumes have been published by the Maurice and Laura Falk Foundation, of Pittsburgh. See also Moulton, *Economic Progress without Economic Revolution*, *Fortune*, Nov., 1935.

⁵ Nourse and associates, *id.*, at 415.

⁷ Nourse and associates, *id.*, at 422.

⁶ Nourse and associates, *id.*, at 421.

⁸ Nourse and associates, *id.*, at 422-23.

dred and twenty per cent of 1929 production is the top until we build more plant.⁹

2. Neither is it true that we were living beyond our means in 1929.

"Individuals, of course, were living beyond their private means as individuals always will in both prosperity and depression. But the nation was not. We were not trenching on our resources of capital goods or of labor power. Equipment was being maintained at a rate entirely suitable to the indefinite continuance of operation at the 1929 rate of activity. There was an unutilized margin which, in the perspective of the past, would appear to be about normal. Labor in general was not being so driven as to impair either health or morale. On the contrary, there was nearly twenty per cent of reasonably available labor which was not turned into the productive stream. Our economic society lacked almost twenty per cent of living up to its means."¹⁰

Suppose we had made up the slack? The survey states it thus:

"Finally, the 19 per cent which we estimate that we could have added to the total productivity of 1929, while modest as compared with the easy optimism of some observers, would have constituted a very substantial achievement. Nineteen per cent increase in the national product would have represented an added 15 billion dollars. This would have permitted of enlarging the budgets of 15 million families to the extent of \$1,000 each. It would have enabled us to add goods and services to an amount of \$765 on the 1929 price level to the consumer gratifications of every family having an income of \$2,500 or less in that year. We could have produced \$608' worth of additional well-being for every family up to the \$5,000 level. Or we could have brought the 16.4 million families whose incomes were less than \$2,000 all up to that level.

If it be objected that such improved economic well-being would not have been thus distributed in inverse ratio to the size of the previous income or at a flat rate, we might change the form of our computation and say that it would permit of increasing all family incomes below the \$3,500 level by 42 per cent. Presumably these groups would be the chief beneficiaries of such an increase in national production. Finally, not to put

⁹ Nourse and associates, *id.*, at 423-24. This conclusion is sharply challenged by the national survey of potential product capacity, as reported in Harold Loeb and associates, *The Chart of Plenty* (1935). According to that study the economy is technically ready to produce consumer goods and services amounting, at 1929 prices, to \$4,370 per American family *per annum*, that is, to increase by fifty per cent the 1929 production as calculated by the same survey. (See pages 73-121.) It is quite obvious that Mr. Loeb's engineers and the Brookings economists are proceeding on different bases. Mr. Loeb's figures are based on the assumption that production is to be "directed toward the satisfaction of human needs and reasonable wants and restrained only by physical factors and the state of our knowledge" (Page 164). The Brookings study assumes that present human habits, including the habits and legal rights of owners, are still operating.

But it is quite unnecessary for present purposes to resolve the differences between the two surveys. They both assert the truth of the two fundamental points, that is

1. That the plant could readily have produced in 1929 much more than it did in fact produce.

2. That nevertheless it is still not sufficient to satisfy all needs, and must be improved and enlarged and modernized. (The *Chart of Plenty* asserts this, I think, at least by inference, at pages 13, 56-64, 119-21.)

¹⁰ Nourse and associates, *op. cit. supra* note 1, at 425.

our statement in a form which smacks in any way at all of redistribution of wealth, we could say it would add \$545 to the income of every family of two or more persons, or give \$125 to every man, woman, and child in the country.

However we may state it, such an outcome would be a very substantial boon. If, upon the very conservative grounds that we base our findings, such a betterment in material conditions lay within our grasp in the prosperous years of the late twenties, every alert mind must be driven to the question: What was there in the organization or functioning of our economic system which caused us even in those favorable years to fail to attain it, to say nothing of the margin four times as wide which we are failing today to make available to the satisfying of human wants?"¹¹

II

The second volume of the study¹² deals with the amount and sources of the national income, its distribution, geographically, by major classes of claimants, and by income groups, and what the recipients of monetary incomes of various amounts do with their shares. The figures, as in the first volume, come down to 1929. They contain many surprises, and are in some respects disquieting in the extreme. It appears, for instance, that between 1919 and 1929 the income of independent farm operators decreased almost forty per cent and their share of the national income almost fifty per cent.¹³ There were twelve states in the South in each of which the per capita income of the farming population was below \$200.00 in 1929, the average for the whole twelve being \$162.00.¹⁴ There were eight states, also in the South, in which the per capita income of the whole population, both farm and city people, was below \$400.00, and twelve more in which it was below \$600.00. In only seven (calling the District of Columbia a state) did it rise about \$1,000.00.¹⁵ These are average per capita figures, and of course disclose only geographical diversities. Individual diversities show up when the incomes of families are studied. It there appears:

"Nearly 6 million families, or more than 21 per cent of the total, had incomes less than \$1,000.

About 12 million families, or more than 42 per cent, had incomes less than \$1,500.

Nearly 20 million families, or 71 per cent, had incomes less than \$2,500.

Only a little over 2 million families, or 8 per cent, had incomes in excess of \$5,000.

About 600,000 families, or 2.3 per cent, had incomes in excess of \$10,000."¹⁶

It also appears here again that the farming population are on the whole worse off than their brothers in the city. More than half the farm families

¹¹ Nourse and associates, *id.*, at 429-30.

¹² Leven, Moulton, and Warburton, *America's Capacity to Consume* (1934).

¹³ Leven *et al.*, *id.*, at 26-30.

¹⁵ Leven *et al.*, *id.*, at 41-43.

¹⁴ Leven *et al.*, *id.*, at 43-46.

¹⁶ Leven *et al.*, *id.*, at 55.

had yearly incomes below \$1,000.00.¹⁷ (These family figures are for families of two or more persons, averaging a fraction more than four, and they include the earnings of children and other supplementary earners living at home, as well as the income of the main bread winners. Farm income is computed to include the value of food and other materials produced and used on the farm, as well as money income.¹⁸ The year is 1929.)

We now begin to see what "America's Capacity to Consume" consists of and adds up to. When a family of four had to make up its budget, for food, clothing, shelter, transportation, education, doctors' bills, and all the rest, at 1929 prices, for a total under \$2,000.00 for the year, it had to leave out many things and skimp on everything; and when 16 million families (that is more than 64 million people) found themselves in that condition,¹⁹ their ineffective demand for consumable commodities must have reached astronomical proportions.

The survey is not satisfied with any such easy generalization. It undertakes to ascertain what people would buy if they had more income, and in what amounts. It does this primarily by ascertaining what they do buy now.

There are of course no statistics for the individual consumptive expenditures of all the families in the United States. There are however sixteen sample studies, made by various agencies, covering people in various parts of the country, of varying occupations, and with incomes ranging from \$400.00 to \$20,000.00. The people sampled range from farmers in Arkansas to residents of New York apartments, and from Mexican families in San Diego to employes of the Federal Government in Boston.²⁰ Though the numbers involved are a minute fraction of the total population of the country, they are all we have to go on, and there seems no substantial reason to doubt that they are fairly representative.

The expenditures of these families are reported in five classes: food, home, attire, other living, savings. It appears at once that consumptive expenditures are dependent upon income. Until the income of the family reaches \$2,500.00 in the city and \$1,500.00 on the farm, the whole is spent in living, and there are substantially no savings. Above these figures consumption still increases, but there now appear some savings, and above \$5,000.00 in the city and \$2,500.00 on the farm the savings are substantial (farm "savings" include improvements on the place and increase in livestock herds). The ten per cent top families (that is, those whose incomes exceed \$4,600.00 per annum) spend more for "attire" alone than

¹⁷ Leven *et al.*, *id.*, at 59.

¹⁹ Leven *et al.*, *id.*, at 56.

¹⁸ Leven *et al.*, *id.*, at 55, 59.

²⁰ Leven *et al.*, *id.*, at 66, 239-245.

the bottom ten per cent for everything, and they spend more for "home" and "other living" than the bottom fifty per cent spend altogether. They also save six times as much as the whole balance of the population.²¹

The question is therefore pertinent—what would happen to demand if additional monetary income, arising from the use of the latent productivity of 1929, could somehow be created in the amounts shown to be possible by the production study, and put in the hands of those having the lowest incomes in that year? The survey does not pose the question exactly in that form. It asks rather what would happen to demand if existing incomes below \$5,000.00 could be increased in varying amounts on a stated sliding scale, what would happen if all family incomes could be raised to \$2,500.00, and what would happen if all families had incomes sufficient for a "reasonable standard of living" based upon nutrition studies. It appears in each one of the three cases that if the increased incomes assumed could somehow be realized, demand would exceed the productive capacity of the nation in 1929.²² The conclusion on nutrition should be quoted:

It would seem a reasonable minimum aim of our national economy to provide the entire population with a 'liberal diet,' which would furnish adequate nutrition, a substantial margin of safety in respect to vitamins and minerals, and a satisfying variety of foods; and at the same time to permit the purchase of such necessities and comforts as are ordinarily associated with a 'liberal diet.' To reach these standards would require an increase in the production of all kinds of consumers' goods and services by something like 70 or 80 per cent.²³

The last chapter brings together the findings of the two volumes, and reaches certain fundamental conclusions, which may be summarized as follows:²⁴

1. The United States was not living beyond its means in the peak year, 1929. On the contrary, substantially more current wealth could have been produced and used up in that year without overdriving either plant or labor. Capital facilities were not depleted by the peak production. On the contrary, they were well maintained, and important additions were made to them.

2. Inequalities in the distribution of income became more marked between 1920 and 1930. As a result, the proportion of the national income that was saved increased.

3. Vast potential demands for all kinds of goods and services existed in 1929, in the unfulfilled wants of the masses of the people. The plant was

²¹ Leven *et al.*, *id.*, at 65-81, 82-85, 87-90, 91-99, 246-265.

²² Leven *et al.*, *id.*, at 115-124.

²⁴ Leven *et al.*, *id.*, at 126-132.

²³ Leven *et al.*, *id.*, at 124.

by no means capable of fulfilling all those wants. If they were armed with buying power they would exceed our full capacity. This means that if they are ever to be fulfilled the plant must be increased, and the working day can not now be materially shortened.

4. Merely better distribution of what we produced in 1929, or of what we could have then produced if operating at capacity, would not give the masses of the people a satisfactory standard of living. Whatever scheme of distribution is effective "it will always be true that the level of consumption or the standard of living can be raised only through the production of food, clothing, shelter, comforts, and luxuries."

III

Continued and substantial additions to productive plants are therefore needed if we are ever to achieve a reasonable standard of living for the people of this country. The question is, under what conditions as to the use of the existing plant, and especially as to the distribution of the monetary income arising from that use, are we most likely to obtain that increase?

At this point the present survey (Volume III)²⁵ departs, completely and I believe most usefully, from the teachings of the classical economists. The latter saw that savings were essential to new capital construction, and commonly assumed that they were the only essential. Saved money, so the theory goes, constitutes in itself an effective demand for new capital investment, and is therefore necessarily translated, within a varying but rather limited period of time, into demands for materials and labor in the capital goods industries, and ultimately into new plant, new machines, and increased capacity. Since increased capacity is still essential to a satisfactory standard of living (to this extent the present survey agrees with the classical economists), therefore the largest possible amount of savings is desirable. Savings, according to the theory, create employment as surely as does money spent for living, and they also add to future wealth. Saved money is the limiting factor of material advance, and its amount today determines the construction of next year. Since the country has in any year only a given amount of monetary income to dispose of, the theory concludes, it is essential that it live as cheaply as it can, and save the difference.

This theory the present survey contradicts. It shows three things:

(1) Persons who save money do not themselves build plants. Plants are built by business men, who borrow from the savers. They build and bor-

²⁵ Moulton, *The Formation of Capital* (1935).

row if, but only if, they see a chance to make a profit. New plant looks profitable if, but only if, the present plant is making money, and that is generally true only if it is being used to something like capacity. It is increased consumption, putting existing plants to increased use, which makes new ones look like good investments.²⁶

(2) Historically, important new construction in this country has not happened in periods of penury. It has occurred when consumption was increasing, in the various "new eras" when the people had better incomes than they had had before and were spending them accordingly. Changes from bad times to good generally start in the consumers' lines. New ideas are incubated in depressions, but they do not become new plants until revival starts. Consumption and investment have expanded and contracted simultaneously, and not by turns. It is only when the people have been earning and spending money freely that important new construction has in fact occurred.²⁷

(3) New savings have not been the limiting factor upon capital construction at any recent time in the United States. On the contrary, the annual increment of savings has exceeded, regularly and by large amounts, the net new productive investment of the country. The excess savings were in part lost in fraudulent promotions, in part invested overseas, and the balance served among other things to inflate the prices of securities, and contributed to the financial instability of 1929. The growth of plant in recent years in the United States has in fact been adjusted to demand in the consumers' lines, and not to the saved funds available.²⁸

The point is simply this. The national income, measured either in money or commodities, is not a fixed amount. In recent years it has never reached the possible, for we have never used either existing plant or labor to capacity. It is therefore not necessary that we restrict consumption, in order to expand investment. Consumption and construction can and do expand together, merely by making fuller use of the facilities we have. Bank credit can and does powerfully aid that simultaneous expansion.²⁹ Fuller use of all our resources can be permanently generated only by in-

²⁶ Moulton, *id.*, at 41-43, 158. Cf. General Motors Corporation, Letter to Stockholders, Aug. 6, 1935. "*Encouraged by the more assured outlook for profitable development*, the Corporation has authorized an expansion and reconstruction program of approximately \$50,000,000.00. When completed, there will result an increase in the production facilities of General Motors cars, as domestically manufactured—Chevrolet, Pontiac and Oldsmobile in particular. The capacity of the Corporation's manufacturing plants overseas, both in England and in Germany, will also be importantly increased, *as the present capacity of those plants is inadequate to meet the current demand.*" (Italics mine.)

²⁷ Moulton, *id.*, at 43-74, 156-157.

²⁸ Moulton, *id.*, at 75-135.

²⁹ Moulton, *id.*, at 136-154, 158.

creased consumers' incomes. "The primary need at this stage in our economic history is a larger flow of funds through consumptive channels rather than more abundant savings."³⁰

These conclusions, contradicting so much that has been taught so long by classical economists, are not to be taken upon faith. The recorded and observable data upon which they are founded are reminiscent of Galileo's telescopes. "The Formation of Capital" should be prescribed reading for every member of the bar.

The survey does not say it, but these findings and the extent to which they can be put into practical effect, may furnish a decisive test as to the validity of the economics of Karl Marx. Marx found all value the result of labor, and the employer's profit simply the net spread between the purchase price of labor power and the addition to value created by the labor purchased. He therefore laid it down, as a law of capitalism, that labor must be bought as cheaply as possible, which in the long run meant, he thought, that working people must be kept at the subsistence level. But at that level, as he truly reasoned, the products of the system cannot be taken off the market, and periodic crises are inevitable. All of his prophecies depend on one foundation, that capitalist economy requires that the masses of the people must be kept in half starvation.³¹ The findings of the present survey seem to be that that fundamental doctrine is as bad capitalist economics as it is bad morals.

The Marxist dialectic is difficult and arbitrary, and it is a safe guess that few people have embraced it merely because their minds said that it was true. It has converts because it seems to prove itself in practice. People become Socialists because of the actual workings of the present economic system, and primarily because they see that, up to date, the majority of mankind under the capitalist order have always been in want. If the findings of the present survey can be put into practice, that is, if the incomes of the masses of the people can somehow be increased until all share in economic satisfactions to the full extent that our natural resources and our physical techniques make possible, the converts to socialist or communist opinions should be few. Everyone who has a stake in proving the Marxian analysis untrue, or in preventing the emergence of its results in practice, should want to see an effort made to put the findings of these surveys into practical effect.

³⁰ Moulton, *id.*, at 160.

³¹ My conception of Marx' system may be wholly inaccurate, since it is not based on his own writings. *Das Kapital* is beyond my staying powers. What here appears is based on Marx' most readable recent interpreter, John Strachey, *The Nature of the Capitalist Crisis* 167-308 (1935).

IV

The fourth volume³² sets out to furnish the prescription for which the first three volumes are the diagnosis. But there is a change of emphasis between Volumes III and IV. We are now back in what seem on the whole more traditional ways of thought.

We find for instance that "taxation for the support of idle people" is not sound long-run practice, because the idle do not contribute to production. "Proposals to raise the incomes of the masses generally" are given a general negative for the same reason. The straw man of redistributing present wealth or present income is set up and readily knocked down. Public works projects (except housing) must be limited, because the things constructed "do not as a rule meet primary wants, as would the production of additional food, clothing, and other necessities and conveniences." The extraordinary difficulties of raising money wages are referred to, and the effect of higher wages upon costs and prices. And in connection with each scheme we find that it can only reach a portion of the population.³³ The impact of the added buying of that portion upon the whole economy seems to have been discounted. One would like to see a calculation of that impact, based for instance on the C.C.C., the A.A.A., or on the British dole. If the findings of the first three volumes mean anything at all, one would expect to find that the money distributions of those programs have been useful, not only to the direct recipients of cash, but to the whole economy. No such analysis is undertaken, and no scheme for going further in the same direction is approved. The author of the final volume seems preoccupied with only one result of the findings of the former three.³⁴

We are not forced to follow. We should reread Volumes II and III, and make sure that their authors really mean to recommend "a larger flow of funds" through the hands of the masses of the people. When we have done so, and made sure again that that is what they do assert, we are at liberty to draw our own conclusion, whether or not the authors fully agree with us.

What then does the final volume most strongly recommend? Only one thing if I read correctly, namely persistent, gradual, long-time reductions in the selling price of goods and services. By this device, and by no other, increased real incomes can be brought to all the members of society, demand for goods and services expanded, and the benefits of technological

³² Moulton, *Income and Economic Progress* (1935).

³³ Moulton, *op. cit. supra* note 25, at 72-116.

³⁴ I am confirmed in this opinion by the fact that as acute a critic as Stuart Chase agrees with it. See his review, *Saving and Spending*, *Survey-Graphic*, November, 1935, pp. 533, 566.

advance made available to all. Profits are to be preserved by the lower costs of a higher rate of operation.³⁵

Here we are back on ground which Ricardo and Lord Coke would equally have understood. The universal benefits of lower prices have been the standard doctrine of orthodox economists as long as the condemnation of forestalling, regrating, and monopoly have been known to English law. It is true that in the recent past neither law nor economics have been so clear upon the point as they once were. Studies of the business cycle seem to show that depressions are most severe and most prolonged on the downswing of the secular price trend,³⁶ and certainly a catastrophic decline of certain prices is characteristic of all great depressions. Whether that decline is a symptom, or a cause, or both, lawyers had better not determine until economists agree, but the results of the decline include, in recent history, the Reconstruction Finance Corporation Act, the N.R.A. and the devaluation of the dollar. Particular industries, moreover, in which producers are numerous and competition keen, find continuous price cuts resulting in a threat of wholesale bankruptcy, and hence we have the Bituminous Coal Conservation Act of 1935.³⁷ Certain economists contend that technological advance is best encouraged by leaving the profits of efficiency in the hands of the efficient,³⁸ and on that principle we have the patent laws. Other students tell us that free price competition is a dream of bygone days, and that in great sections of our industry we shall not see it again and had best make other plans.³⁹ Congress followed their advice, so far as railroads are concerned, in the Transportation Act of 1920.⁴⁰ Law and economics are each in conflict with itself, and the main picture, if there is one, is obscured.

Some things are however clear. The first is that that form of price competition which is based on sweated labor is an unmitigated evil. Whatever else we do we must make sure that our vaunted lower prices do not result from that. The second volume of the Brookings survey points out the economic penalty if we fail upon that point.

There is also general agreement that violent movement of some prices

³⁵ Moulton, *op. cit. supra* note 25, at 117-154.

³⁶ The evidence is presented for instance by Wesley C. Michell, *Business Cycles* 407-412 (1928).

³⁷ Act of August 30, 1935, c. 824, 15 U.S.C.A. (Supp.) § 801-827 (1935).

³⁸ John R. Commons, *Institutional Economics* 789-805 (1934).

³⁹ Stuart Chase, *Saving and Spending*, *The Survey-Graphic*, November, 1935, pp. 533, 566.

⁴⁰ 41 Stat. 480 (1920); 49 U.S.C.A. §§ 5, 15 (1929).

and rigidity of others is an evil.⁴¹ When the price of farm products falls sixty-three per cent in fourteen years, the price of farm machinery six per cent,⁴² and real estate taxes and the rate of mortgage interest not at all, we have bad business all around. We do not know the answer to this problem, but the A.A.A. was partly an attempt to deal with it within a single field.

On the main point we cannot be so clear. Is a gradual reduction in the selling price of all kinds of goods and services desirable? We are dealing chiefly with the findings of the Brookings survey, and that is definitely their conclusion. I think that it is also true that notwithstanding all of the foregoing the main voice of economic doctrine is still in the same direction, just as it seems to me that the main voice of American law is still in favor of free competition. The question is, how to accomplish either one.

For business men do not agree. No one who has represented many business people, and certainly no one who has numbered a trade association among his clients, has any doubt that price cutting is unpopular. Given fixed rent, interest, and taxes, wage rates strongly resistant to reduction, and raw material prices which may be up tomorrow, it is vastly easier for most businesses to operate on a steady selling price than on a falling one. There are of course conspicuous exceptions, of which the automobile industry is one, where a consistent policy of cutting prices, reaching a larger market, increasing volume, and thereby cutting costs, has made fortunes for some companies; but by and large the managers of American business concerns show by their conduct that they prefer to keep their selling prices up until competition forces them to cut. If the objective of increasing the real incomes of the masses of the people is to be sought through lowered prices, the way of the price-cutter must be made as smooth as possible and his incentives strengthened. This, and the benefits of increased money incomes in the hands of the masses of the people, are the lessons of the Brookings survey as a whole:

V

What are the results, for lawyers?

Current output of consumers' goods and new capital investment are both to be increased by increasing the real incomes of the masses of the people. This is to be done by two main methods, namely:

⁴¹ Economic Reconstruction (Report of the Columbia University Commission) 57-61 (1934); Slichter, *Towards Stability* 164-175 (1934); Moulton, *op. cit. supra* note 25, 128-141.

⁴² Means, *Industrial Prices and their Relative Inflexibility*, report to the Secretary of Agriculture, Senate Document 13, 74th Congress (1935).

- (1) A steady pressure in the direction of lower selling prices for all kinds of goods and services, and
- (2) Like pressure for increased monetary incomes in the lowest brackets.

I. LOWER PRICES

This seems to mean enforcement of the anti-trust laws.

Anyone who contemplates the actual level of the prices of consumers' goods and services, and their rapidity of movement, at the date of enactment of the Sherman Act, and compares it with the situation that existed in 1929, or 1935, will have some doubts as to the effectiveness of the anti-trust laws as a device for forcing prices downward. But some things can be said.

Except in those few industries where substantial monopoly exists, the most effective single present day device for maintaining steady prices is probably the open price association. This is so because it weakens the incentive of the price cutter.

Business men cut prices to enlarge their sales. If they must report their cuts, and especially if they must report before they cut, they are perfectly aware that their competitors will meet them, and they may well expect that their proportion of the total will be no larger than before, and on a lower level. The market they must always meet, but a cut below the market must commonly be made in secret, for a while at least, or it is not attractive.⁴³ It is unquestionably for this reason that codes under N.R.A. provided in 422 instances for open price arrangements, and in 297 of these for a waiting period between the date of publication of a price and the date when sales at that price might be made.⁴⁴ These provisions must have been regarded both by the business groups that recommended them, and by N.R.A. itself, as contributing to a desired stability of price.

But price stability need not be the only objective of an open price arrangement. If it contains no waiting period (that is if prices may be quoted and sales made before instead of after filing), and if it is so set up as to insure immediate information on price changes, not only to the members of the industry but to its customers, it may fulfil the functions of a commodities exchange by making it possible for everyone to know the best bid or offer now available. Mr. Justice Holmes said long ago that "The Sherman Act did not set itself against knowledge,"⁴⁵ and that is

⁴³ Slichter, *Towards Stability 170-181* (1934).

⁴⁴ Lyon *et al.*, *The National Recovery Administration* 610 (Brookings, 1935).

⁴⁵ *American Column and Lumber Company v. United States*, 257 U.S. 377, 412 (1921).

now the decision of the court.⁴⁶ Presumably this principle applies to current quoted bids and offers as to other business facts.

The question therefore is, can an open price arrangement be set up which does distribute knowledge, to customers as well as to the industry concerned, but which does not lessen the incentives to cut prices? To this problem N.R.A. began to give attention somewhat late in the code making process, and it worked out and announced a concrete program, which however met with opposition from the coded industries, and was never made substantially effective.⁴⁷ Accordingly, we have little experimental knowledge as to how well such a scheme can work.

If the findings of the present survey are accepted open price associations are *prima facie* bad. Their normal tendency, that is, is to reduce the incentives of the price cutter, to freeze prices where they are, and to slow down that persistent and continuous reduction which the present survey finds to be essential to the successful working of the economic system. If that is so, they are against the public interest, and are therefore "unreasonable" combinations under the anti-trust laws. The sponsors of any particular arrangement should be required to show, as a condition of approval either by the Federal Trade Commission under its again important powers⁴⁸ or by a court in an injunction suit under the anti-trust laws, that their concrete proposal tends only to an open market, and not to price stability. And the commission and the courts should employ official Devil's Advocates upon that point.

The major price rigidities, however, will probably be found, in the future as since 1900, in those great industries which have attained "stability" in the sense that the producing facilities are owned by a small number of large companies, whose respective shares of the total sales run about the same from year to year, and none of whom therefore has much to gain by forcing a price war. "More and more the problem that confronts us is one of operating a system of monopolies rather than a system of competition."⁴⁹ The problem, how to strengthen the incentives to cut prices in such a situation, has engaged the attention of many economists, but it can

⁴⁶ *Maple Flooring Ass'n v. United States*, 268 U.S. 563 (1925); *Cement Manufacturers Protective Ass'n v. United States*, 268 U.S. 588 (1925).

⁴⁷ *Lyon et al.*, *The National Recovery Administration*, 610-611, 674-678, 734-742 (1935).

⁴⁸ 15 U.S.C.A. §§ 41-51 (1927); Act of June 14, 1935, c. 246, § 2, 15 U.S.C.A. (Supp.) § 705 (a) (1935).

⁴⁹ Slichter, *Towards Stability* 181 (1934); for the evidence, see Berle & Means, *The Modern Corporation and Private Property* (1932), *passim*, and Means, *Industrial Prices and Their Relative Inflexibility* (Report to the Secretary of Agriculture), Senate Document 13, 74th Congress (1935). But this does not explain why it is that retail prices are less flexible than wholesale (Moulton, *op. cit. supra* note 25, 131-133), nor why steel products sold to the automobile industry are more flexible than rails.

not be said that there is yet enough agreement in their views to justify an integrated legal program.

This is a major point. Price rigidities are serious, are not all known, and may be largely uncontrollable. They are at least as hard to deal with as rigidities of wages. There is good ground for believing that the advice given by the final Brookings volume, to center all our efforts upon lower prices, may miss the easier way.

Some suggestions may however usefully be made. One of them relates to the form of unemployment compensation.

An industrial manager, in a field of partial or complete monopoly, faced with declining demand at the going price level, has a choice of alternatives, to reduce production and hold prices, or to maintain production, lower prices, and hope at the lower price to sell the output of the plant. The decision will depend on the probable duration of the slump, the elasticity of the demand for the particular commodity, and the comparative expense of shutting down and cutting prices. The first two elements the law can hardly influence, but the third it may, by something in the nature of a tax on idle plant capacity.

If a statutory system of unemployment reserves is in effect, and if that system reduces the individual employer's contribution when his record is one of uniform employment, an extra incentive to maintain production and employment is provided. Profit margins being narrow, and costs being closely figured, an extra two or three per cent on shut-down costs may turn the scale to fuller operations.⁵⁰ The pioneer Wisconsin unemployment reserve act is constructed on this theory, and Title IX of the Social Security Act of 1935 permits it.⁵¹ Such acts may justly claim a double public purpose: (1) to lighten the effects of unemployment; (2) to provide incentives to keep up both production and employment with resulting flexibility of price. The second purpose is at least as urgent as the first.

Our major price rigidities, as has been said, are in the integrated industries. The economies of mass production require great size in business units, but when single units grow so large that prices become rigid, they may cost the country more than their economies are worth.

Mere size does not violate the Sherman Act as it now stands.⁵² But the

⁵⁰ Slichter, *op. cit. supra* note 43, at 179-181.

⁵¹ Wis. Stats. 1933, c. 108, especially §§ 108.16, 108.18; Act of Aug. 14, 1935, c. 531, Title IX, 42 U.S.C.A. (Supp.) §§ 1101-1110 (1935), especially § 1109; see Brandeis and Raushenbush, Wisconsin's Unemployment Reserves and Compensation Act, 7 Wis. L. Rev. 136 (1932); John R. Commons, *Institutional Economics* 840-873 (1934).

⁵² *United States v. United States Steel Corporation*, 251 U.S. 417 (1920).

act can be amended. If Congress really believes in flexibility of price as an economic policy, it should consider a provision definitely limiting, by a percentage of the total, the amount of the capacity for producing any one commodity that any single business unit, engaged in commerce among the States, may lawfully control. And the power of taxation may be exerted in the same direction, as the Revenue Act of 1935 to some extent has done.⁵³ It is perfectly well settled that when the power to tax exists, and is exerted to raise revenue, the incidence of particular rates may be guided by other social policies.⁵⁴ And among such policies the restraint of excessive business bigness may find a proper place. Mr. Justice Brandeis' great dissent upon this point, in *Liggett v. Lee*⁵⁵ has now become the law of the court as to state taxes on chain stores,⁵⁶ and there is no apparent difference in this respect between the taxing power of Congress and the states, nor between chain stores and other kinds of business units. Excessive business bigness has economic consequences, and both the commerce and the taxing powers may deal with it within the limits of due process. I shall try later to suggest those limits.

If lower prices are desired, revisions of the tariff are in order. And so is the repeal of special state taxation on chain stores. We can hardly advocate a lowering of price and at the same time tax in a special and oppressive way the principal proponents of that policy. And individuals may well again consider the economic wisdom of supporting consumers' co-operative stores. Business concerns run by and for their customers will not for long refrain from cutting prices when they can. We may expect an increase of consumers' co-operation in this country, and lawyers would do well to give attention to the rules relating to the legal structure and the operations of such business.

⁵³ Act of Aug. 30, 1935, c. 829, § 102 (a), 26 U.S.C.A. (Supp.) § 13 (1935).

⁵⁴ *Veazie Bank v. Fenno*, 8 Wall. (U.S.) 533 (1869); *McCray v. United States*, 195 U.S. 27 (1904); *United States v. Doremus*, 249 U.S. 86 (1919); *Nigro v. United States*, 276 U.S. 332 (1928); *Hampton & Co. v. United States*, 276 U.S. 394 (1928); *Magnano Co. v. Hamilton*, 292 U.S. 40 (1934).

⁵⁵ 288 U.S. 517, 548-575 (1933).

⁵⁶ "A chain, as we have seen, is a distinctive business species, with its own capacities and functions. Broadly speaking, its opportunities and powers become greater with the number of the component links; and the greater they become, the more far reaching are the consequences, both social and economic. For that reason the state may tax the large chains more heavily than the small ones, and upon a graduated basis, as indeed we have already held (cases). Not only may it do this, but it may make the tax so heavy as to discourage multiplication of the units to an extent believed to be inordinate, and by the incidence of the burden develop other forms of industry" (italics mine). *Fox v. Standard Oil Co.*, 294 U.S. 87, 100 (1935). But see *Stewart Dry Goods Co. v. Lewis*, 295 U.S. 550 (1935).

II. THE SPENDING POWER

Money incomes in the lowest brackets are also to be raised. Where are these lowest incomes, and how can they effectively be reached?

There is first of all the farming population. Those of us who live in farming states have bored our brothers in the East with our insistence, ever since the end of 1920, that farmers needed help. The figures are now here, and it is shown that the condition is a hardship, not to farmers only, but to the whole economy. Are then the processing taxes levied under the Agricultural Adjustment Act⁵⁷ beyond the power of Congress?

"The Congress shall have power to lay and collect Taxes, Duties, Imposts, and Excises, to . . . provide for the . . . general welfare of the United States."⁵⁸ What is the general welfare? Does it include the efficient and productive functioning of the economic system of the country? If so, and if the findings of the present survey are accepted, has not the Congress power to pay bounties to poor persons, and to levy any taxes needed for that purpose and not otherwise unlawful? It is no longer sufficient to assert, with *Loan Association v. Topeka*,⁵⁹ that taking money from A to give to B is robbery rather than taxation. When it appears that the Bs are very numerous, and that their poverty not only is destructive to themselves but is a drag upon the whole economy, relieving their condition ceases to be merely charity and becomes legitimate provision for the public welfare as a whole. As such, it is within the taxing power.

The District Court for Massachusetts dealt with A.A.A. substantially upon this basis.⁶⁰ In the Circuit Court of Appeals another view was taken.⁶¹ That court (passing the delegation point, with which we are not now concerned) held that the processing taxes are not taxes to raise revenue, but are regulations of a matter not within congressional control, the quantity of agricultural production in the States, and are therefore invalid under the authority of *Bailey v. Drexel* and like cases.⁶²

⁵⁷ Act of May 12, 1933, c. 25, 48 Stat. 31; now amended by Acts of Apr. 7, 1934, c. 103, 48 Stat. 528; May 9, 1934, c. 263, 48 Stat. 670; June 16, 1934, c. 551, 48 Stat. 973; June 26, 1934, c. 759, 48 Stat. 1241; March 19, 1935, c. 32, 49 Stat. 45; May 17, 1935, c. 131, 49 Stat. 281; 7 U.S.C.A. (Supp.) §§ 601-622 (1934). What follows was written, and in type, before the A.A.A. decision of the Supreme Court. *U.S. v. Butler*, 296 U.S.—(Jan. 6, 1936). I have let it stand, as a monument to folly.

⁵⁸ U.S. Const. Art. 1, § 8, cl. 1.

⁵⁹ 87 U.S. 655, 664 (1874).

⁶⁰ *Franklin Process Co. v. Hoosac Mills Corp.*, 8 F. Supp. 552 (D.C. Mass. 1934).

⁶¹ *Butler v. United States*, 78 F. (2d) 1 (C.C.A. 1st 1935).

⁶² *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922); *Hill v. Wallace*, 259 U.S. 44 (1922). Other cases are cited by the court, but the argument as to the limits of the taxing power rests substantially upon these two.

It seems to me that this decision evidences a complete misunderstanding, both of the Agricultural Adjustment Act and of the *Bailey* case. Granting that the act intends to accomplish federal control of agricultural production, and granting further that Congress cannot directly regulate that subject under any of its enumerated powers, the question is: do the processing taxes regulate, or do they tax? If so-called taxes tax, and do not regulate, then *Bailey v. Drexel* is not applicable.

A regulating tax is one whose incidence depends on the existence or the non-existence of the regulated thing. True examples are easy to discover in new deal legislation.⁶³ But the processing taxes under A.A.A. are not of that description. They are imposed not on processing over an allowable amount, or in violation of a code, or in any other special manner, but on all processing of particular commodities, at an even rate per unit, whatever the production, source, crop year, cost, price, code compliance or reverse, labor policy or otherwise, mode or amount of manufacture, or any other incidental circumstance. They fall simply on the act of processing, which is a legitimate object of an excise, and they bring in a large revenue. Such taxes do not regulate, they tax. The *Bailey* case does not cover them.

I have conceded, as I must, that the Agricultural Adjustment Act intends to accomplish a result, the increase of farmers' income, and to do it partly in a certain way, by control of agricultural production. If this control is not accomplished by the taxes and if Congress has no power to reach it by a directly regulating law, then how is it accomplished? Simply by an expenditure of money. The United States agrees with the contracting farmer that if he will limit acreage as specified, the United States will pay him certain sums. Has the United States authority to spend money for this purpose?

These cases raise, in other words, not the question of the power of regulation by taxation, but the old unsettled question of the spending power of Congress. May Congress make appropriations only for those purposes which it may regulate in other ways (as James Madison believed) or may it spend money for the general welfare as it sees it, whether within the other granted powers or not? Alexander Hamilton and Mr. Justice Story thought the latter, and the history of Congressional appropriations since the beginning of the Government is in agreement with their view. I do not intend to review this controversy, which Mr. Corwin

⁶³ Act of Apr. 21, 1934, c. 157, 48 Stat. 598, 7 U.S.C.A. 701-725 (1934) (Bankhead Cotton Act); Act of Aug. 30, 1935, c. 824, 17 U.S.C.A. (Supp.) 801-827 (Bituminous Coal Conservation Act of 1935).

has covered so fully and so well.⁶⁴ No one has ever adequately answered Mr. Justice Story's argument. If he was wrong, and Madison was right, then the Agricultural Adjustment Act is void, and so are the Departments of Agriculture, Labor, The Interior, and Commerce (in large part), the Geographical Survey, the Weather Bureau, Mr. Hoover's flood control upon the Mississippi, the Public Health Service, Howard University, The Reclamation Service (except for public lands), the Reconstruction Finance Corporation, all grants in aid of education and all relief expenditures. Granting, as I believe to be the case, that the point is now presented for decision, as it was not in *Massachusetts v. Mellon*,⁶⁵ I shall assume it has to be decided in accordance with the views of Hamilton and Story. Congress, that is to say, may make appropriations "to provide for the general welfare" whether or not the particular expenditure is in connection with a subject over which Congress could exercise any of its other powers.

But may Congress *regulate* by an expenditure? Here we meet the question posed by President Monroe.⁶⁶ He was definitely of opinion that while Congress may appropriate for any purpose within "the general welfare" in the sense of Hamilton and Story, such appropriation "does not draw after it any consequences" in the way of jurisdiction. Once the expenditure is made (indeed if I understand Monroe correctly while it is still in progress) sole power of regulation is vested in the states. Congress can do nothing but appropriate. It cannot even condemn land to build the roads for which it pays the money.⁶⁷

I think we shall find, when this question is threshed out, that we must go part way, but part way only, with President Monroe. Assuming that the Public Works Administration may lawfully grant money to utilities and public bodies to build electric light plants, it does not follow that Congress may regulate the rates of the completed plants forever after. But if from that we assume, as Monroe seems to me to have assumed, that

⁶⁴ The Spending Power of Congress, 36 Harv. L. Rev. 548 (1923); see also *Missouri Utilities Co. v. City of California*, 8 F. Supp. 454 (D.C. Mo. 1934); *Washington Power Co. v. Coeur d'Alene*, 9 F. Supp. 263 (D.C. Idaho 1934); *Duke Power Co. v. Greenwood*, 10 F. Supp. 854 (D.C. So. Car. 1935); *United States v. Certain Lands in Louisville*, 78 F. (2d) 684 (C.C.A. 6th 1935); *United States v. Realty Co.*, 163 U.S. 427 (1896) (Sugar Bounty Case).

⁶⁵ 262 U.S. 447 (1923).

⁶⁶ Views of the President of the United States on the Subject of Internal Improvements, May 4, 1822, 2 Richardson, Messages and Papers of the Presidents 144, quoted and summarized in Corwin, The Spending Power of Congress, 36 Harv. L. Rev. 548, 561-565 (1923).

⁶⁷ Monroe, Views of the President of the United States on the Subject of Internal Improvements, 2 Richardson, *id.*, at 168, Corwin, *id.*, at 562. Cf. *United States v. Certain Lands in Louisville*, 78 F. (2d) 684 (C.C.A. 6th 1935).

Congress cannot even regulate the expenditure of the government's own money, we shall certainly be wrong.

The question is, can Congress spend in such a way as to accomplish a result, or can it merely spend? There can only be one answer to that question. Expenditures are not made merely to get rid of money. They are made to accomplish some result. To say therefore that Congress may spend money means that it can spend it for a purpose, that is, that it can control the object, method, time, and conditions of disbursement, to any end within "the general welfare," *until the disbursement is complete*. If by such controlled expenditures it can effectively accomplish things which it could not lawfully do otherwise (for instance, the control of agricultural production or the construction of low-cost houses in our cities) that is a necessary consequence of giving it the spending power at all. To the extent that the "general welfare" can be promoted by controlled expenditures of money, the Congress can promote it.

What shall we say then about A.A.A.? Is the promotion of agricultural prosperity within the general welfare? Could Congress reasonably think that the means which it adopted were conducive to that end? If we answer yes to both, as it seems to me we must, then A.A.A. is valid. For the only tool that Congress uses to accomplish its result is money.^{67a}

So much for bankrupt farmers. How about the unemployed, the unemployable, the aged, the plain poor? As to State relief expenditures there is no question, as to federal relief the question is the same as in the case of A.A.A., but easier. Unless Story and Hamilton were wrong, federal relief is constitutional. The questions posed by President Monroe, in general, do not arise.

But what are we to say to a system of unemployment compensation, either imposed by a state alone, or helped along by the Social Security

^{67a} See note 57 *supra*.

The basis of the decision in *Butler v. United States* (Jan. 6, 1936) is that the A.A.A. regulation invades the reserved powers of the States. It would be interesting to know what the Court would say as to the validity, under the Fourteenth Amendment, of a state law providing: "It shall be unlawful for any person to plant a larger cotton acreage in the year 1936 than 85% of his average plantings in the years 1933-1935 inclusive." *New State Ice Co. v. Liebman*, 285 U.S. 262 (1932).

On the question of "coercion" by the A.A.A. I am reliably informed that the 1935 planting of winter wheat in Kansas is the largest in the history of that State. There is also noticeable increase in the movement of young pigs to market since the A.A.A. decision. Is the explanation that these pigs were raised by persons who did not sign corn-hog contracts, and who now feel free to make their non-compliance public?

But the main difficulty of the A.A.A. decision is that it throws in doubt so many grants-in-aid. Is it any less a constitutional crime to "coerce" state governments by grants of land and money than to influence the action of individuals by corresponding methods?

Act of 1935.⁶⁸ As to a state system, or a system imposed on individuals direct by Congress under the power of taxation and expenditure, the answer seems extremely easy. We now know unemployment intimately. It not only starves the unemployed, it bankrupts states and cities, stalls the economic system, and adds enormous sums to the debt of the United States. It is the haunting fear of every employed person, and the greatest modern worry of taxpayers, merchants, economists, and Presidents. To prevent it if we can, and to modify the horrors of its next appearance by provision in advance, seem the most obvious objects of a governmental policy directed to the general welfare. If so, the taxing and the spending power, both of the states and Congress, may be exerted to that end.

Probably no one seriously doubts this as a general proposition: at least no one has yet attacked in court any of the new unemployment compensation systems. If that attack is made the question for decision will be whether money payments on account of unemployment promote a private or a public purpose. Upon that question the contribution of the Brookings survey is important. The Brookings findings demonstrate, if it needed demonstration, that the widespread loss of income that results from unemployment is an evil not only to the losers of the income but to the economic system as a whole. What we call booms and depressions are mainly fluctuations in the expenditures of business institutions. Business spending depends mainly upon the prospects for profit, and the prospects for profit depend very largely upon the volume of anticipated sales. Anticipated sales depend in all consumer lines upon the income of the masses of the people. Whenever that dries up sales fall, production drops, more men are unemployed, and the depression grows. "There is need for a way of making unemployment produce income. Unemployment reserves are a device for doing this."⁶⁹ The need is public and not merely private, and the device may properly be public also.

If the foregoing is accepted, there is no question that most of the provisions of the Social Security Act of 1935⁷⁰ are within the taxing and the spending powers of Congress. Indeed the question probably does not arise in a justiciable form, for the appropriations are not tied in with the taxes, and the principle of *Massachusetts v. Mellon*⁷¹ seem therefore to apply. As to Title IX⁷² however a word further must be said.

⁶⁸ Act of Aug. 14, 1935, c. 531, Title IX; 42 U.S.C.A. (Supp.) secs. 1101-1110 (1935).

⁶⁹ Slichter, *Towards Stability* 150 (1934). Every lawyer ought to read this little book. My argument in this last paragraph is based in equal parts on it and on the Brookings findings.

⁷⁰ Act of Aug. 14, 1935, c. 531; 42 U.S.C.A. (Supp.) §§ 301-305 (1935).

⁷¹ 262 U.S. 447 (1923). ⁷² Secs. 901-910 of the Act; 42 U.S.C.A. (Supp.) §§ 1101-1110.

Title IX relates to unemployment compensation. It is called "Tax on employers of eight or more." It levies an excise tax on such employers of a per cent of total wages, and gives credit, up to ninety per cent of each year's tax, for contributions paid by the employer "into an unemployment fund under a State law."⁷³ The state law must meet certain tests, else the credit is not claimable.⁷⁴ Congress, to put the matter bluntly, has here tried to guide State policy by an exertion of the taxing power. Are the taxes levied void on that account?

The first objection that occurs to this arrangement is that the excise is not "uniform throughout the United States"⁷⁵ because the amount of an employer's debt to the United States will depend on the statutes of his state. That point was raised and answered in *Florida v. Mellon*,⁷⁶ as to the eighty per cent credit against federal estate tax allowed by the Revenue Act of 1926 for payment of state taxes. Territorial uniformity of federal taxation does not mean that Congress must find the same facts or laws existing in all the several states, but merely that where it finds like situations it must impose like taxes.⁷⁷ This the present act does as fully as the Revenue Act of 1926.

But is the excise bad because it seeks to regulate State matters? I think not, for three main reasons:

(1) As we have already seen, when the power to tax exists and is exerted to raise revenue, Congress may legitimately base the rates on other social policies.⁷⁸ The ten per cent of three per cent of payrolls which the Treasury will in any event receive under this excise is obviously much larger than the "nearly nine million dollars" (in nine years), which was ultimately held to make the Narcotics Act a tax and not a regulation.⁷⁹

(2) The only governmental powers essential to set up a system of unemployment compensation are the powers of taxation and expenditure, which Congress has. The principle of *Bailey v. Drexel*,⁸⁰ that the taxing power may not be used exclusively for regulation, is applicable only when

⁷³ Sec. 902 of the Act; 42 U.S.C.A. (Supp.) § 1102. See also § 909 of the Act; 42 U.S.C.A. (Supp.) § 1109 for "additional credit against tax," intended to permit a plan by which employers who give regular employment are relieved of contributions. See note 51 *supra*.

⁷⁴ Sec. 903 of the Act; 42 U.S.C.A. § 1103.

⁷⁵ U.S. Const. Art. I, § 8, cl. (1). ⁷⁶ 273 U.S. 12 (1926).

⁷⁷ *Knowlton v. Moore*, 178 U.S. 41, 107-109 (1900).

⁷⁸ *Veazie Bank v. Fenno*, 8 Wall. (U.S. 533 (1869)); *McCray v. United States*, 195 U.S. 27 (1904); *United States v. Doremus*, 249 U.S. 86 (1919); *Nigro v. United States*, 276 U.S. 332 (1928); *Hampton & Co. v. United States*, 276 U.S. 394 (1928).

⁷⁹ *Nigro v. United States*, 276 U.S. 332, 353 (1928).

⁸⁰ 259 U.S. 480 (1922).

the regulated matter is one otherwise beyond the power of Congress. This act is, on the contrary, within the principle of those cases that declare that where Congress has both powers (to tax and regulate) it may use one to help the other.⁸¹

(3) In this field either Congress or the States could act alone. Congress could perhaps exclude the States if it desired. But it is no where stated in the Constitution that it must. Common sense and inter-sovereign propriety agree that it may suggest a policy, go part way to make it operate, but leave ultimate decisions to the states. It is not a Constitutional objection to an exercise of power in a field where either sovereign can act, that Congress has not put forth its full strength, but has left something for the States to do.⁸²

III. DUE PROCESS

Some incomes in the lowest brackets may be raised by regulation, as well as by taxation and expenditure. Are minimum wage laws, or minimum wage provisions in state or federal codes, permissible under the Fifth and the Fourteenth Amendments?

*Adkins v. Children's Hospital*⁸³ clearly holds that they are not. The case does not depend on any specifically arbitrary item in the minimum wage law of the District of Columbia, but on the proposition that any such law, as applied to adult employes, is an arbitrary interference with liberty of contract. If *stare decisis* is controlling in this field such laws are all invalid.

But we have known since *Holden v. Hardy*⁸⁴ "that, in passing upon the validity of state legislation under that (the Fourteenth) amendment, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science," and, what is more important for the present purpose, we have known for a long time that the question whether an act is "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt,"⁸⁵ and therefore wanting in due process, is often one primarily of fact.⁸⁶ Facts change, and our knowledge of them

⁸¹ *Veazie Bank v. Fenno*, 8 Wall. (U.S.) 533 (1869); *Board of Trustees v. United States*, 289 U.S. 48 (1933).

⁸² *Cooley v. Board of Port Wardens*, 12 How. (U.S.) 299 (1851); *In re Rahrer*, 140 U.S. 545 (1891); *National Prohibition Cases*, 253 U.S. 350 (1920); *McCormick & Co. v. Brown*, 286 U.S. 131, 143-145 (1932); see *Bikle*, *The Silence of Congress*, 41 Harv. L. Rev. 200 (1927). All this has an unreal sound after the A.A.A. decision. See note 57 *supra*.

⁸³ 261 U.S. 525 (1923).

⁸⁴ 169 U.S. 366, 385 (1897).

⁸⁵ *Nebbia v. New York*, 291 U.S. 502, 539 (1934).

⁸⁶ *Bikle*, *Questions of Fact Affecting Constitutionality*, 38 Harv. L. Rev. 6 (1924), and cases cited in next footnote.

also, and what is arbitrary and unreasonable in one set of circumstances may be wholly proper in another, and vice versa.⁸⁷

Has anything happened since 1923 which might make a lawyer feel that the *Adkins* case should not be followed now? The economic system is the same that it was then. Some employers still pay sweatshop wages and some employes accept them. The effect upon the health of employes, upon the wages paid in other shops in the same industry, and on the buying power of labor as a whole, has probably not changed. But our knowledge of them has. We have now learned that:

First: Price competition based on sweatshop wages in one plant may force that plant's competitors, however humane their intention, to do likewise or go out of business. We have all seen this work since 1929 and know it to be true.

And second: Sweatshop wages, wherever they exist, destroy to that extent the buying power of labor, and dry up both demand and production of commodities and services. Many economists, not all of them disciples of Karl Marx, have told us this for many years, but since the second volume of the Brookings survey we can assert it as a fact, and since Volume three we can contend that the result extends to the production not only of the current wealth on which we live, but to the creation of additions to the plant itself. What then as lawyers can we say about an act which seeks, by putting bottoms under wages, to limit such results?

The liberty of contract is not absolute, but may be regulated in the public interest when that interest is clear enough.⁸⁸

"It is clear that there is no closed class or category of business affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exercise of governmental authority or condemn it as arbitrary or discriminatory. . . . So far as the requirement of due process is con-

⁸⁷ *Chastleton Corporation v. Sinclair*, 264 U.S. 543 (1924); *Nashville etc. Ry. v. Walters*, 294 U.S. 394 (1934); *Muller v. Oregon*, 208 U.S. 412 (1908); *Minnesota Rate Cases*, 230 U.S. 352, 465-473 (1913).

⁸⁸ *Holden v. Hardy*, 169 U.S. 366 (1898); *Orient Ins. Co. v. Daggs*, 172 U.S. 557 (1899); *Knoxville Iron Co. v. Harbison*, 183 U.S. 13 (1901); *Patterson v. The Eudora*, 190 U.S. 169 (1903); *Lottery Case*, 188 U.S. 321 (1903); *Muller v. Oregon*, 208 U.S. 412 (1908); *Lemieux v. Young*, 211 U.S. 489 (1909); *McLean v. Arkansas*, 211 U.S. 539 (1909); *House v. Mayes*, 219 U.S. 270 (1911); *Mutual Loan Co. v. Martell*, 222 U.S. 225 (1911); *Atlantic Coast Line R.R. Co. v. Riverside Mills*, 219 U.S. 186 (1911); *Chicago, B. & Q. R.R. Co. v. McGuire*, 219 U.S. 549 (1911); *Selover, Bates & Co. v. Walsh*, 226 U.S. 112 (1912); *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917); *Bunting v. Oregon*, 243 U.S. 426 (1917); *New York Central R.R. Co. v. White*, 243 U.S. 188 (1917); *Radice v. New York*, 264 U.S. 292 (1924); *Hardware Mutual Fire Ins. v. Glidden Co.*, 284 U.S. 151 (1931); *Advance-Rumely Co. v. Jackson*, 287 U.S. 283 (1932); *Nebbia v. New York*, 291 U.S. 502 (1934).

cerned, and in the absence of other constitutional restrictions, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. . . . If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*.”⁸⁹

To make possible the full use of our productive plant for the creation of the current wealth on which we all must live, and to facilitate the creation of additions to that plant until it is adequate to satisfy our needs, are legitimate legislative purposes. In the field of domestic economic policy they are the most important purposes there are. One lesson of the Brookings survey is that the two are consistent with each other, that they can and must be sought at the same time and by the same means, and that among those means, on the side of distribution, the most important is to increase and sustain the real incomes of the masses of the people. Minimum wage laws are a fundamental step in that direction. In view of our new knowledge it is impossible to argue longer that they have no reasonable purpose. This is not to say that any law whatever on the subject has to be sustained. It is easy to imagine acts that set up impossible scales, or that discriminate unfairly between competing industries. Those questions are still open. But the general assertion that no minimum wage law can be consistent with due process is no longer a tenable position.

*Adkins v. Children's Hospital*⁹⁰ should follow the fate of *Lochner v. New York*.⁹¹ And it seems to me the same is true as to *Charles Wolff Packing Co. v. Court of Industrial Relations*,⁹² *Adair v. United States*,⁹³ and *Coppage v. Kansas*.⁹⁴ The court has already taken a long step toward the overruling of all three of those cases.⁹⁵ In the case just cited the court sustained the Railway Labor Act of 1926, upon the ground primarily that Congress has authority by virtue of the commerce clause to “foster, protect, control, and restrain” the commerce of the country, and that “exercising this authority, Congress may facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation.”⁹⁶ It was so held although the act was found to contemplate “that the proceedings for the amicable adjustment of disputes will have an appropriate termination in a binding adjudication, enforceable as

⁸⁹ *Nebbia v. New York*, 291 U.S. 502 (1934).

⁹⁰ 261 U.S. 525 (1923).

⁹² 262 U.S. 522 (1923).

⁹⁴ 236 U.S. 1 (1915).

⁹¹ 198 U.S. 45 (1905).

⁹³ 208 U.S. 161 (1908).

⁹⁵ *Texas & New Orleans R.R. Co. v. Brotherhood of Railway Clerks*, 281 U.S. 548 (1930).

⁹⁶ *Texas & New Orleans R.R. Co. v. Brotherhood of Railway Clerks*, 281 U.S. 548, 570 (1930).

such."⁹⁷ The reasoning applies not only to the transportation system and the commerce power, but to the production of all goods and services and the police power of the States.

But this is not the only ground on which the National Labor Relations Act of 1935,⁹⁸ as to industries within Congressional control, and like acts of the States within their field, may be sustained. The Brookings surveys show us that the incomes of working people are important not only to themselves, but to the whole economy. If we accept that finding, it is clearly a reasonable view to hold that hours, wages, and conditions of employment bearing upon income are more likely to be fixed fairly, and at a point consistent with the public interest, when they result from bargain between parties of somewhat equal authority and power, than when one side only must agree or starve. Unless we are to have public compulsory fixing of the rates of wages, which few American desire, strong and responsible labor unions are essential to the fruitful functioning of our economy.

At every point the findings of the Brookings survey throw new light on the requirements of substantive due process. "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."⁹⁹ The command of the Fourteenth and of the Fifth Amendments is not that business conduct shall be wholly free from public regulation (as personal religion should be free under the first)¹⁰⁰ but only that the regulation shall be uniform, and fair, and have a public purpose. The Brookings findings show that to increase and sustain the real incomes of the masses of the people is a public purpose fundamental to our whole economy.¹⁰¹ Any legislative action, then, directed to that end has a safe foundation in legislative power, and unless it is otherwise arbitrary or discriminatory, or offends some more specific requirement of the Constitution, it is valid.

⁹⁷ *Texas & New Orleans R.R. Co. v. Brotherhood of Railway Clerks*, *supra* note 96 at 565.

⁹⁸ Act of July 5, 1935, c. 372. ⁹⁹ *Nebbia v. New York*, 291 U.S. 502, 536-537 (1934).

¹⁰⁰ See Alexander Meiklejohn's great book, *What Does America Mean?* (1935).

¹⁰¹ In response to criticisms which Dr. Moulton and Dr. Nourse have been good enough to make, I have somewhat modified the original form of my observations on Volume IV. Price reductions are, it is true, not the only thing that the fourth volume considers. It concedes possibilities of usefulness to public works, taxation, expenditure, and increased wages, while pointing out their difficulties. The emphasis, however, is upon price. My trouble with the volume is that price reductions seem to me at least as hard to realize in practice as the other things.

It is hard for a lawyer to be an amateur economist, but it is a necessary task. If my discussion can force members of the Bar to read in the original, attentively and several times, the volumes of the Brookings survey, my job will have been done.