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The Kansas Industrial Court Act

DURING the past two or three years the Supreme Court of the United States has rendered a series of decisions which go far toward defining the attitude of that body on the constitutional aspects of the labor question. The latest of these is *Wolff Packing Company v. Court of Industrial Relations*.¹ The subject with which this case dealt—roughly, compulsory arbitration—is so important, and the popular interest in the fate of the Kansas Court so intense, as to constitute the decision a political event. The lawyer, as a technical expert in decisions, is apt to confine his interest to the strict constitutional point decided; but the lawyer, in the broader role of social engineer, to quote Dean Pound's phrase, must interest himself in the historical and economic setting as well. In the following pages we shall, first, give some account of the successes and failures of the Kansas Court, and, second, discuss its constitutionality.

I.

The history of the Kansas Court of Industrial Relations centers around four names—Judge Huggins, its first presiding officer; Governor Allen; Alexander Howat, President of District 14 of the United Mine Workers; and Governor Davis. Judge Huggins conceived the idea of the court; Governor Allen gave it being; Alexander Howat did more than any other single man to wreck it; and Governor Davis reduced it to powerless nonentity.

The provocation for the passage of the Kansas Industrial Court law lay in the labor situation in the Kansas coal industry. The miners therein are of many different nationalities, although the largest single group is American-born. The bulk of them are adherents of the traditional "business unionism" but there is an active socialistic minority. The president, Alexander Howat, who

¹ (June 11, 1923) 261 U. S. —, 67 L. Ed. —, 43 Sup. Ct. Rep. 630.

dominated the district, commanding extraordinary prestige, was likewise socialistically inclined, and, taken as a whole, the district is probably further to the left in the trade union movement than the majority of workers in the coal industry. For many years it has been the scene of violent struggle between the miners and the operators—how violent, may be judged from the assertion that 705 separate and distinct strikes were called during the period 1916-1919.² In 1919 came the post-war bituminous coal strike, and, amidst the suffering resulting therefrom, public resentment against the strikers flamed high. Governor Allen, immediately upon the settlement of the strike, called a special session of the Kansas legislature, and secured the passage of the Industrial Court Act (January, 1920).³

For the drafting of the Act, and for the ideas which it embodies, Judge Huggins was mainly responsible. The Act created a "Court"—really an administrative board—of three members, with jurisdiction over certain "key" industries declared to be essential to the public welfare; these were, first, the orthodox "public utilities"; second, transportation; and, third, the production of fuel, clothing and food products. The Court was given power, either on its own initiative, or at the instance of either of the parties to a dispute, to investigate and decide any controversy which "may endanger the continuity and efficiency . . . of said industry". The Court was limited in this power only by the requirement that labor receive a "fair wage" and capital a "fair return on investment." Strikes, picketing, boycotts and lockouts were forbidden, and so likewise was limitation or cessation of production for the purpose of evading the provisions of the Act. In case production was suspended in one of the regulated industries, and it appeared "that such suspension . . . shall seriously affect the public welfare", the Court was given power to take over the operation thereof. And, finally, it was provided that the unconstitutionality of any one section of the Act should not affect the remainder.

Judge Huggins conceived the Court in an individualistic, but broadly humanitarian and genuinely idealistic spirit.⁴ Labor, how-

² See opinion of Burch, J., in *State v. Howat* (1921) 109 Kan. 376, 198 Pac. 686.

³ Chapter 29, Special Session Laws of Kansas of 1920. The Act as originally passed conferred upon the Industrial Court the powers formerly vested in the Public Utilities Commission. These powers were withdrawn by the legislature in 1921, at which time there was added to the functions of the Industrial Court the duties of the state departments of labor, factory and mine inspection, free employment, and industrial welfare.

⁴ See Huggins, *Labor and Democracy*.

ever, with insignificant exceptions, looked upon it as the merest subterfuge, and attacked it with a bitterness and violence that effectively shattered Huggins' dream of industrial peace. After the jailing of Howat and various other leaders for contempt, the union leaders, to be sure, no longer openly flouted the Court's jurisdiction; nevertheless, the prohibition of strikes was so freely ignored that, during the years of the Court's active operation, the coal fields were the scene of almost incessant turbulence and disturbance.

This failure to win the goodwill of the parties concerned—for the unpopularity of the Court was by no means confined to the employees—marked the first and basic failure of the Court. Its second demonstrated weakness was its unfortunate susceptibility to political manipulation. Against this tendency, Judge Huggins strove manfully but unsuccessfully. By virtue of the fact that the power of appointment to the Court was vested in the Governor, the Court soon became completely subordinate to the state executive, and enmeshed in all the ramifications of state politics. Originally passed by an overwhelming majority as a non-partisan measure, its abolition was made to serve as the chief plank in the Democratic platform in the gubernatorial campaign of 1922. Inevitably the activities and policies of the Court became tempered by considerations of approaching elections. In the end, Governor Davis, the Democratic nominee, supported by labor, was elected, and completely devitalized the Court by innocuous appointments. That he did not completely abolish it, was due to the fact that the people, although electing a Democratic governor, had neglected to elect a Democratic legislature.

The entire period of the active operation of the Court was thus less than three years (February, 1920—November, 1922). During this period, in addition to many purely local disturbances, three interstate strikes occurred, involving Kansas. These were the strike in the packing industry in 1921, the coal strike of 1922, and the railway shopmen's strike of 1922. Under this strain the Court, as a court, simply did not function. In the coal strike there was an informal "investigation"; but there was no attempt to decree and enforce a settlement. In the other two interstate strikes there was not even an investigation. In brief, it proved impracticable to isolate industrial conditions in Kansas from industrial conditions in the rest of the nation.

This is not to say that the Court was completely inactive and that the Industrial Court Act remained a dead letter during the course of these strikes. For one thing, the Court, though not acting officially, evidently did exert a good deal of unofficial pressure upon

coal production during the coal strike by threatening to take over the mines—as had been done by Governor Allen in 1919—unless the operators produced the maximum possible with the men at their disposal. Secondly, the anti-picketing provisions of the Act were at all times vigilantly enforced. The effect of these measures was sufficient to maintain coal production in Kansas during the strike at a much higher percentage of normal than in other strike areas, and to assist materially in breaking the railway strike. Much stress has been laid on these achievements; but, however much they may testify to the effectiveness of an anti-picketing law, they indicate the failure, rather than otherwise, of the original conception of the Court as a peaceful substitute for the strike.

The most conspicuous successes of the Court were achieved in the local street-railway and power industries. In these industries it accomplished all of the things it failed to do on a larger scale; won the goodwill and confidence of the parties, prevented strikes, settled incipient disputes, made awards apparently satisfactory to both sides. In these awards the Court even made some progress toward giving a more exact meaning to the general phrases "fair wage" and "fair profit" which are the sole provisions of the Act for its guidance, although these terms still remain hopelessly indefinite.⁵ The actual awards made by the Court show it sympathetic toward the eight-hour day, and inclined to take the rate of wages prevailing in reputable establishments as its standard.⁶

⁵ In the Topeka Edison case, decided March 29, 1920, the Industrial Court held that a "fair" wage meant more than a living wage; it meant a "wage which will enable them to procure for themselves and their families all the necessities and a reasonable share of the comforts of life. They are entitled to a wage which will enable them by industry and economy not only to supply themselves with opportunities for intellectual advancement and reasonable recreation, but also to enable the parents working together to furnish to the children ample opportunities for intellectual and moral advancement, for education, and for an equal opportunity in the race for life. A fair wage will also allow the frugal man to provide reasonably for sickness and old age." The actual award in this case, however, was only \$32.40 per week.

⁶ The following tables give an approximately correct account of the Court's activities:

1. Total number of formal cases filed, dealing with the Court's powers under the Act of 1920, excluding Public Utilities cases.....	52
Filed in 1920.....	28
" " 1921.....	16
" " 1922.....	6
" " 1923.....	2
2. Distribution by industries—	
Transportation	32
Coal	7
Flour	5
Telephone	3
Packing	3

It may be that the failures of the Court before adverted to have been due, not to any inherent vices, but to the accidents of time and place, and to the brevity of its history. But so far as one can judge from this brief history, the sphere of the Court's usefulness seems limited to minor local disturbances.⁷

II.

There is a tendency for "unwise" subtly to transmute itself into "unconstitutional". Against such a tendency we must, of course, be on our guard, particularly when dealing with a subject so liable to be affected by our personal sympathies as the present. The fact, therefore, that the Kansas Court has not proved to be a very hopeful solution of the industrial problem should in no manner or degree sway our judgment of its technical validity. Moreover, the issues involved are much broader and much more important than the particular case; and those labor leaders and liberals who, out of the vehemence of their opposition to the Court, applaud a decision that it is unconstitutional, are shortsightedly sacrificing the fruits of hard-earned previous victories for a comparatively petty present advantage. It must be admitted, however, that there are few to be found willing to take such a long-range view of the situation. For the most part, labor, which in the past has been a principal bene-

Oil	1
Sugar refining	1
	<hr/>
	52
3. Initiation and nature—	
(a) no controversy between employer and employee.....	7
orders relating to continuity of production.....	5
miscellaneous	2
(b) controversy between employers and employees.....	45
initiated by the court.....	6
initiated by the state.....	1
initiated by labor.....	36
initiated by employers.....	2
4. Disposal of cases dealing with controversies.	
Dismissal for lack of jurisdiction.....	2
No order made, for reasons of policy.....	4
Agreement reached out of court.....	9
Increase in wages granted.....	13
Increase in wages refused.....	3
Decrease in wages granted.....	2
Check-off system regulated.....	1
Miscellaneous	6
Data not available.....	5
	<hr/>
	45

The greatest proportion of wage increases was granted in 1920.

⁷ See articles by Herbert Feis, *Survey*, Feb. 25, 1922, and Dec. 15, 1922.

ficiary of the broadened concept of police power, and the political future of which is dependent upon a still further development thereof, was the first, now that the police power was used for a purpose to which it was antipathetic, to raise the erstwhile employers' cry of "inalienable right to liberty".

The first case involving the validity of the Industrial Court Act was *State v. Howat*.⁸ In this case the Industrial Court had subpoenaed Howat and others as witnesses to testify in an investigation of the coal industry. Howat refused to grant any recognition to a court created by what he claimed was an unconstitutional statute; whereupon the Industrial Court obtained an order from the state District Court ordering Howat to testify. Howat still refused, whereupon he was sentenced to jail for contempt. On the appeal to the Supreme Court of Kansas, the lower court was sustained. The opinion brushes aside a number of minor objections, such as the validity of the special session at which the Act was passed, and the asserted infringement of the doctrine of separation of powers. Into the validity of the fundamental provisions of the Act, however, the court did not in this case find it necessary to inquire, inasmuch as it held that only the power of the Court as an investigatory body was involved, as to which there was no question. The case was appealed to the United States Supreme Court,⁹ but that body held that, even though the Act were unconstitutional, the order of the District Court would merely have been erroneous, and not void, and, hence, that no Federal question was involved in the case.

The next case of importance was also entitled *State v. Howat*.¹⁰ This case likewise was an appeal by Howat from an order of a lower court sentencing him for contempt—this time, of an order enjoining him from calling a general coal strike. The court held in this case, as in the other, that irrespective of the constitutionality of the Act, the order of the District Court was at most erroneous and not void; but "in order that defendants may not feel a rule of procedure has prevented full consideration of their case", it went on to discuss the question on the merits. It met the argument that the Act amounted to involuntary servitude by referring to the Act's express preservation of the *individual's* right to quit work. On the fundamental question of the right to regulate coal, fuel and other industries not hitherto recognized as "public", it relies upon *Munn v.*

⁸ (1920) 107 Kan. 423, 191 Pac. 585.

⁹ *Howat v. State* (1922) 258 U. S. 181, 66 L. Ed. 550, 42 Sup. Ct. Rep. 277.

¹⁰ (1921) 109 Kan. 376, 198 Pac. 686.

Illinois¹¹ and the line of cases based thereon, which it interprets as authorizing regulation whenever and to whatever extent public interest demands. Its position, summed up, was that: "The rights of society as a whole . . . are dominant over industry; and the state is under obligation to intervene to compel settlement of differences whenever failure of manager and laborer to agree endangers the public safety or causes general distress".¹² This case, like its predecessor, was taken up to the United States Supreme Court, and was likewise dismissed as not involving any Federal question.¹³

Finally, we come to the case of *Wolff Packing Co. v. Court of Industrial Relations*.¹⁴ Here, for the first time, essential provisions of the Act were squarely involved. The facts are as follows: The Wolff Packing Company is a small plant employing about three hundred men engaged in the packing industry. The total product of the plant is a negligible fraction of the total product of the packing industry at large. In January, 1921, at a time when a general strike in the packing industry was seriously threatened, the Industrial Court, after investigating a controversy between the company and its employees at the instance of the latter, made an order slightly increasing wages. The company refused to comply, whereupon resort was had to the Supreme Court of Kansas to compel obedience. The order was resisted on three grounds: first, that it would compel defendant to operate at a loss; second, that no sufficient emergency existed to give the Industrial Court jurisdiction under the Act; and, third, that the Act was unconstitutional. The court upheld the order, holding (1) that the facts did not show definitely that the new scale of wages would mean operation at a loss, and that, if it did, defendant could go out of business; (2) that, even though the plant was a small one, the dispute created sufficient "emergency" to give the Industrial Court jurisdiction under the Act; and (3) it upheld the constitutionality of wage regulation by the Court on the analogy of eight-hour laws, minimum wage laws (this was before the United States Supreme Court had decided the *District of Columbia Minimum Wage* case), and factory legislation generally. Two judges, however, dissented, holding, as a matter of statutory interpretation, that the Act was only intended to apply to great

¹¹ (1876) 94 U. S. 113, 24 L. Ed. 77.

¹² 198 Pac. 686, 705.

¹³ *Howat v. State*, supra, n. 9.

¹⁴ (1921) 109 Kan. 629, 201 Pac. 418, and (1922) 111 Kan. 501, 207 Pac. 806.

crises gravely endangering the public—emergencies such as the coal strike of 1919 which gave birth to the Act.

The case was appealed to the United States Supreme Court, the advocates of the Industrial Court presenting two lines of argument to match the narrow and broad interpretations of the Court's statutory authority above referred to. In the first place, it was contended that the labor situation in the packing industry at the time the Court made its award was such that a strike in the Wolff Company's plant, small though it was, might have had the consequence of inflaming a much larger and graver one. The threat of a general strike in the packing industry was so ominous, it was contended, as to bring the case squarely within the holding of *Wilson v. New*,¹⁵ which upheld the constitutionality of the Adamson Act when that measure, in effect one of compulsory arbitration, was passed to avoid an impending railroad strike. The second line of argument rested the validity of the Act, not on the pressing character of the immediate emergency, but on the public nature of the industry, claiming that there existed as much ground for impressing the food industry with a public interest, as existed in *Munn v. Illinois*¹⁶ and the many cases which followed it.

The decision of the court was rendered by Chief Justice Taft, and it held the Act unconstitutional, insofar as involved in this case.¹⁷ There was no dissent.

The opinion is disappointing to those expecting to find therein an illuminating discussion of the limits of state power in dealing with labor disputes. It considers, at some length, it is true, and is evidently very dubious of, the power of the state to impress the food, fuel and clothing industries generally with a public interest, and to regulate them accordingly; but it decides the case on a ground which makes it unnecessary to hold definitely on that question. Somewhat surprisingly, it finds the fatal flaw not in the fact that the order of the Industrial Court required defendant to continue to operate its plant at a loss, but in the mere fact that it required defendant to continue to operate. The argument is as follows: the mere fact that a business is "public" enough to be "regulated" does not determine the extent or manner in which it may be regulated; there are various kinds of "public" industries, and a regulation which is permissible and proper for one type may be invalid for

¹⁵ (1917) 243 U. S. 332, 61 L. Ed. 755, 37 Sup. Ct. Rep. 298.

¹⁶ *Supra*, n. 11.

¹⁷ *Wolff Packing Co. v. Court of Industrial Relations*, *supra*, n. 1.

another. The particular regulation in question—regulation requiring a plant to continue to operate—is common and admittedly proper for the railroads, and for other “public utilities”. But here the opinion makes a distinction: it is only where there is a contractual condition, express or implied, on entering a business, not to withdraw, that such regulation is valid. Such assent the court finds as an implied term of the franchise granted a railroad company; but such assent the court finds does not exist in the case of those quasi-public businesses of the type dealt with in *Munn v. Illinois*,¹⁸ which operate without the need of franchise or special grant. As to this latter type, “the theory is that of revocable grant only”; that is to say, the right of the public to regulate is derived from the fact that the owner who invests property in an industry of a public nature “grants the public an interest in the use”, but with the withdrawal of the property from the public use, the right of the public to regulate ceases. The packing industry, to return to the instant case, if “public” at all, belongs at most to the latter class, and, hence, property invested in it, though subject to regulation while left in the business, cannot be prevented from being withdrawn therefrom at will.

The court goes on to distinguish the case from *Wilson v. New*¹⁹ both on the ground that *Wilson v. New* was concerned with the railroad industry, where an agreement not to withdraw is implied, and also on the ground that no emergency existed in the instant case comparable to the situation existing when the Adamson law was passed.

So far as this latter point is concerned, the Supreme Court is no doubt correct; but in its main contention, viz., that the “continuity” of operation required by the Act is beyond the power of the legislature to secure, the decision is very unsatisfactory. To begin with, the court’s decision is apparently based upon a misinterpretation of the statute. A careful survey of the Act and of its interpretation fails to reveal anything preventing a plant from definitely going out of business. The relevant sections are Sections 6 and 16. Section 6 provides that “It is hereby declared . . . necessary for the public . . . welfare . . . that the industries . . . herein specified shall be operated with reasonable continuity and efficiency . . . No person shall . . . wilfully hinder, delay, limit or suspend such continuous and efficient operation *for the purpose of evading the purpose and intent of the provisions of this act . . .*” (Italics mine).

¹⁸ *Supra*, n. 11.

¹⁹ *Supra*, n. 13.

Section 16 provides that "It shall be unlawful for any person . . . engaged in the operation of any such industry . . . willfully to limit or cease operations for the purpose of limiting production . . . *for the purpose of avoiding any of the provisions of this act*; but any person so engaged may apply to said Court of Industrial Relations for authority to limit or cease operations . . . and if said application shall be found to be in good faith and meritorious, authority to limit or cease operations shall be granted." (Italics mine). In short, not cessation of production in itself is forbidden, but only cessation of production for the purpose of evading the provisions of the Act; which, I take it, means a temporary, pretended withdrawal from business unaccompanied by any real intention to terminate operations. It is true that the language of Section 16—"if said application shall be found to be in good faith and meritorious"—is obscure, and leaves one in doubt as to what may be meant by "meritorious"; but any possible doubt is removed by the construction placed upon the Act by the Kansas Supreme Court, which is as follows:

"An analysis of these statutes reveals that the defendant is restricted from doing certain things with the intention of violating the law, or in other words is restricted from doing those things prohibited by the law. But the defendant is not, by the law, compelled to operate its plant at a loss, *nor is it prohibited from changing its business, nor quitting the business, if it desires to do either of these things in good faith*, not intending thereby to violate any of the provisions of the act."²⁰

At the very worst, the Act is uncertain, and by well-known rules of interpretation, should be construed, if possible, so as to avoid invalidity. If interpreted as suggested above, there would be no attempt in the Act to prevent the withdrawal of property from a public use to which it had formerly been devoted, but merely a prohibition on pretended withdrawal. So interpreted, the Act says to the property owner, "You may, if you like, withdraw your property from the public use to which you devoted it; but so long as you leave your property in a public industry, it is subject to regulation, whether or not it is being actively operated at the precise moment." There is nothing in the opinion of the Supreme Court, which gives ground for holding the Act, if so interpreted, invalid.

But even assuming that the Act were intended to prevent bona fide withdrawal from the industry, is the court right in holding it unconstitutional? Recognizing that a distinction in this respect

²⁰ 201 Pac. 418, 422 (italics mine).

exists between public utilities like common carriers, and public businesses like the milling industry, under the common law as it now stands, what ground is there for holding that it is constitutionally impossible for the legislature to break down that distinction?

Only two cases are cited by the court in this connection; the basic case of *Munn v. Illinois*,²¹ and the case of *Weems Steamboat Co. v. People's Co.*²² *Munn v. Illinois*, as everyone knows, held that legislative regulation of industries clothed with a public interest did not work a deprivation, without due process of law, of the private property invested in such industries: and, further, that an industry might become clothed with a public interest by virtue of changing economic circumstances. These propositions lie at the very bottom of the arguments in favor of the validity of the Kansas Act, yet, nevertheless, it is on *Munn v. Illinois* itself that Chief Justice Taft relies for his main argument against it. Quoting from his opinion:

"... in *Munn v. Illinois* . . . it is said 'Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use, but so long as he maintains the use, he must submit to the control.*' These words refute the view that public regulation in such cases can secure continuity of a business against the owner. The theory is that of revocable grant only."²³

The language above italicized seems on its face to support the court, but the court's error lies in the fact that it fails to distinguish between statements of common law rules of property and questions of the legislature's constitutional power to change those rules of the common law. The above-quoted assertion that "He may withdraw his grant by discontinuing the use" was not made as an assertion of a *constitutional* right; it was made as an assertion of the owner's right *at common law*. Chief Justice Waite, in upholding the validity of the regulation in question in *Munn v. Illinois*, had chosen the familiar method of showing that the power exercised was one that government was traditionally invested with, even at common law. It is as a statement of the common law that he quotes Lord

²¹ *Supra*, n. 11.

²² (1909) 214 U. S. 345, 53 L. Ed. 1024, 29 Sup. Ct. Rep. 661.

²³ 43 Sup. Ct. Rep. 630, 635.

Hale to the effect that when private property becomes affected with a public interest, it ceases to be *juris privati* only. It is at the termination of a paragraph defining the rules of the common law that the sentences quoted by Chief Justice Taft occur. The full paragraph reads as follows:

"This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. *Looking, then, to the common law* from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."²⁴

Munn v. Illinois does not discuss the power of the legislature to change the common law rules thus stated, because there was no need in that case to do so. The case, therefore, is absolutely no precedent for the judgment in the principal case. No more is *Weems Steamboat Co. v. People Co.*²⁵ That case concerned the right of the owner of a public wharf to withdraw the wharf from public use, and the court held correctly that the owner could withdraw it; but the case was decided purely and simply as a question of general common law. No statute was involved. In short, the mere fact that the legislative power dealt with in *Munn v. Illinois* was supported on purely common law grounds, does not mean that it could not be supported on any other grounds, nor that the exact scope and contour of the power was forever restricted by the Constitution to the scope and contour it possessed at common law. The ultimate justification for the doctrine of *Munn v. Illinois* is not common law precedent, but the considerations of public welfare which gave rise to that precedent.

Shorn of its show of authority, the opinion in the principal case

²⁴ *Munn v. Illinois*, 94 U. S. 113, 125.

²⁵ *Supra*, n. 22.

becomes a mere assertion—potent enough when voiced by the Supreme Court of the United States—that the legislature may not prohibit the withdrawal of private property from use in the food industry. There is not a single word of real argument on principle. And on principle, the only questions, assuming the industry may be regulated at all, are: (1) Is the end sought a reasonable one? (2) If so, are the means employed reasonable? That the end sought by the Kansas Act—continuity of production—is a reasonable one, cannot admit of a moment's hesitation. Then it must be that the means employed are unreasonable. But why? The implication of the decision is that they are unreasonable because not consented to by the property owner. But the right to regulate property does not rest on consent. During the past half century innumerable property rights, every whit as important, and more important than the right here involved, have been regulated with utter indifference to the consent or dissent of the property owners affected. Certainly, the thousands who suffered the rigors of December weather without coal because production had been stopped by a coal strike would find it difficult to understand why a measure prohibiting such cessation of production was clearly and indubitably unreasonable, wanton, spoliative and arbitrary. The opinion in the principal case ignores the first principles of constitutional law.

III.

Thus far, we have seen that the Act might easily have been interpreted so as to avoid the alleged unconstitutional feature, and that, moreover, there is little reason on principle for holding the Act invalid, even if it does prohibit withdrawal from the industries regulated. But in any event, the body of the Act is not affected by the decision, inasmuch as Section 28 thereof provides that the invalidity of any one provision shall not affect the remainder. Any legislature that desires to install a system of compulsory arbitration or industrial courts is therefore left free to do so. To steer clear of the holding in the principal case it is only necessary to draft the Act in negative terms, and prohibit the continued operation of the industry on any conditions other than those specified by the Industrial Court, instead of affirmatively requiring operation on those conditions. As a practical matter, such a prohibition would be almost, if not quite, as efficacious as an express mandatory injunction.

The fact that the rule of the principal case can thus be so easily avoided, leaves us face to face with the fundamental questions respecting the constitutionality of compulsory arbitration, which the court did not here feel it necessary to decide. There are two questions involved: (1) Would a scheme of compulsory arbitration be valid if applied throughout industry generally? (2) If not, does the fact that it is restricted to certain "key" industries make a difference?

Three or four years ago one would have been apt to prophesy confidently in favor of the constitutionality of a general scheme of compulsory arbitration. Case after case had held that the due process clause was not a narrow, technical restriction upon the legislature; that it did not prevent any proper governmental activities;²⁶ that it was only aimed at regulation so unreasonable as to lose the character of "law" and become mere arbitrary fiat;²⁷ that every presumption in favor of constitutionality was to be indulged, and that, irrespective of the court's view of the wisdom of the regulation, it was to be sustained, provided only that it might possibly be considered a reasonable measure.²⁸ Approached with so liberal an attitude, it can not seriously be doubted that compulsory arbitration would be held valid. To hold otherwise—to hold that a scheme in operation in half a dozen foreign countries, and advocated by many deep students of industry as a necessary measure, could not possibly be considered reasonable—would be a farcical obliteration of the meaning of language.

Today, however, he would be rash indeed who ventured any prophecy as to the fate of such a measure; but rasher still, who prophesied in favor of its validity. The truth is that the Supreme Court no longer applies the liberal test above referred to; it has reverted to an earlier attitude, and scrutinizes every new progressive measure with an eye jealous lest, under the cloak of the police power, the sanctity of private property be completely destroyed, and industry completely socialized.²⁹ Two recent decisions are especially

²⁶ *Hurtado v. California* (1884) 110 U. S. 516, 28 L. Ed. 232, 4 Sup. Ct. Rep. 111; *Holden v. Hardy* (1898) 169 U. S. 366, 42 L. Ed. 780, 18 Sup. Ct. Rep. 332. In *Hurtado v. California*, the court said: "There is nothing in Magna Charta, rightly construed . . . to exclude the best ideas of all systems and every age." (110 U. S. 531).

²⁷ *Purity Extract & Tonic Co. v. Lynch* (1912) 226 U. S. 192, 204, 57 L. Ed. 184, 33 Sup. Ct. Rep. 44.

²⁸ *Dominion Hotel v. Arizona* (1919) 249 U. S. 265, 63 L. Ed. 597, 39 Sup. Ct. Rep. 273.

²⁹ There are two possible legislative approaches to the industrial problems. One is by means of ameliorative legislation striking directly at conditions

relevant: *Truax v. Corrigan*,³⁰ and the Minimum Wage case.³¹ In *Truax v. Corrigan* it was held that an Arizona statute abolishing the use of injunctions in labor disputes was invalid, on the ground that the employer thus denied the injunction relief against threatened injury, which property owners in general possess, was denied the equal protection of the laws guaranteed by the Fourteenth Amendment. In the eyes of the court, the facts of industrial warfare did not make the classification reasonable. Logically, the question of the validity of compulsory arbitration is concluded by this decision; for, if employers, as a class, are unduly discriminated against by a law which merely deprives them of a special form of remedy, *a fortiori* they are unduly discriminated against by a law which deprives them of such essential matters as their liberty to contract freely with respect to wages, hours and conditions of labor. Yet the Supreme Court does not always decide cases by strict logical deduction from precedent, and in this fact, advocates of compulsory arbitration may take what comfort they can.

In the Minimum Wage case the court held invalid a law providing for the regulation of the wages paid to women. The court takes for granted that a general minimum wage law, not confined to any particular class, would be invalid, and it does not find sufficient grounds to take women employees, as a special class, out of the general rule. Now, compulsory arbitration, insofar as it gives the board or Court power to settle wage disputes, is, in effect, a form of minimum wage law, and the Minimum Wage case is therefore superficially more in point than *Truax v. Corrigan*. Actually, however, it is much easier to distinguish, because minimum wage laws and compulsory arbitration laws are based upon entirely separate and distinct principles of classification. The class regulated by minimum wage laws is either the class of employers generally, or employers of some special form of labor, such as female labor. The class regulated by compulsory arbitration laws, on the other hand (and by the statute in *Truax v. Corrigan*), is neither the class of

supposed to cause unrest. This line of approach threatens to become effectively blocked by decisions such as the Child Labor cases and the Minimum Wage case. The other line of approach is by direct regulations of strikes, boycotts, etc. This line of approach is being cut off by decisions like *Truax v. Corrigan* and the principal case. There remains indicated, as a possible way out, the much agitated movement for a constitutional amendment once and for all placing beyond doubt the power of the legislature to deal freely and adequately with social questions.

³⁰ (1921) 257 U. S. 312, 66 L. Ed. 254, 42 Sup. Ct. Rep. 124.

³¹ *Adkins v. Children's Hospital* (1923) 261 U. S. —, 67 L. Ed. —, 43 Sup. Ct. Rep. 394. [See comment, 11 California Law Review, 353].

employers generally, nor of employers of any special type of labor, but the employers of labor which threatens to strike and thereby cause industrial dislocation and public inconvenience. The one law seeks directly to improve the status of the labor affected; the primary aim of the other is merely to spare the public the results of industrial conflict. The court which held that the first law afforded no reasonable basis for special regulation, might very well find special circumstances justifying the latter.

But if it should not, or if the decision in *Truax v. Corrigan* is pressed to its logical conclusion, would the fact that the scheme was confined, as in the Kansas Act, to special "quasi-public" industries, such as coal mining and food production, be sufficient to render it valid? Such a confinement would be an additional ground for distinguishing the Minimum Wage case; for the same court which found no special public necessity to regulate the health of women might very well find a special public necessity to regulate the supply of coal. Moreover, such a confinement of the scheme to special industries would afford a basis for distinguishing the case from *Truax v. Corrigan*. In actual fact, food, clothing and shelter are commonly recognized as peculiarly essential to life: and certainly, there is ample ground for holding that coal, because of its scarcity and necessity, stands in a peculiar relation to the public welfare.

For all of the foregoing reasons, the constitutional status of compulsory arbitration, in its various forms, still remains to be defined.

Herbert Rabinowitz.

San Francisco, California.