LEGISLATION

LEGISLATIVE STABILIZATION OF THE COTTON INDUSTRY—The cotton industry is demoralized. The disappearance of the economic stability that made cotton "king" may be ascribed to a surplus in the production of raw cotton. The carry-over in world stocks of American cotton on August 1, 1931, amounted to 8,800,000 bales, an increase of 2,600,000 bales over the previous year. That immediate relief is not to be expected is evident from the forecast, made on the first day of November of this year, that the 1931 cotton crop of the United States will total 16,903,000 bales. This production has been exceeded only by the 17,977,000 bale crop of 1926, when the price of cotton fell thirty dollars a bale. Adding the carry-over to the anticipated crop for 1931 sets the supply of cotton for the 1931-32 season at approximately 25,703,000 bales. So much for the supply, the significance of which is shown by the demand. The consumption of cotton during the past year was 10,900,000 bales, while the greatest consumption recorded was 15,800,000 bales in the 1926-27 season. The result is inevitable. Cotton prices in early October of this year were the lowest since 1898, and the decline has amounted to forty-two per cent. in the past year and seventy per cent. in the past two years.[1] The story of the unbalanced supply and demand is not completed there, since cotton farming is more than an industry; it is a mode of living, and the social as well as the economic stability must be regained. It has been estimated that 2,000,000 farm families and approximately 20,000,000 persons in all are directly or indirectly dependent upon the fortunes of this industry.[2] The condition to which they have been reduced was indicated, during the recent investigation by the Senate Committee on Agriculture into the activities of the Federal Farm Board, when it was shown that the average cotton grower in the South made about three hundred dollars a year.[3]

The remedy is thought to lie in an artificial balancing of supply and demand. Innumerable plans of all kinds have been suggested to the Federal Farm Board, and it is a sufficient commentary thereon to note that at the present time none has been successfully followed.[4] Coincident with the cotton problem is the thought, the pertinence of which has been enhanced by economic depression, that industrial regulation or control is a necessity in the economic community of the present era.[5] The cotton situation is suggestive evidence of its validity. Regula-

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[1] Federal Farm Board, Bulletin No. 4, *Outlook for American Cotton* (December, 1930) 1, 3, 4; L. C. Gray, *The Responsibility of Overproduction for Agricultural Depression* (1931) 14 ACADEMY OF POL. SOC. PROC. No. 3, 376; League of Nations, International Economic Conference (May, 1927) Memorandum on Cotton, 23; Pamphlet, United States Department of Agriculture (1931) *The Agricultural Outlook for the Southern States 1931-32*, 1, 6.

[2] Literary Digest, August 22, 1931, at 34.

[3] Federal Farm Board Bulletin No. 4, *supra* note 1 at 5, "It is entirely possible that relatively low cotton prices may prevail for two years in succession . . . In many sections of the South when two years of crop failure have come in succession, banks have failed and farmers and laborers have moved into other areas. What would happen if both 1930 and 1931 should be years of low cotton prices? It would bring economic ruin, not only to a large number of southern farmers but to the business interests of the South as well. . . . The agriculture marketing act provides for the development of some form of insurance. No insurance agencies, however were willing to take the risk." Time, Dec. 7, 1931, at 13.

[4] Literary Digest, Sept. 19, 1931, at 8; N. Y. Times, Aug. 13, 1931 at 1 (federal farm board asks every third row of cotton be plowed under) with which *cf.* N. Y. Times, Aug. 14, 1931 at 16 (Editorial saying federal farm board has fallen into a panic).

[5] E. M. Patterson, *Economic Adjustment in a Machine Age* (1931) 70 AMERICAN PHILOSOPHICAL SOCIETY PROC., No. 3, 263.

tion may be either voluntary, where it is adopted by the industry and the control rests in a central organization, or compulsory, where it is imposed by and directed through the medium of governmental machinery. Because of the international scope of the trade in raw cotton, the type of control most likely to succeed would seem to be that based upon a voluntary international economic agreement.[6] In the more limited sphere of the United States cotton industry, voluntary regulation has been considered a practical impossibility, principally because of the diversity of ownership of farm lands and the antagonism of the individual farmer to vesting another person, or a group of persons, with control over his farming activities.[7] Cotton legislation has resulted. The international aspect of the business that sponsors regulation also condemns state legislation as inadequate to solve the world cotton problem, because its efficacy is directly coterminous with the boundaries of the state. However, in addition to aiding in the generally desired reduction of production of cotton, the validity of state regulation, in connection with the present consideration, is a means whereby the diverse units in each state will be co-ordinated and the industry's unwieldiness reduced somewhat so that plans for organizing the industry on a basis as extensive as its nature requires may more readily be consummated.

But voluntary regulation and regulation as a policy of government, whereby it is made compulsory, are widely different. Whereas the former has gained in favor and lies at the basis of much of the recent agitation against the anti-trust laws,[8] the latter has always been seriously questioned. The *laissez-faire* that was Adam Smith and the nineteenth century has been considered "bred in our bones" and its exponents may find in the artificial control of supply and demand, resident in current cotton regulation, an undesired paternalism. It is no far cry from the attitude of Mr. Justice Brewer, who, dissenting in *Budd v. New York,* said:

> "The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and the duty of government." [9]

However, the exigency of the situation and frustration in other attempts to aid the farmer, by lessening production or by a mitigation of the harsh conditions attendant upon the surplus, were the elements which resulted in the drafting of the first legislation, which was passed by Louisiana, to artificially control cotton production so that the gap between production and demand might be lessened. Inartistically drawn, it seems as though the draftsmen were conscious of the existing state of affairs to the exclusion of the requirements of legislation as a valid exercise of the police power.[10] An interesting provision in this statute is that it is conditioned on the passage of "legislation similar hereto" on or before January 15, 1932, "by a sufficient number of states producing a total quantity of not less than seventy-five (75) *per centum* of the cotton grown in the United

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[6] TOYNBEE, SURVEY OF INTERNATIONAL AFFAIRS (1931) 443.

[7] Literary Digest, *supra* note 2 (citing newspapers from cotton states).

[8] 157 ANNALS, AMER. ACAD. OF POLIT. AND SOC. SCI. (1930).

[9] 143 U. S. 517, 551, 12 Sup. Ct. 468, 472 (1892) (Mr. Justice Field and Mr. Justice Brown concurred). *Cf.* Gas Products Co. v. Rankin, 63 Mont. 372, 394, 207 Pac. 993, 999 (1922) (the court used language almost identical to that cited); see JOAD, MODERN POLITICAL THEORY (1924).

[10] The conservation point is omitted from the Louisiana statute. For a practical criticism of the Louisiana statute see Outlook, Sept. 4, 1931, at 37. In Literary Digest, *supra* note 4, the following arguments against the Louisiana statutes are listed; that it would allow other countries to seize world markets for cotton which America now supplied, that it would destroy a rich market for cotton seed, that cotton farmers are not prepared to switch overnight to raising other type crops, and that the cotton-growing holiday adds myriads to the ranks of the unemployed.

States during the year 1930." [11] The Texas legislature, upon application of the executive department of Louisiana, refused to pass a statute in the form enacted by the Louisiana legislature,[12] although subsequently passing an act similar in purpose while materially differing in the provisions for effectuating that purpose.[13] It is therefore somewhat of an open question whether this latter type of legislation will be considered so like the Louisiana act as to meet the condition and make the Louisiana statute operative. The legislatures of Arkansas and Mississippi in passing acts akin to the Texas statute, but unlike Texas in this respect, condition the operation upon similar legislation being enacted by states producing seventy-five per cent. of the cotton grown in the United States in 1930.[14] Considerable ingenuity is exhibited in the incorporation of such provisions in the statute, whereby a result similar to that which would be attendant upon contemplated interstate compacts, if possible in this type situation, is achieved.[15] If the statute

[11] Louisiana Act (House Bill No. 1, approved Aug. 29, 1931): prohibits the planting of cotton seed in 1932 and if any is planted, then the gathering and ginning thereof is prohibited. Purpose: to exterminate boll weevils and eradicate root rot. Enforcement clause: anyone doing any of prohibited acts is guilty of a misdemeanor to be fined not less than $100 nor more than $500, or imprisoned not less than 10 nor more than 60 days for each offense. Conditional clause: act not effective unless states growing 75% of the 1930 crop enact similar legislation by January 15, 1932. South Carolina Act (House Bill No. 1085, § 93, approved Sept. 23, 1931): same as Louisiana Act with the addition to the reason therefor that it is "to conserve the fertility of the soil." Mississippi Act (Senate Bill No. 2, approved Oct. 13, 1931) The legislature declares it ". . . to be unlawful to plant or cultivate or harvest during the year 1932 . . . any crop of cotton, or other soil exhausting plants, except feed crops for man and domestic animals, or either, in excess of thirty per cent (30%) of the area of . . . separately owned tract of land which was in cultivation in planted crops during the crop year 1931". There is a similar provision for 1933. For 1934 and thereafter the thirty per cent. limit is omitted and the legislature provides "it shall be lawful . . . to plant, or cultivate, or harvest cotton . . . on any land . . . upon which . . . cotton or other soil exhausting plants . . . were planted . . . during the . . . (preceding year) . . . excepting feed crops . . . unless there was grown during the winter . . . a leguminous cover crop." Purpose: "to prevent waste and erosion of the soil; to prevent spread of root rot and other diseases of plants and soil; to destroy insects and prevent insect damage to plants; to preserve the interest of the public, the general welfare, peace, and happiness of the people of the state." Reason given therefore: "deterioration in the quality and reduction in the quantity per acre of the cotton and other plants raised and has resulted in . . . farmers (failing) . . . to meet obligations due on their homes, and/or to discharge the taxes . . . whereby the general welfare of the people is injuriously affected, and the efficiency of the State government greatly impaired." Enforcement provision: provides for (1) injunction, (2) fines (this provision is applicable if no more than 50% of 1930 acreage is planted). Conditional clause: similar to Louisiana clause, *supra*, limiting date being Jan. 20, 1932. Arkansas Act No. 1 (Approved Oct. 14, 1931): follows the Mississippi Act. The Texas Statute (House Bill No. 7); same as Mississippi Act, with the conditional clause omitted. The following two states are contemplating statuates at the present time: Oklahoma (State Question 170, Initiative Petition 115) presenting the Mississippi type statute to the people by initiative petition; Tennessee: proposal for legislation submitted to the Governor with view to inducing him to include such within a call for an extra session of the legislature.

For meaning of word "crops" see Moore v. Hope Natural Gas Co., 76 W. Va. 649, 655, 86 S. E. 564, 567 (1915) (defining the word "crops" to mean that which is not spontaneous but requires an outlay of labor and cost at one time, the recompense arising in shape of crops at a later time).

[12] The Texas Legislature censured Governor Long because of his manner in trying to get them to enact the Louisiana type statute since it seemed to them an unwarranted public display attempting to coerce them into acting. Time, Sept. 28, 1931, at 18.

[13] *Supra* note 11.

[14] *Supra* note 11. The problem here, again, is whether the Louisiana type statute will constitute "similar legislation" under these acts.

[15] The problem of co-ordinating action by the various states to curtail the spread of plant disease and pests between states apparently has not been considered within the operation of interstate compacts. Donovan, *State Compacts as a Method of Settling Problems Common to Several States* (1931) 80 U. OF PA. L. REV. 5 (the approach to the problem is from the angle of interstate disputes); Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments* (1925) 34 YALE L. J. 685, 699.

is within the scope of the police power, Texas in omitting the conditional clause creates what may be an awkward situation and may work a hardship upon the Texas cotton farmers, if sufficient states do not follow suit in order to meet the condition in other state statutes, unless some other method for the circumvention of its provisions is discovered.[16]

There are three distinct grounds in the statutes on which efforts to sustain them may be based: (1) the ground that the legislatures seek to prevent the spread of infection by plant diseases and to exterminate pests; (2) the general ground that it is an emergency measure in the interests of the general public interest, and (3) the conservation ground where the preservation of the soil and the fertility thereof is the purpose. The statutes in question are, with the exception of the Louisiana statute, of an "omnibus" nature, in that each one has all three bases contained within its provisions. In the framing of the Louisiana act, however, the conservation provision was omitted.[17]

Before undertaking to discover the purpose of the acts from their language and to test their constitutionality, consideration will here be given to their provisions relative to the elimination of plant diseases and insects, since a survey of the authorities in this field shows that the manner in which these provisions are intended to be carried out is unconstitutional. The provisions against infection are so framed as to prevent the raising of crops, totally or in part, and are not designed to provide, solely, for the destruction of crops which have been specifically determined to be infected with the particular disease against which the precaution is aimed. In this lies the distinction between the statutes hitherto upheld in decided cases and the method embodied in the cotton statutes. The general proposition of law is well established that regulation enacted to prevent infection of crops is within the police power, with this corollary, however, that the method for achieving the elimination of infection must be "reasonable" or otherwise be held invalid.[18] An attempt to prevent by law the planting of crops, in anticipation of infection, would seem to be unreasonable, and hence unconstitutional, since the precedents on this point go no further than to allow destruction of the plant after it has become infected. Similarly, it would seem that the pro-

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[16] It is impossible to anticipate all the problems that might arise under such a statute, if held valid. To illustrate: the statutes of Texas, Arkansas, and Mississippi make it unlawful to plant, cultivate or harvest on a separately owned tract of land during the year 1932, any crop of cotton in excess of thirty per cent. of the area of such separately owned tract, which was in cultivation in planted crops during the year 1931. What would be the effect of this provision on new ground which has never been cultivated or upon ground which had been allowed to lie fallow in 1931? There is the possibility of three different results depending upon the construction given. A strict construction would make it unlawful for a person to plant his new land in cotton in 1932, in defining "separately owned tract", or to plant cotton upon that which was not in cultivation in planted crops in 1931. A liberal construction would be that the legislature did not intend the provisions to apply to new ground or that not in cultivation during 1931, and that they may be planted entirely in cotton in 1932-3. The third and least likely view is that the limitation percentage applies to the new ground or that which had lain fallow with equal force. For an interpretation of the provisions of the Texas statute see the opinion rendered by the Attorney General of Texas to the Department of Agriculture of Texas on November 4, 1931.

[17] *Supra* note 11.

[18] Los Angeles Berry Growers' Co-op. Ass'n v. Huntley, 84 Washington 155, 146 Pac. 373 (1915) (destruction of potatoes affected with tuber moth); Carstairs v. de Scullin, 82 Wash. 643, 144 Pac. 934 (1913) (destruction of pear trees infected with fire blight); *cf.* State v. Main, 69 Conn. 123, 37 Atl. 801 (1897) (destruction of peach trees affected with "yellows"); Balch v. Glenn, 85 Kan. 735, 119 Pac. 67 (1911) (extermination of plants attacked by "San Jose scale"); see also the analogous situation where animals infected with disease are destroyed under the police power, Durand v. Dyson, 271 Ill. 382, 111 N. E. 143 (1915); New Orleans v. Charouleau, 121 La. 890, 46 So. 911 (1908).

vision for eradication of the boll-weevil and other plant pests in the same way is invalid by reason of the same distinction.[19]

There remains, then, consideration of the other two grounds on which the statutes may be supported if at all as a valid exercise of the police power. It is important, here, to determine whether the acts are primarily designed to artificially balance supply and demand, or to conserve the soil, or whether their purpose is to achieve a combination of both ends, since the courts will look through feigned expressions of purpose in order to reach the true purpose.[20] The provisions of the statutes, posited in terms of conservation, seem equally effective for carrying out an attempt to balance supply with demand as well as for furthering a conservation program. Thus, some of the statutes, by preamble and specific provision, set up that conservation of the soil, as the most valuable natural resource of the state, is essential to the welfare of the people and that rotations of crops or intervals during which "cotton and/or other soil exhausting plants" are not planted are essential thereto. But the method set up for carrying this purpose out provides that cotton or other soil-exhausting plants shall not be in excess of thirty per cent. of the land under cultivation in planted crops in 1931. If the measure were solely directed to conservation, it would seem, as other portions of the statute indicate, that a restriction of cotton to fifty per cent. of the land would adequately serve for the preservation of the soil.[21] Again, with the surplus in mind, the fact that the restriction to thirty per cent. of the cultivated crops is only to continue for two years seems more suggestive of curtailment of production for that period than of conservation, although the fact also goes to show that the conservation program may be sufficiently advanced by then to allow more extensive planting of cotton thereafter.[22] Further, this provision for conservation of the soil as the intended end is difficult to reconcile with the provision that no action shall be taken under the statute unless a sufficient number of states enact similar legislation, in that conservation of the soil would seem to be peculiarly of interest to the states individually. However, even if conservation is the true issue, this provision is of little merit in preventing spread of such plant diseases

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[19] The state may require destruction of noxious weeds under the police power, Chicago, etc. R. Co. v. Anderson, 242 U. S. 283, 37 Sup. Ct. 124 (1916); Missouri, etc. R. Co. v. May, 194 U. S. 267, 24 Sup. Ct. 638 (1904); Wedemeyer v. Crouch, 68 Wash. 14, 122 Pac. 366 (1912). But "cotton" would not seem to fall within the subject matter to which this rule pertains.

[20] Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1, 49 Sup. Ct. 1 (1928) (statute providing for the conservation of hulls and heads of fish was held to be the feigned and not the real issue); Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 Sup. Ct. 576 (1900).

[21] The statutes provide for a maximum cotton crop of thirty per cent. of its former possible total volume, which could have been the entire crop. Hence where the entire farm land of an individual was in cotton, he may now only plant three-tenths of it. But, since the statutes indicate rotation of crops will serve the recited purpose of conserving the soil then a limitation to fifty per cent. of the acreage would seem adequate since the crops could still be rotated. Therefore, the limitation to thirty per cent. seems unwarranted so far as the twenty per cent. difference is concerned. This thirty per cent. maximum limitation is more stringent than it seems at first because there had previously been about a ten per cent. reduction in acreage and the basis of computation is thirty per cent. of the planted crops in 1931 and not of the acreage, in which case a heavier crop on a more limited area might have been planted and raised.

[22] *Supra* note 11. In 1934 and thereafter Texas, Mississippi, and Arkansas statutes specifically provide that fifty per cent. of the acreage may be planted in cotton or, if the land is allowed to remain fallow in 1934, the entire acreage may be planted in cotton in 1935. The Mississippi statute further provides that if a leguminous cover crop is planted and grown during the winter then during the following year the full acreage may be devoted to cotton. The Louisiana and South Carolina statutes allow full acreage after the 1932 season.

and pests.[23] Rather, in the light of the surplus and of the fact that the yield of 198 pounds of cotton per acre forecast on November 1, 1931, is one of the largest on record, the provision seems more favorable to the curtailment of the cotton crop. Another interesting provision is the legislative declaration that "The growing of cotton in the state is an industry of first importance", which since it is followed by a limitation of this industry to three-tenths of its possible total production for two years, would seem at first glance an inconsistency in terms, but it is to be noted this provision also supports the contention that a present reduction will result in greater future benefits. The provision for conservation being predicated on the idea that cotton is a soil-exhausting plant seems, in light of the surplus and the greater yield per acre forecast for the coming season, more of an assumption than a fact. Recitals in the acts to the effect that farmers are unable to meet obligations, due on their homes and are unable to discharge the taxes due to the state and its political subdivisions, seem, in view of the surplus and the attendant fall in prices, to be disingenuously laid at the door of deterioration of the soil and the presence of harmful insects and plant diseases. The conclusion upon a basis of the foregoing analysis seems obvious: that while the terms of the statute may support conservation they will equally, if not more readily, support a belief that stabilization of prices is the true purpose, and that the form of the statute in light of this is merely a matter of dressing the real purpose in what appears its most acceptable legal garb, conservation.[24] When the facts attendant upon the surplus are given their proper weight and the cry for reduction of the crop that motivated various meetings which, antedating the passage of acts, sought their enactment, is noted [25] the inclination to believe that conservation is but a feigned purpose is difficult to avoid.

Adopting the position, first, that conservation is but a feigned purpose; whether the act would be held constitutional and not in conflict with the Fourteenth Amendment depends on whether the interest sought to be protected will be held sufficient to warrant such regulation. An analysis of the interests affected by the cotton statutes shows that the interest of the public in transacting business with the industry is not sought to be protected by the statutes because there is no problem here involved of regulating the industry so that the public may deal with it on fair terms.[26] However, a more indirect interest, founded on the general

[23] It would seem the weevil menace could as readily go from one state to another where the maximum limit was thirty per cent. as when a full crop was planted. Hence, the Louisiana type statute, eliminating the cotton crop entirely for 1932 would be the only type on which this argument could find any real basis. Texas does not have this provision.

[24] It is to be noted that the anticipated volume of the 1931-32 crop has only been exceeded in 1926; that the increase in the expected crop is present despite a reduction in acreage and quantity of fertilizer used; and that the anticipated yield of 198 pounds of cotton an acre is one of the largest on record and results from a material increase in yield per acre, see Federal Farm Board, Bulletin No. 4, *supra* note 1; Pamphlet, United States Department of Agriculture, *supra* note 1. Offset against this is the fact that boll weevil infestation is much more widespread than it was a year ago, see Pamphlet, United States Department of Agriculture, *supra* note 1 at 2. The presence of the weevil lends the conservation point some force but once the opposite conclusion is reached, that the curtailment of production is in order to stabilize prices, the conservation point strengthens rather than weakens this conclusion since conservation is just such a point that a legally able mind would grasp in an endeavor to achieve what is undoubtedly a meritorious result.

[25] N. Y. Times, Aug. 5, 1931, at 40 (representatives of governors of Oklahoma, Arkansas, Louisiana, Tennessee and New Mexico met and endorsed the bill then pending in Texas legislature providing for reduction of crop acreage); N. Y. Times, Aug. 22, 1931, at 15 (New Orleans Cotton Conference called on state legislatures to pass acts to prevent planting of cotton in 1932; Governor Long of Louisiana, chairman).

[26] The analysis employed here has been developed in order to facilitate discussion of the immediate problem since, in the fifty-five years from the deciding of Munn v. Illinois, 94 U. S. 113 (1876) no tests have been set up. The test sought to be read into the law by the various dissenting members of the courts were all in the nature of limitations upon the application of the police power to new situations, although recognizing a number of situations imbedded in legal history, see Mr. Justice Field dissenting in Munn v. Illinois, *supra*

deleterious effect to the public resulting from the continued conduct of the industry without regulation, *is* involved.[27] More definitely, it is the interest of the general public in their economic welfare which is threatened because of the present, non-regulated manner of conducting an industry on which the economic life of the cotton states largely depends. History supplies us with the rule that such an indirect interest of the public may be sufficient of itself, at least where the legislation is for the public safety,[28] as, for example, to prevent the spread of fires. However, where the indirect interest is purely economic, the outermost point to which the cases have reached usually discloses the presence of the more direct type of public interest also. The case of People v. La Fetra is illustrative of this. There the inadequacy of housing facilities in New York City after the World War became a matter of great concern. More than 100,000 dispossession proceedings were pending. The New York legislature, at an extraordinary session, made the tenants in possession a preferred class by enacting that all pro-

at 136; Mr. Justice Brewer dissenting in Brass v. North Dakota, 153 U. S. 391, 405, 14 Sup. Ct. 857, 862 (1894); Mr. Justice Lamar dissenting in German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 418, 34 Sup. Ct. 612, 621 (1914). The factual question for the court to decide in reviewing the statute under attack [see Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action* (1924) 38 HARV. L. REV. 6] is a composite of the questions whether there is need for regulation and, if so, is the interest which the statute protects sufficiently great to warrant interposition. To illustrate: In Munn v. Illinois, *supra,* the strategic position of the Chicago grain warehouses gave their operators absolute control of those who, having to store their grain, could only do so with the Chicago warehouses and the warehousemen subjected them to various abuses. Because of the exigency resident in the factual situation, the court established a precedent in holding the interest of the class in doing business with the warehousemen was sufficiently great to warrant protection from the abuses. In German Alliance Ins. Co. v. Lewis, *supra,* the interest protected was that of the general public in dealing directly with the fire insurance companies, which the state sought to regulate, and in obtaining fire insurance at reasonable rates. The exigency was not so great as in the Munn case and a more substantial interest was necessary before the individual right to contract could be regulated. This was present in the secondary interest the public had in the general safety, and the regulation was upheld. Thus, where in a like situation the secondary interest was not present, the regulation was held unconstitutional, American Surety Co. of N. Y. v. Shallenberger, 183 Fed. 636 (C. C. A. 8th, 1910) (statute regulating rates charged by surety companies held unconstitutional).

[27] The provisions in the statutes mainly of interest at this point are whether the one year period in which no cotton is to be raised, under the group of statutes, *supra* note 11, or the two-year period wherein a limited amount of cotton may be raised, made in the other group of statutes, *supra* note 11, can be qualified as emergency measures. Turning to the first consideration, the emergency which the legislatures found compelling is found to be based on the disastrous economic condition and that no steps taken so far have materially aided. To accentuate this, it is to be noted that the Texas legislature in passing the act suspended the Texas constitutional rule requiring bills to be read on three several days because of an "imperative public necessity", House Journal, Forty-second Legislature, Second Called Session (Sept. 21, 1931) 207. In People v. La Fetra, 230 N. Y. 429, 440, 130 N. E. 601, 604 (1921) the court said, "Whether or not a public emergency existed was a question of fact, debated and debatable, which addressed itself primarily to the Legislature. That it existed, promised not to be presently self-curative and called for action, appeared from public documents and from common knowledge and observation. If the lawmaking power on such evidence has determined the existence of the emergency and has, in the main, dealt with it in a manner permitted by the constitutional limitations on legislative power, so far as the same affect the class of landlords now challenging the statute, the legislation should be upheld"; GUTHRIE, THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1898) 44. The period of time during which the emergency measures are operative must be of a reasonable duration, and on this score the one and two-year provisions of the two types of statutes are apparently satisfactory. In Block v. Hirsh, 256 U. S. 134, 157, 41 Sup. Ct. 458, 460 (1921) Mr. Justice Holmes, speaking for the majority of the court, said "A limit in time, to tide over a passing trouble, may well justify a law that could not be upheld as a permanent change." The provisions for 1934 and thereafter in the Mississippi type statute, *supra* note 11, would seem to require qualification on a basis of conservation, if at all.

[28] The cases allow a taking in such a situation, Bowditch v. Boston, 101 U. S. 16 (1879); Philadelphia v. Scott, 81 Pa. 80 (1876); FREUND, POLICE POWER (1904) § 534.

ceedings to dispossess them be stayed for about two years, so long as a reasonable rent was paid. The statute was upheld as being a constitutional exercise of the police power.[29] But in this case, unlike the situation under the cotton statutes, there was an effort to protect a primary interest of the public in being able to rent housing facilities at reasonable rates from the landlords whom circumstances had placed in an economically strategic position which gave them control of a limited supply. In the cotton statutes the primary interest of the public in not being compelled to transact business at a disadvantage because of the strategic position of those running the industry does not enter at all, and regulation cannot, therefore, be predicated on that basis. If there is to be regulation to protect the public interest, it must rest upon the more indirect ground, *i. e.*, a general interest of a cotton farming community in the economic welfare of the farmers, dependent upon the effects resulting from the manner in which the industry is conducted. This would not seem to be sufficient in the light of most of the decided cases. That the farmers cannot meet the obligations due on their homes and that the efficiency of the state government is impaired because of their inability to pay taxes is of some importance as showing the exigency of affairs,[30] but the public interest involved is more remote and indirect than has ever been accepted as a ground for sustaining legislation. When one considers that in the Ball Rent Law Cases the Supreme Court upheld a federal statute similar to the New York law only by a bare majority of the judges, it is realized that the rule of the cases supporting regulation in such a situation is itself precariously situated.[31]

Assuming, in disregard of the argument made above, that the statutes can be honestly treated as conservation statutes in accordance with their professed purpose, the question then arises whether they can be upheld on that ground as regulatory measures. The legislatures declare that the need for conservation has arisen because the "most valuable resource of the state is its soil and the fertility thereof adapted to the raising of cotton and other useful plants" and "the preservation and restoration of the soil and the fertility of the soil is essential to the welfare of the people".[32] The legislatures allege that the provisions of the statutes limiting the cotton crop are adopted because the continuous use of land for the growing of cotton and "other soil-exhausting plants" without rotation of crops or without intervals during which such crops are not planted has caused deterioration and disastrous erosion of the soil, the spread of plant diseases, the propagation of harmful insects, and has made their control difficult, and caused a deterioration of the quality and quantity of the cotton and other plants raised. Even if this is the basis for the legislation, the interest to be protected is the same indirect public interest already discussed.[33] Assuming the allegations to be true, the validity of the measures for carrying out the conservation program rest on the general ground that all property is held under the tacit condition that it shall not be used to destroy or greatly impair the public rights or interest of the community. Where the protection of such an indirect public interest has been the sole purpose of a statute, the statutes which have been upheld on this ground have covered such situations as where timber was prevented from being cut on privately owned land in order to protect the water supply,[34] or where the

[29] *Supra* note 27; Block v. Hirsh, *supra* note 27; Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 Sup. Ct. 465 (1921); Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298 (1917) with which *cf.* Fort Smith & Western R. Co. v. Mills, 253 U. S. 206, 40 Sup. Ct. 526 (1920).

[30] See reason for legislation in Arkansas, Mississippi and Texas statutes, *supra* note 11.

[31] Mr. Justice McKenna dissented, with whom concurred Mr. Chief Justice White, Mr. Justice McReynolds, and Mr. Justice Van Devanter; Block v. Hirsh, *supra* note 27 at 158, 41 Sup. Ct. at 460; Marcus Brown Holding Co. v. Feldman, *supra* note 29 at 199, 41 Sup. Ct. at 466.

[32] Arkansas, Mississippi, and Texas.

[33] *Supra* note 26.

[34] Opinion of Justices, 103 Me. 506, 69 Atl. 627 (1907).

removal of stone, gravel or sand from the seashore would injure a large harbor.[35] But where the underlying minerals were considered as part of the realty a statute enacted for the purpose of preventing waste thereof by the owner to the economic detriment of the public at large has been held unconstitutional.[36] The theory of the court in deciding the latter case would seem compelling in such a situation as that presented by the cotton statutes, namely, that one owning a property absolutely,[37] cannot be deprived of the use thereof, even though wasteful of the natural resources contained in such property, and to require a user other than that desired by the owner, on the ground that such user would be for the general economic welfare, is not regulation but a taking without due process of law and therefore invalid.[38]

Assuming the conclusion that the true purpose of the statutes is stabilization of prices and not conservation, is it then within the police power of a state to limit the amount of the crop for this purpose? The earlier analysis would require a negative answer.[39] Legislative fiat will not suffice to make an insufficient public interest the basis for such regulation, since the interest must exist in fact.[40] It seems, then, that the extremity of position which places the statutes outside the rules founded on existing cases would also remove them beyond the pale of reasonable regulation. Consider the cotton industry, large and important in its relation to the southern states, but an industry nevertheless, which is composed of many separately owned units. To hold the police power correctly exercised

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[35] Commonwealth v. Tewksbury, 11 Metc. 55 (Mass. 1846); Hodges v. Perine, 24 Hun 516 (N. Y. 1881).

[36] Gas Products Co. v. Rankin, 63 Mont. 372, 207 Pac. 993 (1922); St. Germain, *etc.*, Co. v. Hawthorne Ditch Co., 32 S. D. 260, 143 N. W. 124 (1913); Huber v. Merkel, 117 Wis. 355, 94 S. W. 354 (1903); see Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229, 252, 31 Sup. Ct. 564, 571 (1911). But see Commonwealth v. Trent, 117 Ky. 34, 43, 46, 77 S. W. 390, 392, 393 (1903).

[37] If there is not an absolute but a qualified property right, as where there are several potential owners of the one thing, interposition of statutory regulation is based on the prevention against the infringement of the rights of others. Because of the current interest in the problem of oil and the fact that it is illustrative of the type of property right aforementioned, the recent articles on the subject are set out. The oil problem seems to be a mixed one of the conservation of natural resources and of stabilization of prices, with the emphasis possibly on the former. The cases turn on the nature of the property right involved, it being held that the surface owner's interest is only a right correlative with that of other owners in the same pool and hence statutes regulating and preventing waste of these natural resources are constitutional, Bandini Petroleum Co. v. The Superior Court of California, U. S. Daily Nov. 24, 1931, at 2173; Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 Sup. Ct. 576 (1900); Fuchs, *Legal Technique and National Control of the Petroleum Industry* (1931) 16 ST. LOUIS L. REV. 189; Marshall and Meyers, *Legal Planning of Petroleum Production* (1931) 41 YALE L. J. 33; Merrill, *Stabilization of the Oil Industry and Due Process of Law* (1930) 3 So. CALIF. L. REV. 396; Note (1931) 31 COL. L. REV. 1170; Note (1930) 43 HARV. L. REV. 1137; Note (1930) 17 VA. L. REV. 173; (1931) 5 So. CALIF. L. REV. 66; Veasey, *Legislative Control of the Business of Producing Oil and Gas* (1927) 52 A. B. A. REP. 577.

[38] Freund, speaking of the constitutional justification of drainage districts said, "It is true that ordinarily an owner will not be forced to improve his land merely to increase the general prosperity of the country." FREUND, *supra* note 28, § 442. On this point, the thought expressed by Mr. Justice Holmes aids the analysis: "The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed", Block v. Hirsh, *supra* note 27 at 155, 41 Sup. Ct. at 460.

[39] *Supra* note 29.

[40] Thus in Pa. Coal Co. v. Mahon, 260 U. S. 393, 43 Sup. Ct. 158 (1922) the United States Supreme Court held a statute forbidding the mining of coal under private dwellings, streets, cities, *et cetera,* unconstitutional, reversing the Supreme Court of Pennsylvania in Mahon v. Pa. Coal Co., 274 Pa. 489, 118 Atl. 191 (1922), which held it a valid exercise of the police power. The United States Supreme Court view coincides with the view of the court in Keator v. Clearview Coal Co., 256 Pa. 328, 100 Atl. 820 (1917) which the Pennsylvania Supreme Court, in the Mahon case, said had been overruled by the state legislature which had declared the public policy of the state.

would allow state regulation of an industry whenever the general public economic interest is deleteriously affected by the non-economic conduct of the units composing it so that a severe condition resulted, providing there was some convenient ground, as preservation of natural resources, in the phraseology of which the exercise of the police power for another purpose might be hidden. It is of no avail to list the industries which might thus be attacked, it being sufficient to note that none of our many industries with their separately owned units would seem safe from the interference of the state if the present manner of running them were not economically the soundest.[41] To hold the statutes valid, then, would seem to require a theory of governmental control of industry which would obviously seem to be odious to those who consider the Fourteenth Amendment the medium whereby *laissez faire* was written into the Constitution.[42] And as for those who recognize the merit of reasonable regulation, the present-day esteem in which the absolute property rights are held, and which the legislation seeks to regulate, would seem at the present time a bar to the validity of an extension of the scope of the police power to the control of cotton production.

C. R. H.

[41] In Gas Products Co. v. Rankin, *supra* note 33 at 393, 207 Pac. at 998, the court said, "Were we to sustain the act, there would be no limit to which the legislature might go in depriving persons of the use of private property under the guise of police power. . . . The owner of coal or minerals in the ground may thus by legislative control have his property rights so limited that he would be compelled to abandon mining although the owner of the fee in the land. The same rule would be applicable to . . . growing trees and agricultural crops grown upon the land. In short, all recognized principles of property rights would thus be destroyed." It is interesting to note that the initiated petition to be presented to the people of Oklahoma also provides for the regulation of the growing of wheat, *supra* note 11.

[42] FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT (1930) 44.