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## Unemployment Insurance—Federal and State

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## CURRENT LEGISLATION

UNEMPLOYMENT INSURANCE<sup>1</sup>—FEDERAL AND STATE.—During the halcyon days of American prosperity, a period when most European nations had definitely committed themselves to unemployment insurance,<sup>2</sup> we righteously derogated any reference to such a program as un-American. True a number of resolutions and bills did find their way into American legislatures, but they met the same fate as all proposals in advance of their time—relegated to the limbo of the committee room.<sup>3</sup> Even as late as 1928, the American Federation of Labor stigmatized the benefits derived from unemployment insurance as a dole and refused to have anything to do with it.<sup>4</sup>

It took the greatest cataclysm in American economic history to bring this country to a realization that there was nothing inherently

<sup>1</sup> It is of interest to observe that the term "unemployment insurance" is not very precise. Obviously, it does not seek to insure against the risk of unemployment. It seeks merely to pay compensation or benefits for a limited period to one who has become unemployed. The Federal Act and the laws of many states refer to this system as unemployment compensation. New York retains the old term. CONGRESSIONAL DIGEST, Feb., 1935, p. 34.

<sup>2</sup> According to the report on unemployment insurance of the International Labour Office, in 1925 the following nations had compulsory systems of unemployment insurance: Australia, Austria, Germany, Great Britain, Irish Free State, Italy, Poland, Russia (subsequently dropped it). Voluntary systems of unemployment insurance existed in Belgium, Czechoslovakia, Denmark, Finland, France, Netherlands, Norway, Spain, Switzerland. INTERNATIONAL LABOUR OFFICE, UNEMPLOYMENT INSURANCE, Series C, No. 10 (1925); Gilson, *Unemployment Insurance*, 15 ENCYCLOPAEDIA OF SOCIAL SCIENCES 162-165.

<sup>3</sup> In January, 1916, there was introduced in the Massachusetts House what is considered the first legislative unemployment insurance bill in the United States. In the same year Representative Meyer London introduced in the United States House of Representatives a resolution for the appointment of a commission to recommend a plan for unemployment insurance. Assemblyman Orr introduced the first unemployment insurance bill in the New York State legislature, but that met the same fate as the London Resolution. The first state in the United States to adopt an unemployment insurance compensation law was Wisconsin. It was passed in 1932 and is known as the Unemployment Reserves and Compensation Act. Chapter 20, Laws of Wisconsin, Special Session 1931; CONGRESSIONAL DIGEST, Feb., 1935, at 35; Brandeis and Raushenbush, *Wisconsin's Unemployment Reserves and Compensation Act (1932)* 7 WIS. L. REV. 136.

<sup>4</sup> "Even the A. F. of L. did not formally come around to unemployment insurance until the depression was upon us. When James H. Maurer, former President of Pennsylvania Federation of Labor and I [Norman Thomas] tried to make unemployment insurance an issue in the presidential campaign of 1928 we were usually told that we were trying to pauperize the people and establish the dole." NORMAN THOMAS, HUMAN EXPLOITATION (1934) 207.

foreign about unemployment compensation.<sup>5</sup> After endeavoring to deal with the problem of unemployment by means of alphabetical agencies—agencies which spelled out a system concededly worse than the dole, our legislators turned to an investigation of the applicability of unemployment insurance to American conditions.

It is our purpose to summarize and appraise the federal and state enactments on that subject.

### *The Federal Statute.*

The Social Security Act<sup>6</sup> has four distinct sections: unemployment compensation, old age pensions, aid for needy children, and health insurance. In this note we are concerned solely with those provisions of the act which pertain to unemployment insurance.

The statute provides, in the main, for state systems of insurance with federal aid. The states are left to enact their own laws, but they are prohibited from participating in federal aid unless those laws meet the requirements of the Federal Act.

In order to encourage and assist the states in the administration of their unemployment compensation laws, the Act authorizes the appropriation of \$4,000,000 for the fiscal year ending 1936, and the sum of \$49,000,000 for each succeeding fiscal year.<sup>7</sup> Each state's allotment is to be based on its needs as determined by the Social Security Board.<sup>8</sup> However, in order to qualify for this subsidy, the unemployment insurance law of the state must measure up to the standards stipulated by the Act.<sup>9</sup>

<sup>5</sup> The practice of insuring against unemployment owes its origin to the trade union movement. England was the first country to introduce successfully compulsory insurance against unemployment (NATIONAL INSURANCE LAW OF 1911). See SIR WILLIAM BEVERIDGE, *PAST AND PRESENT OF UNEMPLOYMENT INSURANCE* (1930); INTERNATIONAL LABOUR OFFICE, *UNEMPLOYMENT INSURANCE*, Series C, No. 10 (1925) at 5.

<sup>6</sup> Act of Aug. 14, 1935, c. 531, 49 STAT. —, 42 U. S. C. A. §301, etc.

<sup>7</sup> *Id.* §301, 42 U. S. C. A. §501. These sums are not to be used by the states for the payment of compensation, but merely for the expenses of administration. SEN. REP. No. 628, 74th Cong., 1st Sess. (1935) 34.

<sup>8</sup> Tit. III, §302, 42 U. S. C. A. §502. The Act provides for the establishment of a Social Security Board to be composed of three members appointed by the President with the consent of the Senate. Its chief duties are to investigate the problem of social security, to assist states in the administration of the unemployment insurance law, to certify payments to those states which have complied with the federal standards, and the supervision of the payment of annuities under the pension system. 42 U. S. C. A. §§901-904.

<sup>9</sup> In order to qualify for this subsidy and the credit provisions of the statute, the state laws must meet certain standards. The following are among the most important:

a. Payment of unemployment compensation is to be made solely through public employment offices in the state or such other agencies as the Security Board may approve.

b. No compensation is to be payable with respect to any day of unemployment occurring within two years after the first day of the first period with respect to which contributions are required.

c. Payment of all money received in the state fund is to be made imme-

On or after January 1, 1936 every employer<sup>10</sup> shall be assessed for each calendar year an excise tax on his payroll of 1% for 1936, 2% for 1937, and 3% for 1938 and subsequent years.<sup>11</sup> As a further incentive to the passage of unemployment insurance laws in the various states, employers in those states which have conformed to the federal requirements may credit against the federal tax the amount of their contributions to the state unemployment insurance fund. However, the total credit is not to exceed 90% of the tax against which it is credited.<sup>12</sup>

Provision is made for the establishment of an Unemployment Trust Fund in the United States Treasury. The Secretary of Treasury is directed to receive and hold in the fund all moneys deposited therein by a state agency from a state unemployment fund. It is the Secretary's duty to invest such portion of the fund as is not required to meet current needs. Such investments are limited to in-

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diately upon request to the Secretary of Treasury to be credited to the state in the Unemployment Trust Fund.

d. All money requisitioned by the state from the Fund must be expended solely for unemployment compensation.

e. No employee shall be disqualified from receiving compensation because he refuses to accept a position made vacant as the result of a labor dispute; or because the wages, hours, or conditions of work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; or because as a condition of employment he is required to join a company union or resign from or refrain from joining any *bona fide* labor organization. Tit. IX, §903, 42 U. S. C. A. §1103.

<sup>10</sup> In view of the novelty of the legislation, special attention must be paid to the definitions. The term "employer" is defined to mean only those persons who in each of at least twenty weeks in the year have a total number of eight or more employees. The definition is so worded that an employer is covered if one day a week for twenty weeks (need not be consecutive) there are eight or more employees in his employ (Tit. IX, §907a, 42 U. S. C. A. §1107a). "Employment" means any service performed within the United States by an employee ment" means any service performed within the United States by an employee for his employer except agricultural labor, domestic service, service of a naval nature, service performed by an individual in the employ of his son, daughter, or spouse, services performed by a child under twenty-one in the employ of his father or mother, services performed in employ of the United States, a state, or municipality, services performed in the employ of a corporation, community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes. (Tit. IX, §907c, 42 U. S. C. A. §1107c.) "Compensation" is the cash benefits payable to individuals. (Tit. IX, §907g, 42 U. S. C. A. §1107g.)

<sup>11</sup> *Id.* tit. IX, §901, 49 STAT. —, 42 U. S. C. A. §1101.

<sup>12</sup> *Id.* tit. IX, §902, 49 STAT. —, 42 U. S. C. A. §1102. This provision is explained as follows: If the excise tax is \$100, the total credit which may be claimed cannot be more than \$90, although the total amount of contributions may be greater than that. SEN. REP. No. 628, 74th Cong., 1st Sess. (1935) at 46. According to this provision employers in the states which have no job insurance laws will be compelled to pay 3% of their payrolls into the Treasury and this will be lost to them if the states fail to enact the necessary laws. The money collected will be put in the United States Treasury to be disposed of by Congress. The Act obviously aims at an equalization of interstate commerce to the extent that each state will tax the employer 3%.

terest bearing obligations of the United States, or obligations guaranteed as to both principal and interest by the United States.<sup>13</sup>

There are numerous other provisions dealing with the administration of the Act, refunds, penalties,<sup>14</sup> and allowance for additional credit.<sup>15</sup> According to the Act,<sup>16</sup> "no person required under a State law to make payments to an unemployment insurance fund shall be relieved on the ground that he is engaged in interstate commerce, or that the State law does not distinguish between employees engaged in interstate commerce and those engaged in intrastate commerce."

A number of states have already complied with the provisions of the federal statute.<sup>17</sup>

#### *The New York State Law.*

Although the New York State Unemployment Insurance Law<sup>18</sup> was passed before the federal statute, it anticipated in almost every detail the provisions of that Act.

In order to aid in the interpretation and application of the law, the New York legislators begin with a clear and concise declaration of the public policy of the state.<sup>19</sup> The section devoted to defini-

<sup>13</sup> Tit. IX, §904 a and b, 42 U. S. C. A. §1104 a and b. Although the Fund may be invested as a single fund, the Secretary of Treasury is required to maintain separate book accounts for the several states (§904 [e], 42 U. S. C. A. §1104 [e]). In England payment of unemployment benefits is made through the Labor Ministry, which controls a nation-wide system of employment exchanges. *N. Y. Times*, Aug. 15, 1935, 4:2, 3.

<sup>14</sup> Tit. IX, §905, 42 U. S. C. A. §1105.

<sup>15</sup> *Id.* Tit. IX, §§909-910, 42 U. S. C. A. §§1109-1110.

<sup>16</sup> *Id.* Tit. IX, §906, 42 U. S. C. A. §1106.

<sup>17</sup> States which have complied: General Laws of Alabama, Regular Session, 1935, Act. No. —S. 395, approved Sept. 14, 1935; CALIFORNIA UNEMPLOYMENT RESERVES LAW, Laws of 1935, c. 352, approved June 25, 1935; General Laws of Massachusetts, 1935, c. 479, approved Aug. 13, 1935; UNEMPLOYMENT RESERVES LAW, Utah, H. B. 86, approved March 25, 1935; Session Laws of the State of Washington, Regular Session, 1935, c. 145, approved March 21, 1935; Laws of Wisconsin, Special Session, 1931-32, c. 20, as amended by cc. 186 and 383 of Laws of 1933, and cc. 192, 272, 446, Laws of 1935; DISTRICT OF COLUMBIA UNEMPLOYMENT COMPENSATION ACT, Public—No. 319, 74th Cong., approved Aug. 28, 1935.

<sup>18</sup> N. Y. Laws of 1935, c. 468. The New York law is the outgrowth of an exhaustive examination of the effects of unemployment within the state made by the joint legislative committee on unemployment appointed pursuant to a resolution adopted April 9, 1931.

<sup>19</sup> *Id.* §500. "As a guide to the interpretation and application of this article, the public policy of this state is declared to be as follows: 'Economic insecurity due to unemployment is a serious menace to the health, welfare and morals of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. \* \* \* Taking into account the report of its own committee, together with facts tending to support it which are matters of common knowledge, the legislature therefore declares that in its considered judgment the public good and the well-being of the wage earners of this state require the enactment of this measure for the compulsory

tions is by necessity a lengthy one. "Employment" is stated to be any contract of hire, including contracts entered into by helpers of employees, whether paid by employer or employee, employed with actual or constructive knowledge of employer.<sup>20</sup> The types of employment not covered by the law are similar to those categories excluded by the federal statute.<sup>21</sup> The term "employee" includes all manual workers and non-manual workers who earn not more than \$50 a week or \$2,500 a year.<sup>22</sup> "Employers" are those who have employed at least four persons in any employment within each of thirteen or more calendar weeks in 1935 or subsequent years.<sup>23</sup> "Wages" include salaries, commissions, bonuses, board, housing, lodging or similar advantages, and gratuities.<sup>24</sup> "Benefit" is the money allowance payable to an employee. "Payroll" means all the wages received by employees.<sup>25</sup> "Total unemployment" is the total lack of employment and wages caused by the inability of an employee to obtain any employment in his usual line of work or in any other field for which he is reasonably fitted.<sup>26</sup>

On and after January 1, 1936 each employer subject to the law is to contribute regularly 3% of the payroll of the employees. However, the contributions payable in 1936 shall be 1% of the payroll and in 1937 such amount shall equal 2%. No contributions shall be made prior to March 1, 1936.<sup>27</sup> All contributions are to be deposited in the Unemployment Trust Fund of the United States

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setting aside of financial reserves for the benefit of persons unemployed through no fault of their own." The reason for this clear statement of policy can be found in *Panama Refining Co. v. Ryan, Amazon Petroleum Co. v. Ryan*, — U. S. —, 55 Sup. Ct. 240 (1935). This decision held that, in an act which delegates power to an administrative bureau, the legislative power must be clearly defined as well as the facts and circumstances necessitating such delegation of power; and that there must be an express finding, by the body to which the power is delegated, of the existence of such specific facts and circumstances for the validity of administrative or executive orders issued pursuant to the law.

<sup>20</sup> N. Y. Laws of 1935, c. 468, §502, subd. 1.

<sup>21</sup> See *supra* note 10.

<sup>22</sup> N. Y. Laws of 1935, c. 418, §502, subd. 2.

<sup>23</sup> *Id.* §502, subd. 3. This provision differs from the federal statute. Therefore, New York employers of four to seven employees inclusive are not liable for the federal excise tax. This section specifies the conditions under which an employer may be liable to the employees of a sub-contractor. An employer not subject to the law may become fully subject thereto upon the filing with the proper authority, his election to become subject to the law for not less than two years.

<sup>24</sup> *Id.* §502, subd. 6.

<sup>25</sup> *Id.* §502, subd. 7.

<sup>26</sup> *Id.* §502, subd. 10. The law covers seasonal and part-time employment. The Commissioner in these cases is empowered to fix the conditions required for the payment of benefits. The Commissioner alone can determine which employments are seasonal. §§508 and 509.

<sup>27</sup> *Id.* §515, subs. 1 and 2 and §516. New York employers will be able to deduct their state contributions from their federal taxes up to 90% of the federal tax. Thus, when a New York employer is liable for \$100 each to the federal and state governments, he will pay \$100 to the state and \$10 to the federal government.

government.<sup>28</sup> The law provides for the creation of an unemployment administration fund to consist of all federal moneys allotted to the state and all moneys received by the industrial commissioner for the administration of the law.<sup>29</sup> In case of default by an employer in his payments, the amount shall be collected by civil action against him,<sup>30</sup> and the amount due shall be a lien against the employer's assets, subordinate to claims for unpaid wages and prior recorded liens.<sup>31</sup>

It is important to note that no employee can make an agreement to pay any portion of his employer's contribution. Nor may an employer make a deduction for such purpose from the wages or salary of any employee.<sup>32</sup>

Benefits become payable two years from the date on which contributions by employers become payable. In order to become entitled to the benefits an employee must suffer total unemployment, must have had not less than ninety days of unemployment within the twelve-months period preceding the day on which benefits are to commence, or in the alternative, not less than 130 days of employment during the twenty-four months preceding the day on which benefits are to commence.<sup>33</sup> Benefits to employees shall be in the ratio of one week of benefit for each fifteen days of employment within the fifty-two weeks preceding the beginning of the payment of benefits.<sup>34</sup> However, the benefits are not to exceed a maximum of sixteen weeks in any twelve-month period.<sup>35</sup> Payment of benefits are to begin January 1, 1938. The benefits are to amount to 50% of the employee's full time weekly wages, but are not to exceed a maximum of \$15 per week, or to be less than a minimum of \$5 per week.<sup>36</sup> No employee can waive his rights under this law,<sup>37</sup> nor can the benefits be assigned, pledged, encumbered, released, or commuted.<sup>38</sup> The benefits are also exempt from all claims of creditors, and from levy, execution, and attachment. An employee who

<sup>28</sup> *Id.* §515, subd. 3.

<sup>29</sup> *Id.* §520.

<sup>30</sup> *Id.* §522, subd. 1.

<sup>31</sup> *Id.* §523.

<sup>32</sup> *Id.* §517. This provision differentiates the New York law from the European statutes. In most of the European countries the unemployment insurance law is based on a tripartite contributory system: workers, employers, and public authorities. INTERNATIONAL LABOUR OFFICE, *op. cit. supra* note 2, at 100; BEVERIDGE, *op. cit. supra* note 5, at 37; Hewes, *Britain's Care of the Jobless* (Dec. 1934) CURRENT HISTORY.

<sup>33</sup> *Id.* 503, subds. 1, 2, 3.

<sup>34</sup> *Id.* 503, subd. 3 (e).

<sup>35</sup> *Id.* §507.

<sup>36</sup> *Id.* §505, subd. 1. Section 504 specifies a waiting period of three weeks before payment of benefits. Persons unemployed because of industrial disputes or discharged for misconduct must wait ten weeks before becoming eligible.

<sup>37</sup> *Id.* §512.

<sup>38</sup> *Id.* §513. Section 511, subdivision 3 modifies this provision to a slight extent in order to permit approved claims by attorneys for services in connection with the benefit to become a lien upon the benefit involved.

refuses to accept an offer of employment is disqualified from receiving benefits unless his case falls within certain well-defined exceptions.<sup>39</sup>

The Act is to be administered by the Industrial Commissioner,<sup>40</sup> who is given the power to make the necessary rules and regulations. The Commissioner is to create as many state employment offices as he deems necessary.<sup>41</sup> Claims for benefits are to be decided in the first instance by the manager of the employment office where the claim is filed.<sup>42</sup> Provision is made for an appeal to an appeal board of three members<sup>43</sup> and for advisory council of nine members<sup>44</sup> to be appointed by the Governor. The council is to advise the Industrial Commission and investigate and study the operation of the law with a view to making recommendations for more effective administration.

In conclusion, it should be observed that the state undertakes the administration of the unemployment insurance fund, but disclaims any liability on its part beyond the amount of money received through allotment from the federal agency.<sup>45</sup>

#### *Constitutionality.*

There is no question but that this federal-state system of unemployment insurance will be attacked as unconstitutional on at least two grounds, each of which requires our consideration.

I. The first basis of attack will probably be that the state law violates the due process clause of the Fourteenth Amendment.<sup>46</sup> It will be contended that since the act requires certain classes of employers to make payments to a fund for the benefit of employees, without regard to any wrongful act of the employer, he is deprived of his property without due process of law.

The so-called "rights" of property under the due process clause are not inviolate. In *Barbier v. Connolly*,<sup>47</sup> Mr. Justice Field stated that the Fourteenth Amendment was "not designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the in-

<sup>39</sup> *Id.* §506. This section conforms with the provision of the federal act which excuses a person for refusing to accept a position when there is an industrial dispute in the establishment, when he would be required to join a company union or would be compelled to give up his membership in a union, or where wages, hours, and conditions offered are substantially less favorable to the employees than those prevailing in the community.

<sup>40</sup> *Id.* §518, subd. 1.

<sup>41</sup> *Id.* §518, subd. 2.

<sup>42</sup> *Id.* §510.

<sup>43</sup> *Id.* §518, subd. 6.

<sup>44</sup> *Id.* §518, subd. 4. Three appointees are to represent employers; three are to represent labor; and three are to be representatives of the public.

<sup>45</sup> *Id.* §529.

<sup>46</sup> U. S. CONST., Art. XIV, §1.

<sup>47</sup> 113 U. S. 27, 31, 5 Sup. Ct. 357 (1885).

dustries of the State, develop its resources, and add to its wealth and prosperity." It should be observed that the courts have long taken cognizance of the fact that public necessity is the yardstick of the police power of the state, provided the exercise of such power is "reasonable."<sup>48</sup> If the legislation engendered by public necessity interferes to a small extent with private property, the law will be upheld.<sup>49</sup> However, if there is an invasion of certain fundamental rights of individuals, such legislation can only be justified on the ground of a corresponding benefit to the public.<sup>50</sup> This "balance of convenience" rule<sup>51</sup> which the Court propounds in cases relating to due process and the police power is so vague in its implications that it is far easier of statement than application.<sup>52</sup>

There are two important classes of legislation which fall within this category and illustrate the principle involved, namely, that if it can be shown that the enactment is a "reasonable" means of protecting the public health, safety, welfare, and morals of the community, the due process clause will not be a sufficient reason for outlawing the legislation. In holding that the workmen's compensation laws were free from constitutional limitation and not violative of due process, the Supreme Court took cognizance of the inevitability of industrial accidents and approved the purpose of making industry as a whole, rather than the public, bear the losses occasioned by unemployment.<sup>53</sup> In these cases the Court permitted the exercise of the police power to place the cost of industrial injuries upon the

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<sup>48</sup> *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186 (1911); *Commonwealth v. Alger*, 7 Cush. 53 (Mass. 1851); MOTT, *DUE PROCESS OF LAW* (1926).

<sup>49</sup> *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499 (1894); FREUND, *POLICE POWER* (1904) §63.

<sup>50</sup> In *Mountain Timber Co. v. Washington*, 243 U. S. 219, 243, 37 Sup. Ct. 260 (1916) the Court stated: "We are clearly of the opinion that a state, in the exercise of its power to pass such legislation as reasonably is deemed to be necessary to promote the health, safety, and general welfare of its people, may regulate the carrying on of industrial occupations that frequently and inevitably produce personal injuries and disability, with consequent loss of earning power, among the men and women employed, \* \* \* and may require that these human losses shall be charged against the industry either directly \* \* \* or by publicly administering the compensation and distributing the cost among the industries affected by means of a reasonable system of occupation taxes."

In *Leonard v. State*, 100 Ohio State 456, 459, 127 N. E. 464, 465 (1919) the court stated: "The dimensions of the government's police power are identical with the dimensions of the government's duty to protect and promote the public welfare. The measure of the police power must square with the measure of public necessity. The public need is the polestar for the enactment, interpretation, and application of the law."

<sup>51</sup> *Brown*, *Due Process of Law, Police Power, and the Supreme Court* (1927) 40 HARV. L. REV. 943; Cushman, *Social and Economic Interpretation of the Fourteenth Amendment* (1922) 20 MICH. L. REV. 737; Lambert, *Unemployment Insurance and Due Process* (1932) 7 WIS. L. REV. 146.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Hawkins v. Bleakly et al.*, 243 U. S. 210, 37 Sup. Ct. 255 (1916); *New York Central Railroad Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247 (1916); *Mountain Timber Co. v. Washington*, *supra* note 50.

employer, the one who derived the greatest benefit from the employee's labor.

The second class is exemplified by *Noble State Bank v. Haskell*<sup>54</sup> wherein the Supreme Court sustained an Oklahoma statute which levied upon every bank existing under the laws of the state an assessment of a percentage of the bank's average deposits, for the purpose of creating a guarantee fund to make good the losses of depositors in insolvent banks. In this connection Professor Paul H. Douglas points out that

"such an assessment for the guarantee of bank deposits is far more stringent in this direction than contributions for unemployment insurance. For some at least of the unemployment insurance contributions of a relatively stable firm will go to pay benefits to its own employees while all of the contributions of banks which remain solvent will go to the depositors of banks which become insolvent."<sup>55</sup>

Furthermore, many states have laws protecting the sheep industry by imposing a tax on dogs in order to create a fund for the remuneration of sheep-owners for losses suffered by the depredations of the dogs. This tax is imposed on all dog-owners, without regard to the question whether their particular dogs are responsible for the loss of the sheep. Statutes of this kind have been sustained by state courts against attacks based on constitutional grounds.<sup>56</sup>

From the tenor of these judicial decisions there is every reason to believe that the state law will be declared constitutional. The case for unemployment insurance is an impressive one and its proponents will undoubtedly be able to establish to the satisfaction of the Court that (a) unemployment is an inevitable risk of our industrial system, (b) that it leads to ill-health, want and destitution, lowered morale, reduced standard of living, decreased purchasing power, and consequent business failures, (c) that the legislation is primarily designed to distribute these risks more equitably, and (d) that the system will aid the employer by stabilizing business in general.<sup>57</sup>

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<sup>54</sup> 219 U. S. 104, 31 Sup. Ct. 186 (1911). In this case Justice Holmes stated that: "It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. \* \* \* If, then, the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it." (At p. 211.)

<sup>55</sup> DOUGLAS, STANDARDS OF UNEMPLOYMENT INSURANCE (1932) 195-196.

<sup>56</sup> *Longyear v. Buck*, 83 Mich. 236, 47 N. W. 234 (1890); *Cole v. Hall, Collector*, 103 Ill. 30 (1882); *Holst v. Roe*, 39 Ohio State 340 (1883). See PROCEEDINGS OF THE CONFERENCE ON UNEMPLOYMENT AND OTHER INTERSTATE INDUSTRIAL PROBLEMS (Albany, N. Y., Jan. 23-25, 1931) 94.

<sup>57</sup> For an unusually fine development of the case for unemployment insur-

II. The second contention of the opponents is that the real purpose of the Federal Act is not to raise revenue, but to establish a nation-wide system of unemployment insurance. They claim that, if the federal government may compel the states to adopt unemployment insurance under the guise of a tax, why may it not similarly compel them to adopt any other type of legislation.<sup>58</sup> Those who maintain this view rely on the *Child Labor Tax Case* and the case of *Hill v. Wallace*.<sup>59</sup>

In a number of cases the Supreme Court has consistently upheld statutes which, while ostensibly revenue measures were obviously intended to accomplish an entirely different purpose.<sup>60</sup> The Court has frequently enunciated the doctrine that if a statute is a valid exercise of the taxing power, the fact that such authority is invoked to accomplish an object other than to raise revenue has no effect upon

ance, see DOUGLAS, *op. cit. supra* note 55, c. I. See also LAMBERT, *op. cit. supra* note 51.

We are fully cognizant of the existence of authority which, if followed, would be fatal to any compulsory system of unemployment insurance. *Adkins v. Children's Hospital*, 261 U. S. 525, 43 Sup. Ct. 394 (1922); *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539 (1905); *People v. Coler*, 166 N. Y. 1, 59 N. E. 716 (1901); *Ives v. So. Buffalo Ry. Co.*, 201 N. Y. 271, 94 N. E. 431 (1911); to cite merely a few cases. We believe, however, that the economic exigencies engendered by the problem of unemployment together with the recognized necessity of adopting a permanent policy with respect to ameliorating its effect on society, will impel the court to follow a plan which has gained widespread recognition. In *People v. Schweinler Press*, 214 N. Y. 395, 412, 108 N. E. 639, 644 (1915) wherein the court reversed its earlier decision that the legislative prohibition of women's night work was a violation of due process of law, Hiscock, J., stated: "There is no reason why we should be reluctant to give effect to new and additional knowledge upon such a subject as this, even if it did lead us to take a different view of such a vastly important question as that of public health or disease than formerly prevailed. Particularly do I feel that we should give serious consideration and great weight to the fact that the present legislation is based upon and sustained by an investigation by the legislature deliberately and carefully made through an agency of its own creation, the present factory investigating commission." In this respect see *supra* notes 18 and 19.

<sup>58</sup> *Hearings Before the Finance Committee on S. 1130*, 74th Cong., 1st Sess., Feb. 14, 1935, at 926-930.

<sup>59</sup> *Child Labor Tax Case* (*Bailey v. Drexel Furniture Co.*), 259 U. S. 20, 42 Sup. Ct. 449 (1921); *Hill v. Wallace*, 259 U. S. 44, 42 Sup. Ct. 453 (1921). In these cases the basis of the Court's decision was that Congress had promulgated an exaction under the title of a tax but, in reality, a penalty.

<sup>60</sup> *Veazie Bank v. Fenno*, 75 U. S. 533 (1869) wherein the Court upheld a 10% tax on bank notes issued by the state banks, the real purpose of which was not to raise revenue but to eliminate the state bank notes from circulation. Cases wherein the taxing power was used in connection with social or economic ends are *Billings v. United States*, 232 U. S. 261, 34 Sup. Ct. 421 (1914); *McCray v. United States*, 195 U. S. 27, 24 Sup. Ct. 769 (1903); *In re Kollock*, 165 U. S. 526, 17 Sup. Ct. 444 (1897); *United States v. Doremus*, 249 U. S. 86, 39 Sup. Ct. 214 (1918).

the constitutionality of the act.<sup>61</sup> A concomitant motive will not invalidate an otherwise valid exercise of the taxing power.<sup>62</sup>

The 90% credit device<sup>63</sup> was apparently made to parallel directly the machinery of the Federal Estate Tax Law provision in the Revenue Act of 1926.<sup>64</sup> The Estate Tax provided that the taxpayer should be credited with the amount of taxes paid to the state, such credit not to exceed 80% of the tax. The constitutionality of that provision was attacked on the ground that its purpose was to act as an incentive to the states to enact inheritance tax legislation, and that it especially discriminated against Florida, which was precluded by its constitution from levying a tax of this kind. The Supreme Court unanimously approved this device in *Florida v. Mellon*.<sup>65</sup>

It should be observed that the Social Security Act is based on the taxing and spending powers of Congress and not on the commerce clause as in the case of the Railroad Retirement Act.<sup>66</sup> The Act provides for a system of excise taxation, the proceeds of which are to be paid into the treasury and to be used for administrative purposes.<sup>67</sup> Congress found it feasible to levy this assessment in the form of an excise tax because the constitutional reference to this tax is contained in very comprehensive language.<sup>68</sup> The only limitation upon the power of Congress to levy excise taxes is geographical unity throughout the United States. Subject to this limitation, Congress may select the subjects of taxation and may exercise the power conferred at its discretion.<sup>69</sup>

<sup>61</sup> *United States v. Doremus*, *supra* note 60, at 93: "Although other motives may impel the exercise of federal taxing power, the courts are not authorized to inquire into that subject. If the legislation has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the suppressed motives which induced it." See also CONG. REC., 74th Cong., 1st Sess., Vol. 79, No. 122, June 14, 1935, pp. 9670-2.

<sup>62</sup> *In re Kollock*, *United States v. Doremus*, both *supra* note 60; *Magnano v. Hamilton*, 292 U. S. 40, 54 Sup. Ct. 567 (1933). In the last mentioned case the Court stated that the due process clause is "applicable to a taxing statute only if the act is so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as for example, the confiscation of property." (At p. 44.)

<sup>63</sup> See *supra* note 12.

<sup>64</sup> Rev. Act of 1926, c. 27, §301, 44 STAT. 9, 69-70.

<sup>65</sup> 273 U. S. 12, 47 Sup. Ct. 265 (1926). For an attempt to draw a distinction between the Social Security Act and the Estate Tax Act see *Hearings before the Ways and Means Committee on H. R. 4120*, Feb. 7, 1935, at 982-983.

<sup>66</sup> Act of June 27, 1934, c. 868, 48 STAT. 1283.

<sup>67</sup> The Railroad Retirement Act provided for the ear-marking of a special fund out of which pensions were to be paid. Here we have a flat tax to secure revenue and not to pay unemployment insurance or unemployment benefits. The 10% tax is really for administrative purposes. *Hearings before the Finance Committee on S. 1130*, Jan. 22-Feb. 20, 1935, at 223.

<sup>68</sup> U. S. CONST., Art. I, §8, cl. 1.

<sup>69</sup> *Veazie Bank v. Feno*, *supra* note 60; *License Tax Cases*, 72 U. S. 462 (1866).

A perusal of this federal-state legislation discloses a cognizance of the constitutional limitations which it must satisfy. We have endeavored to show that there is ample constitutional authority in support of the enactments. What will, however, play an important factor in any decision dealing with this question will be the necessity for an economic measure of this type, and the inability of the states to act alone because of the financial burden involved.<sup>70</sup> Another important factor which may influence the court is the necessity for the uniform payroll tax in order to remove the unfair competitive advantage that employers operating in states which have failed to adopt a compensation system will enjoy over employers in states which give such protection to their wage earners.<sup>71</sup>

#### *Appraisal.*

Like all legislation novel in character, the enactments have attracted many an apologia and jeremiad. It is our purpose to summarize the most important contentions of the critics.

(1) The traditional argument against unemployment insurance is that it will lead to individual malingering. Now, it is of interest to note that whenever these charges have been investigated, they have been found to be irresponsible talk.<sup>72</sup>

(2) The opponents of the laws set forth the contention that unemployment insurance should, at best, be a voluntary system. In support of their argument they refer to the numerous experiments in unemployment compensation conducted at various private firms (Procter and Gamble, Dennison and Company, Columbia Conserve Company, Fond du Lac Collective Plan, and the General Electric Plan).<sup>73</sup>

In 1932 about 200,000 workers were covered by voluntary plans (individual company, trade union, and joint agreement plans). Since the wage and salaried workers in occupations other than agriculture totaled approximately 31,000,000, the voluntary systems resulted in a coverage (in 1932) of about two-thirds of 1%. Mr. Douglas estimates that at this rate of growth it would require 2,000 years to cover the entire working population.<sup>74</sup> The reason for the slow growth of voluntary systems is the added money cost—an item which competitors do not experience. The resulting disadvantage in the com-

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<sup>70</sup> *Hearings before the Finance Committee on S. 1130, supra* note 67, at 240-241.

<sup>71</sup> *Report of the President's Committee on Economic Security*, Jan. 17, 1935.

<sup>72</sup> BEVERIDGE, *op. cit. supra* note 5, at 40-42. See also excerpts from the *Report of the Unemployment Insurance Committee* (1927), quoted in BEVERIDGE, p. 41. It is of interest to note that during seven years (1923-30) of the operation of the English dole, 44% of the people that were insured did not draw one penny of benefits. See *Hearings, Subcommittee, House Committee on Ways and Means*, March 21-30, 1934 (remarks by Abraham Epstein), quoted in CONG. DIG., Feb., 1935, at 54 and 56.

<sup>73</sup> NATIONAL ASSOCIATION OF MANUFACTURERS, UNEMPLOYMENT INSURANCE HANDBOOK (1933) 189-192.

<sup>74</sup> DOUGLAS, *op. cit. supra* note 55, at 33.

petitive struggle acts as a decided deterrent. Most students of the subject agree that progress can be made only through legislation.<sup>75</sup>

(3) Opponents argue that workers ought to be required to contribute to the unemployment fund. Their contention is based on the fact that most European nations have been compelled to resort to a tripartite contributory system in order to withstand strains on the unemployment fund.

One group has attempted to answer this by claiming that, since this is a piece of social legislation for the benefit of the workers, it would be manifestly unjust to compel them to contribute. Another group has set forth the proposition that, although the workers will not contribute under the present laws, they will, in the long run, pay most of the cost. A tax on payrolls is essentially a tax on the cost of production, and it is eventually passed on to the consumer. Thus, the cost of the system will not be borne solely by the employers; it will have to be shared by labor and the consumers.<sup>76</sup> We shall unquestionably hear more of this contention in the future.

(4) Critics of the New York State law object to a pooled unemployment insurance fund from which all payments of benefits are to be made. They advocate individual plant reserves, pointing out that under the law the efficient concerns would be compelled to carry a large part of the cost of unemployment resulting from the less efficient ones.

The trouble with this argument is that it overlooks the very obvious fact that in time of depression many firms would be compelled to close down, and the reserves of the going concerns would not be able to offer any protection to the unemployed of the closed or bankrupt firms.<sup>77</sup>

(5) A most sweeping criticism of the reserves features of the unemployment insurance law is presented by Professor Elgin Groseclose. He contends as follows:<sup>78</sup>

"1. Financial reserves can be effective only in cases where contingencies can be calculated and determined by actuarial

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<sup>75</sup> INDUSTRIAL RELATIONS COUNSELLORS, UNEMPLOYMENT BENEFITS IN THE UNITED STATES (1930) 221.

<sup>76</sup> N. Y. Times, Aug. 18, 1935, IV, 8:2 (editorial); Andrews, *Two Acts for the Security of the Wage Earner* (Oct. 1935) N. Y. BAR ASS'N BULL. 190.

<sup>77</sup> *Id.* at 188-190.

<sup>78</sup> Groseclose, *The Chimera of Unemployment Reserves Under the American Money System* (Feb. 22, 1935) N. Y. TIMES ANNALIST 114. The basic problem encountered is that of obtaining pertinent statistics to supply the basis for a sound insurance system. For a discussion of the actuarial difficulties see NATIONAL ASSOCIATION OF MANUFACTURERS, *supra* note 73, at 64-65; for a discussion of the methods of treating these difficulties see DOUGLAS, *op. cit. supra* note 55, at 128-136. For a comprehensive array of all conceivable arguments against unemployment insurance, see NATIONAL ASSOCIATION OF MANUFACTURERS, *supra*. It is of interest to note that as an alternative relief plan the Association offers no definite substitute for this program. It merely advocates a public relief fund, reduction in governmental expenditures, and removal of legislative restrictions on industries (see c. XXIV).

methods and where these contingencies arise in sufficient regularity to permit the arrangement of reserves in accordance therewith. 2. The incidence of depressions are irregular and unpredictable, and hence defy actuarial procedure. 3. Purchasing power cannot be stored up *en masse* under our money system, which is a system of debt, rather than metallic circulation. 4. The attempt to create unemployment reserves will intensify booms. 5. Unemployment reserves are incapable of mobilization when needed and any attempt to mobilize them will only result in further intensification of depressions."

The import of these contentions is readily conceded, but are they not more in the nature of a criticism of our economic structure than a condemnation of the program itself? In time, a working solution of these problems will unquestionably be evolved. However, granting the truth of those propositions, are there any other means by which we can promulgate a system of unemployment compensation and, at the same time, avoid the pitfalls of the reserves provision?

(6) An answer to this question has been suggested in one of the most unusual documents presented by a Committee of Congress, a document now frequently referred to as the Lundeen Bill.<sup>79</sup> Dissatisfied with the conservative features of the current legislation, the proponents of this bill present a formula of their own. The bill provides for a federal system of social insurance, including all workers over eighteen years of age in all industries, occupations and professions. The bill covers all the employed for the entire period of unemployment. The funds to pay for this sweeping system of social insurance are to be derived from taxation on incomes of individuals, on corporation incomes, on inheritances or estates, on tax-exempt securities, and a tax on corporate surplus.<sup>80</sup> The social significance of this plan is readily conceded. There is, however, a decided question as to its feasibility from an economic and constitutional point of view.<sup>81</sup>

So much for the critics. The supporters of the legislation, in general, make no pretentious claims as to its ultimate effect. Their position is that it will lessen the distress caused by unemployment, and that it will furnish a partial means of stabilizing industry itself.<sup>82</sup> The building up of unemployment reserves in normal times

<sup>79</sup> H. R. 2827, 74th Cong., 1st Sess., Report No. 418 (1935). This is the report of the House Committee of Labor.

<sup>80</sup> *Ibid.* To pay for this plan the Bill provides for the appropriation of federal moneys out of the United States Treasury. The Bill is based on the appropriating powers of Congress.

<sup>81</sup> The advocates of the Bill find constitutional justification for its provisions in (a) the power of Congress to levy and collect taxes, pay debts, and provide for the common defense and general welfare of the people, (b) the Sugar Bounty Case (*United States v. Realty Co.*, 163 U. S. 426, 41 L. ed. 215 [1896]), wherein the sugar bounty was upheld in so far as to create a moral obligation which Congress could meet by the appropriation of money, and (c) the general welfare cause.

<sup>82</sup> DOUGLAS, *CONTROLLING DEPRESSIONS* (1935) c. XIII.

will provide protection for labor similar to that provided for capital by the reserve policies of corporations. These reserves will prove a reservoir of purchasing power, the use of which will tend to lessen fluctuations in business by maintaining purchasing power in times of stress.<sup>83</sup> Lastly, the insurance will enable workers to claim a legal right, to come forward as creditors, and no longer to be regarded as applicants to charity. The system gives not only *de jure* rights but *de facto* benefits.<sup>84</sup>

#### *Conclusion.*

In discussing unemployment insurance we are merely touching the surface of the greatest problem confronting our generation—the problem of social security. It is admitted by most students of the subject that the only solution lies in a program of complete economic rehabilitation.<sup>85</sup> In the last analysis, unemployment insurance is essentially a medicinal measure applicable only after the inception of the malignant disease.<sup>86</sup> Granted that is so, what is the importance of the legislation discussed as to “certain hazards and vicissitudes of life?”

Historically, the enactments are of importance because they aim to promulgate for the first time in American history a system of compulsory unemployment insurance. They aim to bring us abreast of the social insurance legislation that most European nations have deemed feasible for a generation or two. Practically, both laws are minimal, the least that can be offered to wage earners.<sup>87</sup> But we must remember that this is merely a beginning, an experiment. The near future will undoubtedly see the extension and liberalization of many features of the plan. In the meantime, both laws require intelligent administration and whole-hearted cooperation.

ISIDORE STARR.

THE VANISHING SEAL.—New York in 1935 took another long step forward in doing away with the old-time force and effect of a seal on a written instrument. Section 342 of the Civil Practice Act was rewritten<sup>1</sup> so as to provide: (1) That a seal upon a written instrument executed subsequent to the effective date of the Act shall not be received as conclusive or presumptive evidence of consideration; and (2) that a written instrument need not be under seal in

<sup>83</sup> DOUGLAS, *op. cit. supra* note 55, at 25-30; N. Y. Times, Oct. 2, 1935, 43:1.

<sup>84</sup> INTERNATIONAL LABOUR OFFICE, *op. cit. supra* note 2, at 10.

<sup>85</sup> See works by Charles A. Beard, Paul H. Douglas, Stuart Chase, John Strachey, Norman Thomas, and George Soule.

<sup>86</sup> For an elucidation of the argument that social insurance is a mere makeshift, a temporary device, a mere sop to discontent, a program which begs the entire issue of social security, see Mitchell, *Social Insurance Is Not Enough* (Feb. 1935) CURRENT HISTORY.

<sup>87</sup> Andrews, *supra* note 76.

<sup>1</sup> N. Y. Laws of 1935, c. 708, effective Sept. 1, 1935.