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CONSTITUTIONAL LAW - PUBLIC WORKS ADMINISTRATION - VALIDITY - REQUISITE INTEREST TO CHALLENGE CONSTITUTIONALITY

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COMMENTS

Constitutional Law — Public Works Administration — Validity — Requisite Interest to Challenge Constitutionality — After three years of prolonged litigation which has deprived the nation of many intended immediate benefits, another New Deal measure commonly known as the Public Works Administration has withstood the legal attacks persistently made upon it. One of the earliest enactments of the Seventy-third Congress during the present administration, Title II of the National Industrial Recovery Act,\(^1\) passed with the view of directing the country from an economic abyss, recently received judicial sanction in the United States Supreme Court, although Title I of the same act\(^2\) was early attacked and decreed unconstitutional in *Schechter Poultry Corp. v. United States*.\(^3\) Title II, creating the Federal Emergency Administration of Public Works, has been largely carried into execution without interference from private interests, except as to loans and grants to municipalities and other

\(^3\) 295 U. S. 495, 55 S. Ct. 837 (1935).
Millions of dollars have been made available under Title II of the N.I.R.A. and its extending acts for the construction of public works in order to effectuate the avowed purpose of the statute, i.e., to increase employment quickly by means of construction, and financial aid in construction, of public works of various descriptions. The great majority of the projects authorized by the act have been carried to completion, accomplishing the purpose of increasing employment to some degree and thereby stimulating a general business recovery. The aforesaid power projects alone have been held in abeyance by injunctions.

As a result of the recent decisions in the Alabama Power and Duke Power cases, holding that private power companies without exclusive franchises have no legal right to question the validity of P.W.A. loans and grants to competing municipal plants, even though injured by such aid to competitors, the Supreme Court has virtually upheld the constitutionality of the Public Works Administration. The practical result of these decisions is that the majority of the sixty-one temporary injunctions restraining the construction of municipal power projects aided by federal loans and grants under Title II in twenty-three states may now be dissolved, and funds to the extent of $107,900,000 released for these projects. The United States Attorney General immediately instructed the federal district attorneys throughout the country to enter the proper motions in those cases that were of such a nature as to be controlled by the Alabama Power and Duke Power cases; in many instances this has already been done. These projects, many of which were enjoined before any material construction had been begun, involve a total cost of $146,917,808, of which P.W.A. had allotted $99,632,952; $61,200,000 in loans and $38,400,000 in direct grants.

As intimated in the foregoing, the power projects constitute but a small proportion of the almost unlimited field of public works expressly or impliedly authorized by the statute. In fact, section 202 stipulates that the Administrator, appointed by and under the direction of the President, should prepare a "comprehensive program of public

5 Alabama Power Co. v. Ickes, (U. S. 1938) 58 S. Ct. 300, 82 L. Ed. 263.
works," including enumerated illustrative projects: (a) construction, repair and improvement of public highways and parkways, public buildings, and any publicly owned instrumentalities and facilities; (b) conservation and development of natural resources, including control, utilization and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, construction of river and harbor improvements and development of flood control; (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; (d) construction, reconstruction, alteration or repair, under public regulation or control, of low-cost housing and slum clearance projects; and (e) any other project of a character heretofore eligible for loans under the Emergency Relief and Construction Act of 1932.

The P.W.A. is not a unique idea, for it has long been recognized that a program of public works during periods of economic recession will provide stimulation to business and will in general aid recovery. The immediate precedents for the P.W.A., during the 1929-1936 depression, are found in the Employment Stabilization Act of 1931, providing for a six-year federal public works program, and in the Emergency Relief and Construction Act of 1932, authorizing the Reconstruction Finance Corporation to make loans to states and political subdivisions thereof to aid in financing authorized self-liquidating projects.

In fact, section 301 of Title II of the N.I.R.A. provided, in effect, that the Public Works Administration should take over the public works activities of the Reconstruction Finance Corporation. For the purposes of continuing such a program and for the other provisions

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11 “The construction of public works as a means of combating economic depressions has been known since antiquity. It has been said that the construction of buildings on the Acropolis under Pericles was undertaken to create work for the unemployed masses. The Romans devoted their idle resources to construct not only public buildings but also water supply systems and roads, some of which still endure. More recently, the policy of retarding public works during periods of prosperity and extending them during periods of depression has been adopted by Great Britain, Canada, France, The Netherlands, and Norway.” Defendant's brief before the Supreme Court, p. 151, note 45, Alabama Power Co. v. Ickes. See also Clark, The Economics of Planned Public Works (National Bureau of Economic Research, 1935); League of Nations, Enquiry on National Public Works, C. 482, M. 209, 1934 VIII.
in the National Industrial Recovery Act there was then appropriated from the general funds the sum of $3,300,000,000.\textsuperscript{16} The appropriation for public works was increased substantially in the Emergency Appropriation Act, fiscal year 1935.\textsuperscript{17} This was followed by the Emergency Relief Appropriation Act of 1935\textsuperscript{17} which made further grants to projects authorized under the P.W.A. with specific reference to loans and grants to self-liquidating projects of municipalities and other state subdivisions. Section 12 of this act also continued the P.W.A. until June 30, 1937. Next came the First Deficiency Appropriation Act, fiscal year 1936,\textsuperscript{18} with further appropriations, and an increase in the grant limitation from 30 per cent to 45 per cent of the cost of labor and materials required for the particular project in relation to which an application was to be made. Finally, there has been enacted the Public Works Administration Extension Act of 1937,\textsuperscript{19} again increasing the appropriation and continuing the functions of the Administration until July 1, 1939. However, by virtue of section 206, no new applications for loans or grants for non-federal projects were to be considered after the date of the act.

This review of the legislation is necessary for a full appreciation of the magnitude of the program undertaken; it also provides the basis for the later consideration of the constitutional problems involved.

According to most recent reports there have been approved over 9,000 non-federal projects\textsuperscript{20} alone; these are of many different types and have been undertaken in every county in the United States except three, with a total allocation of almost $1,500,000,000. The broad scope of these projects is evidenced in a schedule submitted by the Administrator during hearings on the First Deficiency Appropriation Bill,\textsuperscript{21} indicating that the approved projects [for which grants up to 30 per cent (later 45 per cent under the First Deficiency Appropriation Act, fiscal year 1936\textsuperscript{22}) and loans had been made] included: streets and highways, elimination of grade crossings, sewer and water systems, electric power plants and other utilities, educational and munici-

\textsuperscript{20} The public works authorized by the statute are of two distinct classes: (1) federal projects undertaken, constructed and carried on by federal agencies, and (2) non-federal projects undertaken, constructed and carried on by non-federal agencies including those undertaken by states and their subdivisions or by private agencies.
\textsuperscript{21} S. Hearings before Subcommittee of Committee on Appropriations on H. R. 12624, 74th Cong., 2d sess. (1936), pp. 15-16. See note 18, supra.
pal buildings, hospitals, housing units, flood control, water navigation aids, bridges, highways and aids to railroads and aviation.

Thus there is no doubt that the Public Works Administration has made possible a stupendous construction program which unquestionably has had its effect in stimulating business and in relieving unemployment (although in 1938 there still are between seven and ten million unemployed according to the recent government census).

As over 15,000 projects, federal and non-federal, have been completed (or are in process of construction) since the inauguration of the P.W.A., large sums necessarily have been spent for wages and materials (which include the remote labor thereon as well). Incomplete reports show that over $750,000,000 has been expended for direct wages and $1,400,000,000 for materials in the several years in which the P.W.A. has been in operation. Even during the first three years of its operation, it might be estimated that the P.W.A. has provided over 20,000,000 man-months of labor, direct and indirect. The social and economic significance of the Public Works Administration is made apparent, by this summary reference to the statistics involved. That the appropriations by the Federal Government may be justified under the general welfare clause will be discussed subsequently.

The significance of the Alabama Power and Duke Power cases in denying power companies the right to question the validity of a single class of projects, the municipal power plants, is not lessened by the fact that the competing electric power projects, to which the decisions relate, constitute only about 2 per cent of the total amount of allotments. Such a denial of the right to attack the validity of the P.W.A.—a denial to those most adversely and directly affected by the municipal power projects, the private power companies with whom the municipal plants may now compete at low rates—is substantially equivalent to an express declaration of the constitutionality of the P.W.A.

While the nature of the subject matter has necessitated a somewhat

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23 31 TIME 13, Jan. 10, 1938.
25 Figures are conservatively computed upon a 130-hour month basis for P.W.A. direct labor and a 175-hour month for indirect labor in producing materials on the basis that more than two persons in private industry were employed by the demand for materials in public works for each person therein employed. See Byer, "Employment Created by P.W.A. Construction," 44 MONTHLY LABOR REV. 838 (1936).
26 "As of January 1, 1937, there were 9,389 'non-federal' projects of the Public Works Administration, of which only 282 were power projects. Of these only 92 involved competition with existing private companies; and the total amount of money involved in these 92 projects was only $27,339,947, as compared with $1,480,612,543 involved in the 9,389 non-federal projects, or less than 2 per cent." Duke Power Co. v. Greenwood County, (C. C. A. 4th, 1937) 91 F. (2d) 665 at 971.
comprehensive view of the Public Works Administration as a whole, the constitutional questions have been limited to this particular type of project, i.e., the construction of municipal power plants aided by federal loans and grants. In that field alone, as a consequence of competition with private power companies serving the same community, has there appeared to be injury rather than benefit to private enterprise. Hence the balance of the discussion will be primarily limited to (1) the right of electric power companies to challenge the validity of loans and grants under the P.W.A. which make possible competition on the part of the subsidized municipalities; and (2) the validity of the P.W.A., assuming that the constitutional questions can properly be raised.

2.

In both the Alabama Power and Duke Power cases the petitioners were private utilities having non-exclusive franchises for the manufacture, supplying and selling of electrical energy in the states of Alabama and South Carolina respectively. In the Alabama Power case the Alabama Power Company sought to enjoin the Administrator from making federal loans and grants under the P.W.A. upon the approved applications of several northern Alabama municipalities. Under Alabama law, these municipalities were authorized to construct and operate municipal electric plants in competition with private utilities. Likewise, in the Duke Power case commenced a year before the other, the Duke Power Company, operating under a non-exclusive franchise in South Carolina, filed a bill to enjoin Greenwood County from constructing the Buzzard Roost hydro-electric power plant and distributing system, aided by similar federal laws and grants. The Administrator was then made a party defendant on his own application. The county also was authorized by state law to enter into the power business.

One of the primary contentions of the power companies had been that the Federal Government was seeking by means of the P.W.A. to regulate power rates and to set up publicly owned “yardsticks” throughout the country for that purpose. Since these projects were

28 Even before the enactment of Title II of N.I.R.A. authority had been conferred upon municipalities and their political subdivisions to issue revenue bonds for a project of this type, S. C. Laws (1933), act 299, p. 411. A later enactment expressly authorized Greenwood County to contract with the Public Works Administration and to borrow under the act above stated. S. C. Laws (1934), Act 1095, p. 2020. Park v. Greenwood County, 174 S. C. 35, 176 S. E. 870 (1934), by which the Supreme Court would be bound, held that the construction of the power plant and the issuance of the revenue bonds to pay for same were within the powers of the county.
to be financed, in addition to direct grants under Title II of the N.I.R.A., by loans effected by the purchase of revenue bonds, the only interest that the Administrator had in the rates was whether or not the rates charged by the municipal power plant would repay the loan within the time provided for in the contracts. In the third trial of the Duke Power case, an express finding was made that in view of the fact that the proposed loan was to be evidenced by revenue bonds it was necessary that the loan be reasonably secured, and that it was therefore necessary that the Administrator be satisfied that the proposed rates were low enough to secure customers, yet high enough to yield a revenue sufficient to liquidate the bonds.

Although the same issues were raised in both cases, a somewhat different disposition was made thereof in the Court of Appeals of the District of Columbia, where the Alabama Power case was heard, and in the Court of Appeals for the Fourth Circuit, to which the appeals in the Duke Power case had been prosecuted. In the former, the constitutional questions were expressly set aside, the bill being dismissed on the ground that the private utilities did not have the right to enjoin the lawful competition made possible through federal loans and grants to municipalities. However, the lower courts in the Duke Power case not only dismissed the bill on that ground but also passed on the merits and upheld the P.W.A. on the constitutional grounds.

Subsequently the Supreme Court of the United States, which had considered one of the cases a year before but remanded it for a new trial because of substantial errors in practice, expressing no opinion on the merits or constitutionality of the statute, has settled the issue as pointed out above. The Supreme Court has now held that the furnishing of federal funds to municipalities for the construction of power plants to compete with a private utility violates no legal right thereof so as to entitle the latter to enjoin the making of federal loans and grants, where the municipalities themselves have a right under state law to construct and operate electric power plants and borrow money for that purpose.

Thus the situation is resolved to the question whether the private utility with a non-exclusive franchise may enjoin the loans and grants on the ground that the Administrator lacked constitutional and statu-

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81 This was required by the statute. 48 Stat. L. 195, § 203 (1933), 40 U. S. C., § 403 (1935).
tory authority to make them. With the unassailable premise that munici-
palities have the statutory authority to construct and operate power plants,
as well as to borrow money through the sale of revenue bonds, there is an
equally unassailable conclusion that private utilities cannot complain of
the resulting competition, for that is lawful competition.\textsuperscript{35} The only
financial loss which the power companies in such a situation will sus-
tain would be the proximate consequence of the voluntary and lawful
competition by the municipalities. But such a financial loss concerns no
invasion of any legally protected interests, legal or equitable. Such an
injury is merely \textit{damnum absque injuria}. The thing that affects the
power companies is the competition and that is lawful. The party in-
jured by such lawful competition cannot complain that the competition
is made possible by the financial aid given by another who is alleged
to have exceeded his lawful authority.\textsuperscript{36} Nor is there any general right
to contest fair, lawful and voluntary competition on the supposition
that it is made possible by an allegedly invalid act of a government
official.\textsuperscript{37}

Justification for such a conclusion can be found in the common-
law recognition of the desirability of competition. The competitive
system may not be impeded by permitting an investigation of the law-
fulness of the conduct or the authority of third persons, such as donors
and lenders, except for whose acts the admittedly lawful competition
could not take place. The result of a contrary rule would be that com-
petitors of a borrower could attack the validity of bank loans, or that

\textsuperscript{35} Oppenheim v. City of Florence, 229 Ala. 50, 155 So. 859 (1934). In fact,
a city may construct a competing system even though it has granted an exclusive fran-
chise as against “any other person or corporation.” Knoxville Water Co. v. City of
Knoxville, 200 U. S. 22, 26 S. Ct. 224 (1906).

A non-exclusive franchise assures only freedom from illegal competition, that is,
from one not having a valid franchise to compete. Frost v. Corporation Comm. of
Oklahoma, 278 U. S. 515 at 521, 49 S. Ct. 235 (1929). So if a municipality ex-
ceeded its charter authority in constructing a competing electric power plant, power
companies even with non-exclusive franchises would be entitled to injunctive relief.
560; Iowa Southern Utilities Co. v. Cassill, (C. C. A. 8th, 1934) 69 F. (2d) 703;
Arkansas-Missouri Power Co. v. City of Kennett, (C. C. A. 8th, 1935) 78 F. (2d)
911.

\textsuperscript{36} New Orleans, Mobile & Texas R. R. v. Ellerman, 105 U. S. 166, 26 L. Ed.
1015 (1881); Sprunt & Son v. United States, 281 U. S. 249, 50 S. Ct. 315 (1930)
distinguishing Chicago Junction Case, 264 U. S. 258, 44 S. Ct. 317 (1924), which
is not to the contrary, since controlled by statutory provision]; Edward Hines Yellow
Pine Trustees v. United States, 263 U. S. 143, 44 S. Ct. 72 (1923).

292 U. S. 642, 54 S. Ct. 776 (1934); Milwaukee Horse & Cow Comm. Co. v. Hill,
207 Wis. 420, 241 N. W. 364 (1932); Keen v. Mayor & Council of Waycross, 101
Ga. 588, 29 S. E. 42 (1897).
the validity of bond purchases could be attacked by competitors of the issuer.

The Supreme Court was appalled at the contention of the power companies that the validity of gifts and loans by others might be drawn into question by a competitor of the donee or borrower. Said Justice Sutherland:

"Can anyone who will suffer injurious consequences from the lawful use of money about to be unlawfully loaned maintain a suit to enjoin the loan? An affirmative answer would produce novel and startling results. ... If such a suit can be maintained, similar suits by innumerable persons are likewise admissible to determine whether money is being loaned without lawful authority for uses which, although hurtful to the complainants, are perfectly lawful. The supposition opens a vista of litigation hitherto unrevealed." \(^{38}\)

The same view has been uniformly expressed by the lower courts, as exemplified by the declaration of Parker, J., in the Circuit Court of Appeals for the Fourth Circuit:

"But we know of no principle upon which action which violates no right may be enjoined because in aid of another action which violates no right. ... It is well settled that an act which is unauthorized, but which infringes no right of another, may not be enjoined merely because it will enable a third person to enter into competition with that other." \(^{39}\)

Even if the power companies in such a situation are injured, it is thus apparent that they have no standing in court to challenge or enjoin the allegedly unconstitutional loans and grants. Nor can their rights be placed upon some intangible public interest, based upon the expenditure of federal funds pursuant to an invalid statute or in violation of a valid statute, for such a public grievance can not be vindicated by a citizen. \(^{40}\) Nor is the interest of a taxpayer \(^{41}\) in the funds


in the federal treasury sufficient to enable him to enjoin the expenditure thereof.

If one injured by this lawful competition is thus incapacitated to question the validity of the federal aid to local public works of this nature, as is one who has merely the interest of a citizen or taxpayer, it is to be seriously questioned whether anyone will be able to raise the constitutional issue as to the P.W.A. Since the holder of a non-exclusive franchise suffering from lawful competition is barred by the principle above stated, it might be suggested that a power company with an exclusive franchise could raise the issue. However, such an action is not likely because: (1) the Administrator would not make a loan or grant to a municipality where a power company has an exclusive franchise, since it is clear that approval of an application would not be made where the municipality could not act lawfully under state law, or where revenue would be uncertain; (2) before application were made by a municipality, the state, to facilitate the financial assistance, might change the charter of the power company, substituting a non-exclusive franchise, under its reserved power to alter, amend or repeal; or (3) an exclusive franchise may be interpreted as granting the exclusive right as against private corporations only,\(^42\) with the result that the municipality could nevertheless lawfully compete—the latter two situations then being within the doctrine of the *Alabama Power case*.

There seems to be some merit in the contention of the power companies in the *Duke Power* case, which once before had been considered by the Supreme Court,\(^43\) that the remanding for a new trial on amended pleadings was tantamount to a holding that they had standing in court to present the merits for a judicial determination. Reliance is placed upon the principle that an appellate court should make a final disposition of a suit in equity, notwithstanding any error the record discloses (there had been a failure to follow the standards of proper procedure), if it appears that the plaintiff has no right to sue or that the suit is without merit.\(^44\) Nevertheless, the Supreme Court expressly refused to pass on the merits of the case. Further, the power company would not be entitled to the injunctive relief sought unless a legal


\(^{42}\) Knoxville Water Co. v. City of Knoxville, 200 U. S. 22, 26 S. Ct. 224 (1906).


injury were sustained; it has already been pointed out that the injury is traceable only to lawful competition, with the consequence that there was merely _damnum absque injuria._

However, there is merit in a corollary of the contention above stated. No matter how serious may have been the procedural errors, there is little doubt that the issue of the right to sue was before the Supreme Court on the first appeal of the _Duke Power_ case. The issue had been presented in the briefs and had been argued; it would only seem just to the parties to have decided and settled the issue on that ground. It, too, was procedural and not substantive; a determination of the case could have been made without in fact passing on the merits. It seems to be an unnecessary waste of time, effort and money, to retry the cause so as to bring the same issues to light in the proper fashion, when a determination on the other procedural ground would have brought an end to the litigation. There would then have been an authority for the pending _Alabama Power_ case and others for dismissal of similar bills for injunctions.

But even if the utilities with non-exclusive franchises _had_ the right to sue, or if some one _could_ prove a sufficient interest through a direct injury, the violation of a legal interest, it is now submitted that the P.W.A. would be held to be within the bounds of the Federal Constitution.

3.

The primary issue in considering the constitutionality of the P.W.A. is whether the appropriations thereunder can be justified as spending for the general welfare. While the preamble of the United States Constitution may sometimes be resorted to for a determination of the meaning of ambiguous stipulations in the Constitution itself, the fact that the preamble does state that one of the purposes of the Constitution is to “promote the general welfare” provides no source of substantive power. Still, much of the recent legislation, for its validity, must find its justification in the general welfare clause of the Constitution itself. Since, before the A.A.A. and the P.W.A., federal appropriations have generally been non-competitive in nature, the question as to the extent of the power, if any, by virtue of the “general welfare” clause has seldom been raised. Without again reviewing the conflict between the views of Madison, Hamilton and

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47 U. S. Const., Art. I, sec. 8, cl. 1: “The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States. . . .”
Story, suffice it to say that Hamilton's view has been generally followed: that the clause does give a power, i.e., separate and distinct, and is not limited by the expressly enumerated powers. In fact, many agencies created and appropriations made in the past by Congress can now be sustained only if the broader view is taken. Fear has been expressed, however, that for the Supreme Court to accept the view that the "general welfare" clause should be construed as a comprehensive grant of power to legislate or appropriate for the general welfare would result in unlimited powers for the Federal Government.

The federal spending power never has, in fact, been successfully attacked during the one hundred and fifty years of life of the Constitution. Still, throughout those years it has remained practically undefined, no doubt mainly because no one has been able successfully to raise the issue. Under the doctrine of Massachusetts v. Mellon, the power to appropriate appears to be unlimited. It was not until

48 Hamilton: "The only qualification of the generality of the phrase in question, which seems to be admissible, is this: That the object to which an appropriation of money is to be made be general, and not local. . . . A power to appropriate money with this latitude, which is granted, too, in express terms, would not carry a power to any other thing not authorized in the Constitution, either expressly or by fair implication." 3 Works of Alexander Hamilton, Lodge ed., 372 (1885).

Madison contended that the general welfare clause added no substantive power. Federalist, No. XLI, "General Views of the Power Proposed to be Vested in the Union" (1788).

Story, Commentaries on the Constitution, §§ 904-905 (1833), 4th ed., §§ 907-908 (1873), would follow Hamilton's theory but insists that the objects be limited to those of a national character.


The limited construction still finds approval in present day judicial expression. "It is not a substantive general power to provide for the welfare of the United States, but is a limitation on the grant of power to raise money by taxes, imposts and duties. If it were otherwise, all the rest of the Constitution consisting of carefully enumerated and cautiously guarded grants of specific powers, would have been useless, if not delusive." McReynolds, dissenting in Steward Machine Co. v. Davis, 301 U. S. 548 at 605, 57 S. Ct. 883 (1937).


52 262 U. S. 447, 43 S. Ct. 597 (1923).
United States v. Butler,\textsuperscript{53} that a limitation was definitely advanced. There, in the majority opinion by Justice Roberts, it was said:

"The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. . . . [after committing the Court to the interpretation put on the clause by Hamilton and Story] It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution [with the limitation that the purpose must be general and not local]."\textsuperscript{53,54}

However, it is clear, as intimated in the Butler case, that legislating and appropriating for the general welfare is a political question. Hence the choice of the means whereby this spending power may be exercised necessarily rests upon Congress; then, too, there is the presumption in favor of the constitutionality of its conclusion as expressed in particular legislation.\textsuperscript{55} One application of these principles would raise the question whether loans and grants to a political subdivision of a state, for the purpose of constructing a purely local public utility which of itself could serve no federal or national purpose, can be justified under such an interpretation of general welfare. Enough has already been said that the purpose of the P.W.A. was to increase employment at the time of a national crisis, and there is evidence that the administration of the public works program has in fact contributed to the relief of unemployment. Cannot the national purpose be found in the widespread condition of unemployment? Some doubt may be expressed then as to the propriety of the assertion made by Justice Roberts in the Butler case:

"It does not help to declare that local conditions throughout the nation have created a situation of national concern; for this is but to say that whenever there is a widespread similarity of local conditions, Congress may ignore constitutional limitations upon its own power and usurp those reserved to the states."\textsuperscript{56}

But there is no usurpation of the reserved powers, which, it must be remembered are not inflexible, if the Federal Government has the power to legislate and appropriate for the general welfare.

While there may have been some question at the time of the

\textsuperscript{53} 297 U. S. 1, 56 S. Ct. 312 (1935), noted in 34 Mich. L. Rev. 366 (1936), 49 Harv. L. Rev. 828 (1936), 20 Minn. L. Rev. 413, 433 (1936).

\textsuperscript{54} 297 U. S. at 64, 66.

\textsuperscript{55} McCray v. United States, 195 U. S. 27, 24 S. Ct. 769 (1904).

\textsuperscript{56} 297 U. S. at 74-75.
decision in the Butler case and at the time when the statute herein discussed was passed, little doubt now remains as to the power of Congress under the "general welfare" clause.

That spending for the relief of a national economic crisis in relief of unemployment is for the general welfare cannot now be questioned under the decisions of the Supreme Court in the closing days of the 1936 term, i.e., Steward Machine Co. v. Davis and Helvering v. Davis. The question was thus tersely settled by Justice Cardozo in the Helvering case:

"Congress may spend money in the aid of the 'general welfare.' . . . The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event." 

It was in the Steward case that the Court upheld the Social Security tax and credit as a means of alleviating the financial burdens assumed by the Federal Government during periods of depression. In sustaining unemployment and old-age benefits in the Social Security Act the Court, again through Justice Cardozo, spoke approvingly of expenditures for public works and unemployment relief:

"It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare. . . . The nation responded to the call of the distressed. Between January 1, 1933 and July 1, 1936 . . . the obligations for emergency relief incurred by the national government were $2,929,125 . . . the national government expended for public works and unemployment relief for the three fiscal years . . . the stupendous total of $8,681,000,000. The parens patriae has many reasons—fiscal and economic as well as social and moral—for planning to mitigate disasters that bring these burdens in their train."

The power to loan seems to be as broad as the power to grant. Under all the circumstances it is apparent that the Federal Government, under its now-settled power to spend in the aid of the general welfare, could make appropriations, including loans and grants to political subdivisions, for the construction of useful public works as a

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68 301 U. S. 619, 57 S. Ct. 904 (1937).
69 301 U. S. at 640.
70 301 U. S. at 586-587.
national program for the relief of unemployment. While the argument may have merit that the construction of competing municipal power plants should not have been included in this comprehensive program of the P.W.A., it is certainly true that that is a legislative or political question to be directed to Congress and not to the courts. As already pointed out, the states involved in the Alabama Power and Duke Power cases have established a local policy by authorizing the respective political subdivisions to engage in the construction of electric power plants and in fact to take advantage of the federal benefactions.

4.

Whatever may be the extent of the powers of the Federal Government under the "general welfare" clause, it is certain that legislation in pursuance thereof cannot be upheld if in fact it is but a subterfuge to exercise a power that it does not have by express or implied grant, i.e., if the attempted legislation infringes the reserved powers of the states. Query whether we may not, after the Helvering and Steward Machine Company cases, suggest that the Federal Government might be considered as in fact having an express power to spend for the general welfare where the purpose is clearly national in scope?

It is not necessary to go that far, however, in upholding the P.W.A. as against an alleged violation of the Tenth Amendment on the ground that it invades the powers reserved to the states.

An examination of Title II of the N.I.R.A. will reveal little that actually can be interpreted as an invasion of the reserved powers, there being neither coercion nor a restriction on the powers of states. While in the Butler case there was found coercion upon the farmers such as to amount to an invasion of the reserved powers with the result that the A.A.A. was held unconstitutional, the unemployment tax and credit under the Social Security Act was held in the Steward Machine Company case not to coerce the states nor to be an interference with the rights reserved to the states.

The loans and grants here under consideration are even less vulnerable to attack under the Tenth Amendment than was the tax and credit under the Social Security Act. The states are not coerced to apply for financial assistance for public works. Even the element of competitive self-interest is here lacking. On the other hand, to benefit by the Act a municipality must voluntarily assume a financial obligation. No involuntary burden is imposed by the P.W.A. If loans

61 Butler v. United States, 297 U. S. 1 at 68, 56 S. Ct. 312 (1935).
62 United States Constitution, Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
and grants are made, the application must come from the states or their political subdivisions—the only inducement is the availability of the federal funds intended to encourage the construction of public works. Certainly in view of the local choice exercised as to the nature of the projects to be undertaken in a particular community, it cannot be said that any municipality was induced to build a power plant rather than a public library or school.

The situation here is in no respect different from that in Massachusetts v. Mellon, where the Court upheld federal subsidies for the promotion of the welfare and hygiene of maternity and infancy, to be apportioned among the various states that would accept and comply with the provisions of the enabling statute. There, Justice Sutherland pointed out that the state could accept or—not as it chose without surrendering any of its reserved powers.

Since under the P.W.A. the Federal Government is interested in the subsequent operation of the municipal power plants only as a holder of revenue bonds (though as such it is entitled to insist upon rates adequate to liquidate the debt, yet low enough to attract customers), there can be no invasion of the powers of the state relative thereto. The municipal plant would be subject to the state utilities commissions, the state retaining all the control it formerly exercised over the municipality.

5.

Aside from the contention that the undertaking of the manufacturing and selling of electric power by municipalities is a proprietary rather than governmental function, a discussion of which leads only to confusion without solution, the final basic objection that can be directed against the P.W.A. is that it is unconstitutional as an improper delegation of legislative power. There appears to be no such improper delegation. The statute authorized the President or the Administrator to approve the various projects for which loans and grants are made; even if that were subject to question, subsequent Congressional enactments heretofore discussed have confirmed and approved the executive and administrative action taken in pursuance thereof. A question of delegation of powers is rendered moot by such a subsequent ratifica-


64 Cf. Ashwander v. TVA, 297 U. S. 288, 56 S. Ct. 466 (1936). See generally, Seasongood, "Municipal Corporations: Objections to the Governmental or Proprietary Test," 22 Va. L. Rev. 910 at 917, 941-944 (1934), where the writer points out (p. 917): "The facts stated in the recent TVA decision show how difficult it is to segregate use of powers: the high prerogative public right to provide for the national defense shades off into the private, state or local business of selling electric light and power."
tion. Further, the fact that the choice of the projects rests in the applicant municipality or state is certain evidence that there is no objectionable delegation of legislative power to the Administrator.

Since the decision of Cincinnati Soap Co. v. United States, the constitutionality of lump sum appropriations, such as in Title II of the N.I.R.A., is beyond dispute even though in that case the uses to which the money was to be put were not specified. But Title II sets out a definite policy in section 203 (a); it imposes specific limitations on the expenditures in section 220 and on the proportionate amount of the grants in section 203 (a). The making of a loan or grant being administrative in character, the requirement that standards must be set up for a proper delegation of administrative power likewise is fulfilled. Justice Parker in the district court decision in Duke Power Co. v. Greenwood County, quoted with approval the following language upholding the standard provided:

"Sections 203 and 206 . . . lay down standards as to what projects may be financed or aided by loans or grants. They must be public works projects; they must be projects included in the program; they must come within the limitations specified in Section 206 [labor standards]; a loan or grant must be made with a view to increasing employment quickly, and a loan must be reasonably secured."

The objectionable features of delegation of powers so apparent in Schechter Poultry Corp. v. United States and Panama Refining Co. v. Ryan are thus not present in Title II of the N.I.R.A., for the Administrator or the executive, in so far as non-federal projects are involved, is not thereby authorized to take any initial steps but can act only in designating loans and grants to projects for which proper application has been made by the local subdivision.

Whatever delegation of power there might be, it relates only to prospective applications, with the approval of which Congress would be unreasonably burdened. Furthermore, delegation of even greater

67 (C. C. A. 4th, 1936) 81 F. (2d) 986 at 995.
authority to other administrative and executive officers has in the past been upheld.\textsuperscript{71}

Although the constitutionality of Title II of the N.I.R.A. was expressly upheld by the Circuit Court of Appeals for the Fourth Circuit, in \textit{Duke Power Co. v. Greenwood County},\textsuperscript{72} under the general welfare clause, the Tenth Amendment and the doctrine of delegation of powers, that still is not conclusive, as the Supreme Court has not rendered any decision the merits in view of the disposition made of the \textit{Alabama Power} and \textit{Duke Power} cases. However, it is submitted that should the issues be properly raised, and that is unlikely as already pointed out, the Supreme Court would not hesitate to hold that the Public Works Administration constitutes valid legislation, in so far as it authorizes loans and grants to competitive municipal electric power projects.

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\textsuperscript{72} (C. C. A. 4th, 1937) 91 F. (2d) 665.