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SELECTED QUESTIONS IN CONSTITUTIONAL REVISION

Of the hundreds of questions which are being discussed today in relation to revision of state and national constitutions, three have been selected for extensive treatment. An exhaustive analysis of the development and relation of labor and labor law to the Nebraska Constitution is provided by John Gradwohl, associate professor of law, University of Nebraska. Richard Hansen, assistant law librarian at the College of Law and a member of the Nebraska Bar, examines the problems of federal and state executive disability and the related problems of succession and separation of powers. State taxation is the subject of the article by Fremont attorney Forrest Johnson who is presently serving as state tax commissioner.

The Editors

Labor-Management Relations and Nebraska Constitutional Revision

John M. Gradwohl*

I. INTRODUCTION

The field of labor-management relations in Nebraska is saturated with constitutional limitations. At stake are rights protected by both the United States and Nebraska Constitutions: freedom of speech;¹ the right peacefully to assemble;² protection against impairment of the obligation of contract³ and a deprivation of liberty

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¹ U.S. CONST. amend. I; NEB. CONST. art. I, § 5. This has been applied judicially almost exclusively in peaceful picketing cases.


³ U.S. CONST. art. I, § 10; NEB. CONST. art. I, § 16. Although once significant in limiting labor-management relations legislation, the effect of these provisions at the present time is negligible. See Lincoln Federal Labor
or property without due process of law;\textsuperscript{4} and the requirement of equal protection of the laws.\textsuperscript{5} Arguably, certain regulation of this area could constitute the taking of private property for public use without just compensation\textsuperscript{6} or an imposition of involuntary servitude.\textsuperscript{7}

The sphere of labor-management relations activity which the State of Nebraska can regulate is limited by the federal Supremacy Clause\textsuperscript{8} to those aspects not preempted by federal legislation. Under existing federal legislation, this means that Nebraska can, in general, like other states: (1) Regulate labor-management relations subject only to the constitutional limitations as to businesses (a) not affecting interstate commerce,\textsuperscript{9} or (b) which affect interstate commerce but which do not meet the jurisdictional requirements of the National Labor Relations Board, over which Congress has ceded jurisdiction to the states;\textsuperscript{10} (2) Grant injunctions\textsuperscript{11} or award damages\textsuperscript{12} for violent labor activity in connection with labor disputes in businesses covered by federal law—on the theory that, apparently as a matter of constitutional federal division of powers,\textsuperscript{13}


\textsuperscript{4} U.S. CONST. amend. XIV, § 1; NEB. CONST. art. I, §§ 1, 3.

\textsuperscript{5} U.S. CONST. amend. XIV, § 1; NEB. CONST. art. I, §§ 1 and 25, and art. III, § 18. The Nebraska Constitution forbids an irrevocable grant of special privileges or immunities. NEB. CONST. art. I, § 16.

\textsuperscript{6} U.S. CONST. amends. V and XIV, § 1; NEB. CONST. art. I, § 21.

\textsuperscript{7} U.S. CONST. amend. XIII, § 1; NEB. CONST. art. I, § 2. The rights of life, liberty and the pursuit of happiness are inherent and inalienable. NEB. CONST. art. I, § 1. The enforcement of criminal sanctions must be in accordance with constitutional procedure. See NEB. CONST. art. I, §§ 10, 11. For additional Nebraska limitations, see notes 15, and 22-24 infra.

\textsuperscript{8} For a comprehensive analysis, see Michelman, \textit{State Power to Govern Concerted Employee Activities}, 74 HARV. L. REV. 641 (1961).


\textsuperscript{11} E.g., Youngdahl v. Rainfair, 355 U.S. 131 (1957); United Automobile Workers v. Wisconsin Empl't Rel. Board, 351 U.S. 266 (1956).


\textsuperscript{13} See San Diego Building Trades v. Garmon, 359 U.S. 236, 247 (1959): "State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction."
a state has inherent power to act to protect the health and safety of its citizens—and (3) Act in accordance with and to the extent permitted by federal law in certain areas specifically left to the states under federal legislation, such as authorization to prohibit union shop contracts— which Nebraska has done by constitutional provision— enforcement of certain criminal laws, and determination of suits by employees against labor unions under state law.

This leaves a substantial area in which the State of Nebraska can act. But Nebraska, like most states, has no labor-management relations law, and very little statutory labor law on its books. A recent Legislative Council study committee has recommended that Nebraska enact a labor-management relations law. The legislature has had comprehensive labor-management relations bills before it at the last two sessions, and has also given consideration to a number of other bills affecting labor-management relations.

15 NEB. CONST. art. XV, §§ 13-15; NEB. REV. STAT. §§ 48-217 to -219 (Reissue 1960). See Swindler, The Right to Work, A Decade of Development, 36 NEB. L. REV. 267 (1957). Note that these provisions relate solely to discrimination in hiring and firing practices on the basis of union or nonunion affiliation. The federal law, if applicable, also protects against such discrimination in any term or condition of employment or the encouraging or discouraging of membership in any labor organization, but permits union or maintenance of membership shops in certain instances.
18 See Katz, Two Decades of State Labor Legislation 1937-1957, 25 U. CHI. L. REV. 109 (1957). See also NEB. REV. STAT. §§ 28-812, -814 (Reissue 1956) (coercive picketing statute; probably unconstitutional in part, see note 160 infra); §§ 28-814.01 and .02 (Reissue 1956) (mass picketing); §§ 28-814.04 and .05 (Reissue 1956) (intimidating a striker); §§ 48-801 to -823 (Reissue 1960) (compulsory arbitration of public utility labor disputes); §§ 48-901 to -912 (Reissue 1960) (secondary boycotts and hot cargo); § 48-214 (Reissue 1960) (prohibits racial discrimination in collective bargaining); §§ 28-580, 28-804, 28-816, and -817 (Reissue 1956) (anti-violence statutes); 28-725 (Reissue 1956) (imported strikebreakers); § 28-548 (Reissue 1956) (embezzlement of union funds); § 59-801 (Reissue 1960) (antitrust statute; see State v. Employers of Labor, 102 Neb. 768, 169 N.W. 185 (1918), noted 22 NEB. L. REV. 30 (1943)); § 14-1825 (Reissue 1954) (authority of metropolitan transit authority); § 25-313(3) (Reissue 1956) (union suits as entity); note 15 supra (employment discrimination on basis of union or nonunion membership).
Labor-Management Relations

Congress has ceded jurisdiction to the states over a group of comparatively local businesses affecting interstate commerce. If the states fail to act to provide some sort of a labor-management relations system, there is an indication that the federal government may again preempt this area.\(^\text{21}\) States which have failed to act would not be in a very strong position to object to the federal occupation of the field. Regardless of the substance of its provisions, an inclusive labor law for Nebraska would give a needed certainty and predictability to labor-management relations in the State upon which responsible businessmen and responsible labor leaders might rely and from which management, labor and the public would benefit.

Under the present Nebraska Constitution, the development of effective labor-management relations legislation may face a difficult road. These restrictions in the present Constitution illustrate the need for some constitutional revision, whether it be by specific amendment or through a constitutional convention. The purpose here is to analyze two major areas in which it is felt that the present Nebraska Constitution severely limits the State's ability to deal effectively with labor-management relations problems.

A. Limitations on Regulation of Controversies Between Employers and Employees. Superimposed upon rather typical state constitutional requirements, the Constitution also provides that the legislature may create an Industrial Commission "... for the investigation, submission and determination of controversies between employers and employees."

\(^\text{21}\) See statements of Senator Kennedy, 105 Cong. Rec. 17902 (1959): "... we must bear in mind that 35 of the States have no adequate labor laws. ... [I]f any effort is made to use this provision as an opportunity to limit rights which all of us believe all American working people and employers in these State have, then it will be very easy under this provision for the National Labor Relations Board by administrative decision to assume much fuller jurisdiction. ..."

Objections had been raised to ceding this jurisdiction to the states in any event. See, e.g., Statement of Senator Morse, Id. at 17879: "It would be one thing to allow the States which have established labor relations boards and have provided the machinery for holding elections and for punishing unfair labor practices to exercise jurisdiction over firms engaged in interstate commerce. ... But it is a far different thing, indeed, to give to State courts the right to assert jurisdiction where there is no labor relations law at all in the State, where there is no provision for conducting elections and where there is no provision for preventing or punishing unfair labor practices. ..." See also McCoid, Notes on a "G-String": A Study of the "No Man's Land" of Labor Law, 44 Minn. L. Rev. 205, 253 (1969): "Therefore, unless more states adopt statutes which give some minimum protections to collective agreements and provide for representation proceedings, the argument for extention of federal jurisdiction may be persuasive."
and employees in any business or vocation affected with a public interest... At best, this constitutional provision leaves in doubt many vital questions about what the legislature can do with respect to labor-management relations, and, at worst, would be a serious straitjacket on an effective resolution of those problems.

B. Limitations on Enforceability of Voluntary Arbitration Agreements. In this area, the method most suited to resolving disputes arising under a collective labor agreement runs afoul of Nebraska constitutional provisions which provide that any injured person can secure a remedy in court and with a trial by jury.

II. LIMITATIONS ON REGULATION OF CONTROVERSIES BETWEEN EMPLOYERS AND EMPLOYEES

Article XV, Section 9, of the Nebraska Constitution provides:

Laws may be enacted providing for the investigation, submission and determination of controversies between employers and employees in any business or vocation affected with a public interest, and for the prevention of unfair business practices and unconscionable gains in any business or vocation affecting the public welfare. An Industrial Commission may be created for the purpose of administering such laws, and appeals shall lie to the Supreme Court from the final orders and judgments of such commission.

This section was proposed by the 1920 Constitutional Convention. It was only the second such provision enacted in the United States, following the lead Kansas had taken by legislation several months earlier. As a result of a coal strike, Kansas had placed its mines in a state-controlled receivership. The legal theory employed was that the mine operators as a group constituted a combination in restraint of trade. The State operated the mines for some time, and ultimately the strike was broken. In the process, a special session of the Kansas Legislature was called for the purpose of enacting a law which would make a recurrence of such a strike impossible. The legislature acted by creating an Industrial Court with broad powers over all wage and employment conditions.

22 NEB. CONST. art. XV, § 9.
25 For a history of the first three years of this court, see Rabinowitz, The Kansas Industrial Court Act, 12 CALIF. L. REV. 1, 3 (1923): "In brief, it proved impracticable to isolate industrial conditions in Kansas from industrial conditions in the rest of the nation."
26 Statement of Governor Henry J. Allen of Kansas, 2 PROC. NEB. CONST. CONV. 1618 (1920). See Statement of Mr. Pitzer, Id. at 1557.
and a power of compulsory arbitration with respect to transportation, food, fuel, and clothing.

After the Kansas Industrial Court had been in operation just five weeks, during which time eleven cases had been docketed before it, the Governor of Kansas addressed the Nebraska Constitutional Convention. He made a stirring speech vividly outlining the advantages of an Industrial Court. This speech seemed to jar the convention into taking action in this area. Thoughts of the Kansas Industrial Court and the Governor's talk remained constantly before the convention as the debates progressed. If a constitutional convention is calculated to be a sort of detached deliberative process to deal with long range fundamental issues, then the proposal of Article XV, Section 9, may have been unwise. Its enactment by the Nebraska Convention was certainly in response to current problems of the day, and it is quite possible that the provision would not be in the Nebraska Constitution today were it not for the fortuitous timing of the Kansas coal episode.

The Nebraska constitutional provision was also in part an outgrowth of federal legislation enacted in response to the

27 Statement of Governor Henry J. Allen, Id. at 1618-29, 1635-37.
28 Statements of Mr. Peterson, Id. at 1694, 2003 (a leading proponent who spent two or three days in Kansas discussing the Industrial Court); Mr. Epperson, Id. at 1937 (co-chairman of the committee reporting out the final bill); Mr. Howard, Id. at 1953 (objecting to the proposal on the ground, "... I think there is too much of Governor Allen's address injected into it."); Mr. Bigelow, Id. at 1992, 1995; Mr. Abbott, Id. at 2001. There had also been several references to the Kansas Court on the floor previously. Statements of Mr. Kunz, Id. at 1549, 1561; Mr. Radke, Id. at 1553; Mr. Pitzer, Id. at 1557.
29 See, e.g., Statements of Mr. Kunz, Id. at 1549: "As I understand it, Kansas is the first state in the Union to establish this court. It is in the experimental stage, and here we are attempting to write into the constitution an iron-clad provision establishing such a court and establishing its powers."); Mr. Bigelow, Id. at 1991: "I cannot help but feel that we are now upon a wave or sort of reaction, that the conditions of industrial unrest are more or less temporary." In addition to the Kansas coal strike and threatened national railroad strike, the Boston policemen's strike, in which then Governor Calvin Coolidge had acted and achieved fame, was currently in the minds of members of the convention and cited as a reason for this proposal. Cf. Statements of Mr. Pitzer, Id. at 1555-57; Mr. Peterson, Id. at 1564. See also Peterson, Industrial Courts, 3 NEB. L. BULL. 487 (1925). And the members may have had in mind a major Omaha industrial dispute in 1917 involving a general strike and lockout situation over the requirement of yellow-dog contracts. See statement of Mr. Bigelow, 2 PROC. NEB. CONST. CONV. 1993 (1920); State v. Employers of Labor, 102 Neb. 768, 169 N.W. 185 (1918) (in which Mr. Bigelow had been a counsel).
threatened railroad strike of 1916. The Adamson Act had been passed by Congress compelling a settlement of that dispute, and had been held valid over constitutional attack. This was pointed out by lawyers at the Constitutional Convention as a legal basis of the power which might be exerted to settle controversies between employers and employees.

The section was one of the most thoroughly considered proposals at the Constitutional Convention. Its adoption was a meritorious accomplishment of the convention and showed considerable foresight and understanding of the basic issues involved. Yet, in present day terms, the section, at least on its face, does not answer several of the really vital questions involved. Fortunately, some of these answers may be provided by a close examination of the history of its enactment. In at least one instance, that of the basic scope of its business coverage, the limitations appear to be unduly restrictive today, and are likely to constitute an extremely serious obstacle to its effective use.

A. What language in this section is applicable to labor-management relations? An analysis of the historical development of Article XV,

30 Wilson v. New, 243 U.S. 332 (1917) (5-4 decision). This legislation prescribed wages, hours and working conditions for a six to nine month period which was intended to give the interested parties sufficient time to reach an agreement and avoid a nationwide strike. Id. at 344-46. But the court treated this regulation as if it amounted to compulsory arbitration. Id. at 351, 359. The regulation was held valid because by engaging themselves in a "business charged with a public interest," both the employers and employees subjected themselves to regulation of this very type. Id. at 352. But cf. Wolff Packing Co. v. Industrial Court, 262 U.S. 522, 544 (1923) (unanimous decision invalidating the Kansas Industrial Court statute): "It is not too much to say that the ruling in Wilson v. New went to the border line, although it concerned an interstate carrier in the presence of a nation-wide emergency and the possibility of great disaster. Certainly there is nothing to justify extending the drastic regulation sustained in that exceptional case to the one before us."

31 Statements of Mr. Peterson, 2 PROC. NEB. CONST. CONV. 1943-46 (1920); Mr. Flansburg, Id. at 1949-52. This was also the basis for the Kansas legislation. See Statement of Governor Henry J. Allen, Id. at 1622-23 (although the specific power to establish the tribunal was that of the legislature to create inferior courts); Court of Industrial Relations v. Wolff Packing Co., 109 Kan. 629, 644, 201 Pac. 418, 425 (1921), reversed 282 U.S. 522, 544 (1923): "If under the commerce clause of the federal Constitution Congress can regulate the wages and hours of labor of those working on railroads, the state under the police power should be able to regulate the wages and hours of labor of those working in a packing plant wholly within the state. The powers of Congress under the commerce clause of the Constitution are no greater than the authority of the state under the police power."
Section 9, shows clearly that the first sentence deals with two independent subjects: (1) controversies between employers and employees in businesses affected with a public interest, and (2) trade regulation generally in businesses affecting the public welfare. With respect to labor-management controversies, only the first part of the sentence is applicable. This provides that "Laws may be enacted providing for the investigation, submission and determination of controversies between employers and employees in any business or vocation affected with a public interest . . . ." The remaining portion of the first sentence\(^{32}\) pertains only to trade regulation matters, or what was termed "profiteering" in the language of the Constitutional Convention. The second sentence of the section, concerning the Industrial Commission, relates to both labor and trade regulation matters.

Originally, four separate proposals for an industrial court were introduced at the convention and referred to the Committee on Industrial Relations,\(^{33}\) which considered them for nearly three months.\(^{34}\) These proposals were all indefinitely postponed, and in their place the committee reported out a substitute, Proposal No. 329.\(^{35}\) This proposal was considered on the floor of the convention, but was ordered back to a joint committee of the Industrial Relations Committee and the Miscellaneous Subjects Committee for

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\(^{32}\)This portion would read, "Laws may be enacted providing . . . for the prevention of unfair business practices and unconscionable gains in any business or vocation affecting the public welfare."

\(^{33}\)Proposal No. 144, 1 PROC. NEB. CONST. CONV. 204 (1919) (creating a constitutional industrial commission generally supervising all labor laws, and which could be given binding power to resolve controversies and forbid strikes or lockouts pending such decision); Proposal No. 217, Id. at 263 (1920) (permissive industrial court with authority over all labor laws, including personal injuries, and power to determine disputes between employers and employees and carry out its decrees by injunction or other order); Proposal No. 220, Id. at 291 (industrial court could be given jurisdiction in disputes when appealed to by either party, but court would not have power to deny right to refuse employment or cease work, singly or collectively); Proposal No. 237, Id. at 336 (legislature or people could create industrial court with investigatory power, power to enforce better working conditions, and power to act as mediator when requested by either party or when the interests of the public were involved). Other labor proposals were submitted. See, e.g., Proposal No. 80, Id. at 134 (1919) (recognition and enforcement of right of collective bargaining); Proposal No. 93, Id. at 140 (interference with right to work would cause loss of electoral privilege); Proposal No. 189, Id. at 242 (1920) (strict accountability of labor organizations, agents and officers).

\(^{34}\)See Statement of Mr. Donohoe, 1 PROC. NEB. CONST. CONV. 1558 (1920).

\(^{35}\)Id. at 1318.
combination with the trade regulation proposal.\textsuperscript{36} The trade regulation proposal and Proposal No. 329 were both indefinitely postponed and the combination proposal which, as amended, ultimately passed the convention, Proposal No. 333, was reported out by the joint committee.\textsuperscript{37} From this point on in the convention's consideration of Proposal No. 333, there was a clear understanding that the labor-management controversy and the trade regulation clauses, separated above, operated entirely independently of each other.

B. \textit{Can the Legislature regulate labor-management relations other than through an Industrial Commission, (1) under Article XV, Section 9? or (2) under other legislative authority?}

1. Article XV, Section 9. This provision was generally considered by the 1920 Constitutional Convention for its basic purpose of permitting an Industrial Commission to be established. Even though throughout its consideration, the proposal contained two separate sections for the power to legislate with respect to employment controversies and the authorization of an industrial court,\textsuperscript{38} there was no expressed intention that the section was designed to constitute a grant of authority to act concerning labor or trade regulation matters other than through an Industrial Commission. Actually, the sense of the convention was probably to the effect that the first part of the first sentence was merely a recognition of a combination of existing legislative powers, but that an Industrial Commission was needed to combine in one place legislative, judicial and administrative powers.\textsuperscript{39} On the other hand, there does not appear to be any indication that the first sentence should not operate as an independent grant of legislative authority.

The Nebraska Supreme Court has specifically cited Article XV, Section 9, on only two occasions, both of them involving trade regulation aspects of the section.\textsuperscript{40} Both decisions assume tacitly that the first sentence of the section is an independent grant of authority to act other than through an industrial commission concerning a business which affects the public welfare. Such a

\textsuperscript{36} Id. at 1832-33 (by a vote of 32-26).
\textsuperscript{37} Id. at 1910-11, 1936.
\textsuperscript{38} Id. at 1318, 1936. The proposal contained separate sections from the time it was originally reported out onto the floor down to the point of the final substitute. No reason was given why the final amendment contained only one section. \textit{Id.} at 1984-86.
\textsuperscript{39} See notes 108-16 infra.
\textsuperscript{40} Standard Oil v. City of Lincoln, 114 Neb. 243, 207 N.W. 172 (1926), \textit{aff'd} 275 U.S. 504 (1927); State \textit{ex rel.} Western Reference & Bond Ass'n v. Kinney, 138 Neb. 574, 293 N.W. 393 (1940), \textit{rev'd} on other grounds sub \textit{nom.} Olsen v. Nebraska, 313 U.S. 236 (1941).
construction seems perfectly proper under the section. But it still imposes a serious limitation on effective legislative action. It seems clear that under this section the legislature can take action only with respect to businesses or vocations which, as to the type of economic activity carried on, are affected with a public interest.\textsuperscript{41}

2. Other Legislative Authority. There is no indication that by the enactment of Article XV, Section 9, the Constitutional Convention meant to foreclose legislative action under the police power generally. The reply to objections that the section merely permitted what could be done under the police power anyway took the form of explaining other advantages flowing from the section rather than discussing police power.\textsuperscript{42} And, of course, there has been a large number of Supreme Court decisions since 1920 considering legislative power over trade regulation which have been handled in terms of the general police power rather than Article XV, Section 9. But if the general police power of the state is used as legislative authority, the effectiveness of the labor-management relations legislative action may be seriously reduced. Lost will be the ability to combine in a single body the various legislative, judicial and executive functions which was considered so vital by the framers of Article XV, Section 9,\textsuperscript{43} and which still seems to be most desirable in effectively resolving matters of this type.

The recent proposals for a labor-management relations act have called for representation matters to be handled by a special commissioner appointed by the governor\textsuperscript{44} or by the commissioner of labor.\textsuperscript{45} Under both bills, unfair labor practices would be remedied by direct suit under the statute in the district courts. There has been no attempt to utilize Article XV, Section 9, either as general authority under the first sentence, or to create an Industrial Court to handle the controversies.

To the extent that general supervision of a labor-management relations act is left to the courts,\textsuperscript{46} the administrative machinery

\textsuperscript{41}See notes 47-49 infra.
\textsuperscript{42}See notes 112 and 115 infra.
\textsuperscript{46}See Neb. Leg. Council Rep. No. 102, at 28, 36 (1960): "Management did testify that if a labor relations statute was passed it should be administered by the courts and not by a special commission or board." The committee recommended that the act be administered by the Commissioner of Labor and by the courts.
necessary to supervise representation elections would seem to be absent, and executive, and possibly legislative, powers would be likewise lacking in the case of unfair labor practices. The history of the development of an effective labor-management relations law on the federal level was primarily one of getting the solution of these matters out of the courts and into a specialized governmental body. To a considerable degree, this philosophy underlies the Industrial Court provisions of Article XV, Section 9.

C. _Can the Legislature act with respect to controversies between employers and employees in enterprises other than "... any business or vocation affected with a public interest," (1) under Article XV, Section 9? or (2) under other legislative authority?_

1. _Article XV, Section 9._ The phrase "any business or vocation affected with a public interest" was extensively considered at the Constitutional Convention. From the history of the phrase, it seems clear that legislative action cannot be taken under this section except where the business or vocation regulated is affected with a public interest.

The history of this provision is unusually clear and unanimous in this regard. The committee report at the time the final bill was reported out contains a notation of this limitation on the legislative authority. A statement on the floor of the convention by one of the co-chairmen of the joint committee stressed this factor. There were repeated references throughout the floor consideration of the proposal to the interpretation that the legislature could not act except where a business was affected with a public interest. There was also considerable debate over just what area this left the legislature free to turn over to an industrial commission.

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47 Report of Joint Committee of the Committees on Miscellaneous Subjects and Industrial Conditions, 2 PROC. NEB. CONST. CONV. 1910 (1920): "We do not approve of the grant of unlimited power to regulate legitimate business and vocations, by license or otherwise. . . . We consider the exercise of this power necessary or proper only in the interest of the public welfare."

48 Statement of Mr. Epperson, Id. at 1937: "The Committees on consideration of this matter concluded, Mr. Chairman, that no attempt to regulate any business concern was justifiable unless the business engaged in by the concern was in some manner a business in which the public welfare was concerned. Therefore, we undertook to frame this proposal, to provide no regulation whatever for any business, unless it was a business in which the public welfare was concerned or interested."

49 Statements of Mr. Pitzer, Id. at 1939: "In other words, the Committee's idea was to allow the development of industry of legitimate business purposely free, without regulation or interference, until and unless by continuation, or otherwise, it reached a point where the public interest was
In the later stages of its consideration, an amendment was made changing "public welfare" to "public interest," thought to be a narrower term, for an express purpose of limiting the scope of the legislative authorization.\(^{56}\) Also, at a point close to final passage, the trade regulation provision, which by inadvertence read merely "prevention of unfair business practices and unconscionable gains affecting the public welfare,"\(^{51}\) was amended without controversy by adding after "gains" the words "in any business or vocation."\(^{52}\) It is also interesting that some years later, after the Kansas Industrial Court Act had been held unconstitutional,\(^{53}\) one of the principal proponents of the Nebraska proposal wrote that the validity of the Nebraska provision was not in jeopardy by that decision since the Nebraska Legislature could by the very language of the Nebraska Constitution act only with regard to "any business or vocation affected with a public interest."\(^{54}\)

Both the plain meaning of Article XV, Section 9, and the contemporaneous history of its enactment impose as a limitation on legislative action under the section a condition that the legislature can act only with respect to business or vocations affected with a public interest.

2. Other legislative authority. It seems likely that the general police power of the legislature to act with respect to labor-manage-

so affected that it might be in danger."; Mr. TePoel, Id. at 1961, 1964, 1969: "... where it is purely private, to leave that to settlement by private negotiation."; Mr. Bigelow, Id. at 1993 (opponent of the proposal): "By the rule of exclusion that would mean that those businesses or vocations which are not affected with the public interest are not to be within the scope of the powers of this tribunal. I understand you to mean, in the phrasing of this proposal that you are not willing to endow any court with the right to determine controversies other than those affected with the public interest..." See Statement of Mr. Peterson, Id. at 1973. Some members objected to this limitation, however. See Statements of Mr. Magney and Mr. Kunz, Id. at 2000.

\(^{50}\)See notes 78 and 79 infra.

\(^{51}\)2 PROC. NEB. CONST. CONV. 2453 (1920).

\(^{52}\)Id. at 2453-54.


\(^{54}\)Peterson, Industrial Courts, 3 NEB. L. BULL. 487, 498-99 (1925). But the author had suggested to the Constitutional Convention that packers might be within the proposal. Statement of Mr. Peterson, 2 PROC. NEB. CONST. CONV. 1974 (1920).
ment relations is not limited to businesses affected with a public interest.

a. Federal limitations. At one time, there was a federal limitation under the Due Process Clause that the business regulated be charged with a public interest. For example, when the Kansas Industrial Court case was decided by the United States Supreme Court, the Court concerned itself with whether or not the business of meat packing was charged with a public interest. But the doctrine of "affected with a public interest" was permanently laid to rest in the landmark case of *Nebbia v. New York* where it was specifically rejected by the Court. And this has been restated by the Court on later occasions, including the Nebraska closed shop amendment decision. It is safe to assume that there is today no federal requirement that states regulate only businesses affected with a public interest.

b. Nebraska limitations. The Nebraska Court has not required, as a general prerequisite to economic regulation, that the business be affected with a public interest. Yet the Court has quoted

55 Wolff Packing Co. v. Industrial Court, 262 U.S. 522, 535-39 (1923). This decision may be read as refusing to decide whether or not the business was affected with a public interest, but as holding that in any event, compulsory arbitration was unconstitutional as applied to this particular business. *Id.* at 539: "We are relieved from considering and deciding definitely whether preparation of food should be put in the third class of quasi-public businesses, noted above, because even so, the valid regulation to which it might be subjected as such, could not include what this act attempts." See *Tyson & Brother v. Banton*, 273 U.S. 418 (1927) (ticket scalper statute); *Ribnik v. McBride*, 277 U.S. 350 (1928) (employment agency fees); *Williams v. Standard Oil*, 278 U.S. 235 (1929) (gasoline prices); *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (ice manufacturing).

56 291 U.S. 502, 536-37 (1934): "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. ... But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."

57 Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536 (1949): "The Court also ruled on a distinction between businesses according to whether they were or were not 'clothed with a public interest.' This latter distinction was rejected in *Nebbia v. New York*, 291 U.S. 502. That the due process clause does not ban legislative power to fix prices, wages and hours as was assumed in the *Wolff* case, was settled as to price fixing in the *Nebbia* and *Olsen* cases. That wages and hours can be fixed by law is no longer doubted ...."
with approval\textsuperscript{58} the following language used by the United States Supreme Court in invalidating the Kansas Industrial Court Act: \textsuperscript{59}

It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. \ldots One does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances.

In these cases, the Court had before it the question of the validity of the Nebraska law licensing and regulating employment agencies and fixing the amount of the fees which the agencies could charge. \textsuperscript{60} In the first opinion, \textsuperscript{61} the court invalidated the law under a United States Supreme Court decision \textsuperscript{62} which contained language that an employment agency is not a business affected with a public interest. The Nebraska Court reasoned that this decision had not been overruled by the \textit{Nebbia} case and other United States Supreme Court decisions upholding state minimum wage legislation. On appeal to the United States Supreme Court, the judgment was reversed, and the Court effectively overruled its earlier decision upon which the Nebraska Court had relied. \textsuperscript{63}

Subsequently, in a new action, the Nebraska Court held that

\textsuperscript{58} Boomer v. Olson, 143 Neb. 579, 586, 10 N.W.2d 507, 511 (1943); State \textit{ex rel.} Western Reference & Bond Ass'n v. Kinney, 138 Neb. 574, 578, 293 N.W. 393, 395 (1940). The opinion was also cited with approval on another phase of the public interest issue in Standard Oil Co. v. City of Lincoln, 114 Neb. 243, 250-51, 207 N.W. 172, 175 (1926).

\textsuperscript{59} Wolff Packing Co. v. Industrial Court, 262 U.S. 522, 537 (1923).

\textsuperscript{60} This provision is now NEB. REV. STAT. § 48-509 (Reissue 1960). Although it has never been amended by specific legislative action, the Revisor of Statutes was authorized to act by himself to delete any statutory language held unconstitutional between the time of his original report and the publication of the Revised Statutes of 1943. Neb. Laws c. 115, § 4, p. 402 (1943). It was apparently under this authority that the fee language was deleted from the present statutes. See NEB. REV. STAT. § 48-508 (Cum. Supp. 1929). Apparently, too, this would now preclude the Court from holding that employment agencies have become affected with a public interest in the intervening years or from ruling on the issue whether the material remaining in the statute was severable from that deleted.

\textsuperscript{61} State \textit{ex rel.} Western Reference & Bond Ass'n v. Kinney, 138 Neb. 574, 293 N.W. 393 (1940).

\textsuperscript{62} Ribnik v. McBride, 277 U.S. 350 (1928).

\textsuperscript{63} Olsen v. Nebraska, 313 U.S. 236, 244 (1941): "The drift away from \textit{Ribnik v. McBride, supra}, has been so great that it can no longer be deemed a controlling authority."
private employment agencies were still not "... a business in which the public has such an interest that price fixing may be included as a method of regulation under the provisions of our Constitution."  

The provision fixing maximum fees was held to be unreasonable, prohibitory, and confiscatory under four separate sections of the Nebraska Constitution, but, conspicuously, the Due Process Clause was not relied upon.

The Court, however, has upheld an unfair price discrimination act without mentioning that this act undoubtedly applies to some businesses which are not affected with a public interest. Similarly, an unfair trade act, although invalidated on other grounds, was not struck down summarily on the basis that some businesses involved would not be affected with a public interest. Yet, in a more recent decision, the Court, although it nullified a law regulating auctioneering on other grounds, specifically stated that the business of an auctioneer was affected with a public interest and therefore subject to reasonable legislative restriction. And the Court has also felt it necessary to state that labor unions, themselves, are affected with a public interest.

Whether the business of the butcher, the baker, the tailor, the wood chopper, the mining operator or the miner, is subject to labor-management relations regulation by Nebraska under the Ne-

64 Boomer v. Olson, 143 Neb. 579, 586-87, 10 N.W.2d 507, 511-12 (1943): "While it is true that the supreme court of the United States has receded from its position in the later cases in interpreting the provisions of the federal Constitution, this court has consistently adhered to the doctrine, except in a business in which the owner by devoting it to a public use, in effect, grants the public an interest in the use and subjects himself to public regulation to the extent of that interest. ... ."

65 Hill v. Kusy, 150 Neb. 653, 35 N.W.2d 594 (1949). This argument was at least indirectly suggested to the Court. See Brief of Appellant, p. 6, Hill v. Kusy, supra.


69 See notes 55 and 64 supra. These holdings may be distinguished as indicating only that the vocations are free from compulsory arbitration, wage or price regulation, or similar limitations. See Nebbia v. New York, 291 U.S. 502, 536-37 n. 39 (1934). Even though presumably not subject to wage and hour regulation under these holdings, the businesses were still subject to some regulation, such as criminal penalties for an unlawful strike or lockout extortionate in nature. See DorcPremier v. Kansas, 272 U.S. 306 (1926).
nebraska Constitution is not free from doubt. The reliance upon an "affected with a public interest" test has certainly never been abandoned by the Court. Its language appears in the most recent decisions in this general area.

One can only speculate that the earlier cases may have had in mind that being affected with a public interest determined whether or not the business was subject or not subject to any economic regulation.\(^7\) The more recent cases would seem, comparatively, to indicate a present attitude on the part of the Court to use the affected with a public interest concept in measuring substantively the reasonableness of the means chosen to effectuate the legislative end.\(^7\) There also seems to have been a shift in emphasis from inquiry into the type of business activity conducted by the enterprise involved to inquiry concerning the general public interest in the type of legislation enacted.\(^7\)

Even though the federal decisions have specifically discarded the "affected with a public interest" test, the Court will still determine whether the statute involved bears a reasonable relation to a proper legislative purpose.\(^7\) But there might be a significant dif-

\(^7\) See, e.g., Nelsen v. Tilley, 137 Neb. 327, 289 N.W. 388 (1939): "Whether an occupation is charged with such a public interest as to warrant its regulation is a legislative question with which the courts ordinarily will not interfere."

\(^7\) See, e.g., Boomer v. Olsen, 143 Neb. 579, 586-87, 10 N.W.2d 507, 511-12 (1943): "But even if the evidence showed that plaintiffs had engaged in unfair business practices and in the making of unconscionable profits, proper regulatory statutes afford a complete remedy without a resort to price fixing . . . . We think, therefore, that the legislature may properly prescribe standards, reasonable in their nature, by which a private employment agency may operate, and secure their enforcement by recourse to the courts and by granting licenses upon receipt of a reasonable license fee to those who comply with all the valid regulations of the act. . . . We also hold that a private employment agency is not a business in which the public has such an interest that price fixing may properly be included as a method of regulation under the provisions of our Constitution."

\(^7\) See, e.g., McGraw Electric Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 718, 68 N.W.2d 608, 617 (1955): "This court has said that in the absence of appearance of public interest the Legislature may not itself impose prices. . . ." Cf. Blauvelt v. Beck, 162 Neb. 576, 584-85, 76 N.W.2d 738; 745-46 (1956) (where both approaches appear to have been used).

\(^7\) See, e.g., Nebbia v. New York, 291 U.S. 502, 536-38 (1934); Virginian Ry. v. System Federation, 300 U.S. 515, 553-54, 558 (1937); Olsen v. Nebraska,
ference in degree between the wide latitude given to a legislative determination of reasonable means under the federal decisions and that which would be permitted by the Nebraska Court under the Nebraska Constitution.

D. What is meant by "... any business or vocation affected with a public interest?" As the joint committee reported the proposal out to the floor of the convention, the labor-management relations clause covered "... controversies between employers and employees in which the public welfare is affected," and the trade regulation clause was limited to "any business or vocation affected with a public interest." An amendment was offered under which each clause would have read "affected with a public interest." After debate, objection was raised that the trade regulation section should not be so limited, but should relate to "affecting the public welfare." Finally, the labor-management relations clause was limited to "any business or vocation affected with a public interest," and the trade regulation clause amended to cover "any business or vocation affecting the public welfare." This switch in terminology was deliberately made after thorough and careful thought.

From this consideration by the convention, some general conclusions may be drawn. "Affected with a public interest" is a narrower phrase than "affecting the public welfare," and was used in

313 U.S. 236, 246 (1941): "We are not concerned, however, with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which 'should be left where ... it was left by the Constitution—to the States and to Congress.'"

2 PROC. NEB. CONST. CONV. 1936 (1920). The earlier version of the labor-management proposal also referred to controversies "... in which the public welfare is affected." See Proposal No. 329, Id. at 1318. But the difference in wording was apparently not intentional. See Statements of Mr. Bigelow and Mr. Epperson, Id. at 1971-72: "Mr. Bigelow: ... Why the difference in the form of phraseology? Mr. Epperson: In answer to that question, Mr. Chairman, I would say it was not the intention, as I understand the subcommittee, to make any difference; it was perhaps inadvertent in using the different phraseology. There was no intention on the part of the Committee to make any difference in the powers of the Commission of the two subjects it proposed to handle." Cf. Mr. Ferneau, Id. at 1978-79.

Proposal of Mr. TePoel, Id. at 1959-60. The phrase "business or vocation affected with a public interest" had been proposed in an earlier suggested amendment but was not discussed then. See Proposal of Mr. Peterson, Id. at 1695.

Statement of Mr. Rankin, Id. at 1984.

Amendment of Mr. Heasty, Id. at 1984.

Statements of Mr. Peterson, Id. at 1959: "... by that phrase 'business affected with the public interest' you will have eliminated the former question and you will have eliminated the large scope of human endeavor,
the labor-management relations provisions for that reason. Affected with a public interest is a changing and expanding term as public interests and demands change.

Concerning the critical question of how a business affected with a public interest can be distinguished from one not affected with a public interest, the constitutional debates were woefully inconclusive. The problem was not with the lack of a definition, but with the fact that there were many attempts to define the phrase, each speaker having his own version.

From the debates, it would appear that the determination of whether or not a business or vocation is affected with a public interest under this section was intended to be made almost exclusively on the basis of the product involved and of the public interest in that product. Much of the debates concerned whether specific businesses were affected with a public interest or with the public welfare, and confined the regulations to a specific field. Mr. TePoel, Id. at 1960; Mr. Rankin, Id. at 1984; Mr. Heasty, Id. at 1985: "It must be plain to every member of the Convention that the public welfare means something more than business affected with the public interests. . . ."

Statements of Mr. TePoel, Id. at 1960, 1964 (proposer of the original amendment): "It was my thought that the term 'public welfare' was too comprehensive, and perhaps not susceptible of sufficient definition." Mr. Peterson, Id. at 1959; and Mr. Heasty, Id. at 1985 (proposer of the final amendment): "There is, in my view, a broad distinction between those two expressions, and I have therefore sought to observe that distinction in the preparation of this substitute." Similarly, the phrase "affecting the public welfare" was used in the trade regulation provision because it was broader. Statement of Mr. Rankin, Id. at 1984: "... substituting this language 'affecting the public welfare' so broadening the scope in there with what has been the trade commission idea and still leaving it limited in the other part of the proposal."

See, e.g., Statements of Mr. TePoel, Id. at 1962: "It is an elastic rule of law under which various activities have, from time to time, broadened to meet the changed condition of society."; Mr. Peterson, Id. at 1974: "That field is a growing one of necessity as new industrial conditions arise and that field must, of necessity, expand." Also see Peterson, Industrial Courts, 3 NEB L. BULL. 487, 494 (1925): "This phrase was selected by the Constitutional Convention because it has been judicially defined through several centuries, but, while judicially defined, differs from an attempt at enumeration in that it permits an extension of the field under changing conditions." This was stated to be a basis for objection to the bill by the opponents. Statement of Mr. Bigelow, 2 PROC. NEB. CONST. CONV. 1995 (1920): "It is conceded, therefore, that the definition of what businesses are affected with the public interests are matters of consideration by the courts, and the courts are changeable on the proposition and they are constantly widening the scope. They are constantly revising that definition to what they conceive to be new problems and new conditions. . . ."
or were within the phrase, "the production and distribution of commodities essential to the public welfare," which was included in some of the preliminary versions of the proposal. There was general agreement that the so-called public utilities and enterprises then subject to a public franchise or to control by a public regulatory body would be covered. But an amendment which would have limited the commission's jurisdiction to interruptions in public service or in the operation of public utilities or in the production and distribution of commodities essential to the public health and safety was not adopted.

There also seemed to be agreement that public interest would include that class encompassed by the early common law use of that phrase. This would involve persons purportedly devoting themselves or their property to public use, such as policemen and firemen, grist mill operators, and hotel keepers and restauranteurs.

Beyond this, there was much discussion, but little agreement. In the doubtful area were a number of businesses not originally affected with a public interest but then considered to be affected with a public interest because of changed circumstances. Specific businesses were mentioned in the convention debates as potentially falling within this class, including stockyards and packing houses, blacksmiths, milk distributors, retail merchants.

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81 See 2 PROC. NEB. CONST. CONV. 1318, 1936 (1920).
82 Statements of Mr. Peterson, Id. at 1564, 1973; Mr. TePoel, Id. at 1960; Mr. Heasty, Id. at 1985. Public franchise or subjection to control by a regulatory agency was apparently intended to mean regulation for economic purposes only. There is no indication that the phrase was intended to include the many businesses subject to licensing or regulation under the State's general police power over matters of public health, safety, morals or general welfare. Franchise apparently included a power of the State to require the business to serve all persons.
83 Proposals of Mr. Sears, Id. at 1561, 1692.
84 See Statements of Mr. TePoel, Id. at 1962; Mr. Peterson, Id. at 1563-64, 1974. No objection was made to this position.
85 For excellent surveys of the historical and analytical development of the doctrine, see Hamilton, Affectation With Public Interest, 39 YALE L. J. 1089 (1930); McAlister, Lord Hale and Business Affected With A Public Interest, 43 HARV. L. REV. 759 (1930).
86 Statements of Mr. Sears, 2 PROC. NEB. CONST. CONV. 1563 (1920) (if the controversy became so severe as to tie up all the packing houses in Lincoln, the state could intervene); Mr. TePoel, Id. at 1965, 1969; Mr. Peterson, Id. at 1974; Mr. Howard, Id. at 1562. Note that although the Kansas act providing for compulsory arbitration was held unconstitutional as applied to packing houses, the Supreme Court later (but before the affected with a public interest concept had been discarded by the
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generally, and farmers. Cited as examples falling outside of the labor-management controversy provision were disputes between a farmer and his hired hands, a contractor and his laborer working on a house for a private individual, and a doctor and his nurse.

The convention was advised that the Nebraska Supreme Court upheld the federal Packers and Stockyards Act permitting the Secretary of Agriculture to fix a tariff of maximum charges by Commissionmen at the Omaha stockyards. See Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 439 (1930) (distinguishing Ribnik v. McBride, 277 U.S. 350 (1928)): "The question upon which this court divided in those cases was whether the services there sought to be regulated were then affected with a public interest. Whether a business is of that class depends, not upon the amount of capital it employs, but upon the character of the service which those who are conducting it engage to render." The Court also distinguished other cases on the basis that, "There is here no attempt to fix anyone's wages or to limit anyone's net income."

See Statements of Mr. Bryant and Mr. Epperson, 2 PROC. NEB. CONST. CONV. 1938 (1920): "Mr. Bryant: Would this include a blacksmith shop that might affect the public welfare? Mr. Epperson: If a blacksmith was performing work which affected the public interest it would and should."

See Statements of Mr. TePoel, Id. at 1965-66; Mr. Donohoe, Id. at 1560; Mr. Peterson, Id. at 1564-65.

See Statements of Mr. TePoel, Id. at 1966-67; Mr. Alder and Mr. Heasty, Id. at 1986 (discussing the phrase "business affecting the public welfare"): "Mr. Alder: . . . Is that broad enough to include the retail store keeper? Mr. Heasty: I think so."

See Statements of Mr. Evans and Mr. Stewart, Id. at 1942-43; Mr. Taylor, Id. at 1959; Mr. TePoel, Id. at 1960; Mr. Bigelow, Id. at 1996: "There is danger there and ground for the fear that some of the gentlemen expressed on the floor this morning and yesterday, that this would affect the farmer, and it seems to me to be very well founded." Other categories discussed included lawyers, bankers, insurance companies, producers and distributors of polished diamonds, food and clothing, associated press dispatchers, organizations furnishing market quotations and coal mines.

See Statements of Mr. TePoel, Id. at 1960; Mr. Pitzer, Id. at 1557: " . . . not a controversy arising on my farm or in my law office, but a controversy in which the public welfare is affected"; Mr. Epperson, Id. at 1941: "If, however, all of the farm hands in the state form a Union, and you cannot hire any farm hands, your entire problem might then come to a point where the public would have an interest in the Union, and so would the individual."

Statements of Mr. Sears, Id. at 1562; Mr. TePoel, Id. at 1960.

Statement of Mr. TePoel, Id. at 1960. But why isn't this patently a vocation affected with a public interest? The power of the state to license only those qualified by education and good moral character to practice medicine has long been upheld. Gee Wo v. State, 36 Neb. 241, 54 N.W. 513 (1893). But this aspect of licensing was not apparently what the convention had in mind as a public "franchise" which branded a business or vocation affected with a public interest. See note 82 supra.
had never defined business affected with a public interest.\textsuperscript{94} For guidance, the attention of the convention was directed at the precise time the phrase "public welfare" was being changed to "public interest" in the labor-management provision,\textsuperscript{93} to the famous decision in \textit{Munn v. Illinois}\textsuperscript{96} which had upheld state regulation of storage charges by public warehouses. The proposer of the final amendment to this language in Article XV, Section 9, relied upon a definition in Bouvier's Law Dictionary.\textsuperscript{97} The convention was generally

\textsuperscript{94}Statement of Mr. TePoel, 2 PROC. NEB. CONST. CONV. 1961 (1920). This appears to have been correct. The court had recently invalidated legislation regulating the sale of anti-hog cholera serum or virus, stating that an individual "... has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit, and, as an incident to this, the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, and to inherit, purchase, lease, sell and convey property of all kinds. The enjoyment or deprivation of these rights and privileges constitutes the essential difference between liberty and oppression." Hall \textit{v. State}, 100 Neb. 84, 89-90, 158 N.W. 362, 364 (1916). The court cited with approval an Illinois case invalidating a requirement of regular payment of wages because "... the employer and employee had a right to make lawful contracts regarding the time of payment."

\textsuperscript{96}94 U.S. 113, 125-26 (1876): "... it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, inn-keepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all of these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. ... Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be \textit{juris privati} only.' ... Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

\textsuperscript{97}Statement of Mr. Heasty, 2 PROC. NEB. CONST. CONV. 1985 (1920): "'Business affected with a public interest: 1. Where the business is one, the following of which is not of right but is permitted by the state as a privilege or franchise. 2. Where the state on public grounds renders to the business a special assistance by taxation or otherwise. 3. Where for the accommodation of a business special use is allowed to be made of public property or of a public easement. 4. Where the special privileges
assured that the phrase constituted a legal definition to which at least the United States Supreme Court could give (or had given) a precise meaning. 98

Although the convention considered that judicial decision was the means by which the public interest concept would be given definiteness and would be kept current with the times, no such body of law has ever developed. There has been judicial agreement that businesses which are in the nature of public utilities or subject to public franchise are affected with a public interest. 99 The same is true of those exceptional occupations which have historically always been regarded as clothed with a public interest, such as innkeepers and grist mills. 100 With respect to the businesses which fall into the third category of businesses—those not affected with a public interest at their inception, but which have become affected with a

are granted in consideration of some special return to be made to the public.'" He also read from a law dictionary quoting Cooley's work on Constitutional Limitations, "'PUBLIC INTEREST. If by public permission one is making use of public property and he chances to be the only one with whom the public can deal with respect to the use of that property, his business is affected with a public interest which requires him to deal with the public on reasonable terms.'" His own version was stated, "In other words business that is affected by a public interest is business for which the public as a whole, which society because of some person or corporation and special right, privilege or franchise, and in consideration of the granting of that right of franchise the public interest is affected and the conduct of such corporation may be regulated by law." 98

Statements of Mr. TePoel, Id. at 1964: "The courts have said what business is affected with the public interest. . . . That term is susceptible of the precise definition. . . . The phrase 'affected with a public interest' is a technical phrase with a precise and technical meaning.'"; Mr. Peterson, Id. at 1974 (criticising the phrase "distribution of commodities essential to the public welfare" because the phrase gets away from accepted meaning): "The United States Supreme Court always stands as a bulwark and it has, time and time again, drawn the line, and it will not reach into the ordinary vocations, and should not, but if we want to stay on the safe ground let us stay by the ancient landmarks and use the phrase that has a well defined meaning.'"; Mr. Abbott, Id. at 1978-79: "If I understand it correctly, the amendment of Mr. TePoel changes the proposal of the committee and makes it apply to business affected with a public interest. The question of what is a public interest is well defined by the courts as Mr. TePoel said. We are not branching out into a new field, when we use those terms because they are well defined. . . . As I said, the courts have defined what a public interest. . . . [T]his is a well defined term." 99

See, e.g., Wolff Packing Co. v. Industrial Court, 262 U.S. 522, 535 (1923); Boomer v. Olson, 143 Neb. 579, 586-87, 10 N.W.2d 507, 511 (1943).

See Munn v. Illinois, 94 U.S. 113, 125-26 (1876); Wolff Packing Co. v. Industrial Court, 262 U.S. 522, 535 (1923). No Nebraska case has relied upon this classification, but recognition of auctioneers might rest on this basis. See note 67 supra.
public interest because of changed conditions—there has been agreement neither as to the specific businesses falling into the classification nor as to the yardstick by which they would be determined.

The whole concept of business affected with a public interest was abandoned on the federal level more than twenty-five years ago. It never reached maturity there, and was probably abandoned in considerable part because it was neither meaningful nor workable.

Nebraska case law has never been required to develop a concept of business affected with a public interest as a prerequisite for economic regulation under the state constitution. This language in Article XV, Section 9, has never been judicially tested. We can only speculate whether Nebraska would employ the extremely strict view that the federal courts used in the prime of the public interest doctrine, and which was applied in the Kansas Industrial Court case, or whether it would now adopt a more expansive application. Perhaps the recent preoccupation of the Court with the public interest in the legislation rather than in the business involved in police power cases indicates that a more liberal test would now be used by the Court in construing the language of Article XV, Section 9. Also, in the police power cases, the Court has stated that the exercise of the power must be measured by social and economic conditions existing at the time the power is exercised, rather than the time the Constitution was approved.101

The Court could reason that by employing a labor force the business becomes affected with a public interest insofar as its labor-management relations problems are concerned and would, therefore, be subject to regulation under a state labor-management relations act. This approach would find support in analogy to the decisions of the United States Supreme Court involving the Na-

101 Nelsen v. Tilley, 137 Neb. 327, 331, 289 N.W. 388, 391-92 (1939): "Liberty of contract and the right to use one's property as one wills are fundamental constitutional guarantees, but the degree of such guarantees must be determined in the light of social and economic conditions existing at the time the guaranty is proposed to be exercised, rather than at the time the Constitution was approved, otherwise legislative power becomes static and helpless to regulate and adjust to new conditions constantly arising. . . . The balance between due process and the police power is therefore more or less unstable, as it must necessarily keep pace with the economic and social orders. As the exercise of the police power increases to meet new conditions, the protection of the due process clauses must necessarily recede to a corresponding degree. A proper consideration of the act requires us, therefore, to construe it in the light of the later decisions, rather than the earlier ones which were controlled by circumstances and conditions playing no part in the case now before us."
tional Labor Relations Act passed under the federal interstate commerce power. It might prevail with respect to Nebraska legislative action taken under the police powers. But Article XV, Section 9, requires as a prerequisite to legislation that the businesses involved be affected with a public interest. Granted that on its face this phrase does not limit the classification of business solely to those in whose economic product the public has a substantial interest, the public interest requirement does seem to be tied to "business or vocation" in such a way that some showing of special privilege or special concern with that enterprise is necessary to brand it as a "business or vocation affected with a public interest."

For purposes of their own regulation, labor unions have been termed affected with a public interest and a closed shop contract ban upheld. But it does not follow that since unions are affected with a public interest, the related businesses are automatically subject to regulation.

By its requirement of business or vocation affected with a public interest, Article XV, Section 9, has implanted in the Constitution a prerequisite for legislative action which is essentially impossible to define. The operation of the section is dependent upon an interpretation of this phrase. To this extent, Article XV, Section 9, can be given practical meaning only by constitutional amendment, or by the tedious and perilous process of trial and error from whatever number of judicial decisions is necessary to build a workable definition of the phrase.

E. Who makes the determination whether or not a business or vocation is "affected with a public interest?" The determination of whether a business is affected with a public interest or whether the enactment of legislation is in the public interest is a legislative question with which the courts will not ordinarily interfere. Yet, in

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102 See National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41-43 (1937). But the NLRB has not pressed its jurisdiction to the fullest. On a factual, rather than legal, analysis, the examples of building maintenance employees under the Fair Labor Standards Act and individual farmers under the Agricultural Adjustment Acts might afford closer analogies. See, e.g., Kirschbaum Co. v. Walling, 316 U.S. 517 (1942); Wickard v. Filburn, 317 U.S. 111 (1942).


104 See Blauvelt v. Beck, 162 Neb. 576, 587, 76 N.W.2d 738, 746 (1956); McGraw Electric Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 720-21, 68 N.W.2d 608, 618 (1955); Boomer v. Olson, 143 Neb. 579, 584, 10 N.W.2d 507, 510 (1943); Nelsen v. Tilley, 137 Neb. 327, 332, 289 N.W. 388, 392 (1939). But in each of these cases, the Court invalidated all or part of the statutes involved.
proposing Article XV, Section 9, the Constitutional Convention had in mind that the issue of whether a business was affected with a public interest was a judicial matter to be decided by the courts.\textsuperscript{105} This was especially true with respect to those businesses which originally would not have been considered as affected with a public interest, but which under changed circumstances would be brought within the class. The phrase "public interest" was used rather than "public welfare" both because of a desire to limit the range for legislative action and because of the judicial gloss which the public interest concept had been given.

Unanswered is the question of the criteria upon which either legislature or court is to make the determination of whether a business or vocation is affected with a public interest. Equally unanswered is the method by which the court is to approach the subject. Apparently the Constitutional Convention had in mind that a court would simply take judicial notice of whether or not a business was affected with a public interest.\textsuperscript{106}

\textsuperscript{105}Statements of Mr. TePoel, 2 PROC. NEB. CONST. CONV. 1962 (1920): "... I would say that the Legislature is not and never has been the body which has the right to say whether or not the particular business is affected with a public interest. That is a judicial question and is determined by the court."; Mr. Bigelow, \textit{Id.} at 1995: "It is stated, and I think correctly, a legislative declaration that a certain business is affected with a public interest, is not necessary conclusive upon the courts. The courts may examine those declarations and if they determine it is not affected with a public interest, they may define and narrow its application according to its conception of what the public interest is limited to." See notes 96–98 \textit{supra}.

\textsuperscript{106}This is what the past cases had done. But it is not clear whether or not this issue can be raised before the Industrial Commission. Suppose a statute says that candymaking is a business affected with a public interest over which the Industrial Commission shall have jurisdiction. Can the Industrial Commission rule on the constitutionality of the statute on the issue of whether candymaking is a business affected with a public interest, or would the party have to raise the issue by suit in a district court? The Constitutional Convention did not conceive of the Industrial Commission as a full-fledged court, even though it was given judicial powers. Perhaps the judicial power to determine controversies between employers and employees would include a power of the Industrial Commission to decide its own jurisdiction, including a ruling on the constitutionality of a statute conferring such jurisdiction. But see 3 DAVIS, ADMINISTRATIVE LAW TREATISE 74 (1958): "A fundamental distinction must be recognized between constitutional applicability of legislation to particular facts and constitutionality of the legislation. ... We commit to administrative agencies the power to determine constitutional applicability, but we do not commit to administrative agencies the power to determine constitutionality of legislation. Only the courts have authority to take action which runs counter to the expressed will of the legislative body."
Because of this history, it would not be surprising for a court to make an independent determination of whether legislation passed under Article XV, Section 9, relates to businesses or vocations affected with a public interest. There would still be a presumption of legislative validity under the section. But there is ample authority in the history of the section for a court to do more than simply approve any legislative determination of public interest which appears to be reasonable.

F. Does this section permit a delegation of legislative, judicial and executive powers to the Industrial Commission, as an exception to Article II, Section 1, of the Nebraska Constitution? Article II, Section 1, of the Nebraska Constitution provides that:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

One of the fundamental purposes behind Article XV, Section 9, if not the chief reason that the specific language appears in the Constitution rather than being left to the legislature's general police power and power to create inferior courts, was the purpose of permitting legislative, judicial and executive powers to be combined in a single Industrial Commission. Such a combination of powers was felt to be necessary to an effective resolution of labor-management relations in Nebraska by the framers of the proposal. This proposition was fought for throughout a bitter floor fight on the proposal. To the extent that it is still desirable to combine the functions of more than one department of government in a single commission, Article XV, Section 9, is ideally suited to the needs of labor-management relations legislation.

The report of the joint committee made it clear that "... a tribunal in the form of a commission with combined administrative, legislative and judicial powers, is the proper governmental agency to be entrusted with the powers and duties to be granted, and prescribed. . . ." A co-chairman of the joint committee explained, "We thought that it was necessary in order for this commission to perform the duties required of it that this commission should have administrative, judicial and legislative power, so it was the thought of the Committee that in presenting this proposal that we should merely make provision so that the power would be delegated and


then let the legislature work out the details by future acts." There were repeated references to this aspect of the proposal throughout the debates.

Objections to the proposal were made on the basis that the legislature already could act concerning labor-management problems under the police power and had authority to create inferior courts. In reply, it was stated that the powers of a mere court are limited, and that this proposal would permit a combination of administrative, legislative and judicial powers. An amendment to

\[\text{Statement of Mr. Epperson, Id. at 1937.}\]

\[\text{Statements of Mr. Peterson, Id. at 1975: "... you cannot, by legislative act, establish a tribunal with these joint powers. That is the reason for the proposal.";}\]

\[\text{Mr. Ferneau, Id. at 1977: "That tribunal, whatever you may call it, in order to be effective, in my opinion, must necessarily have judicial, administrative or executive and legislative powers combined in one tribunal in order to be an effective tribunal. Under the Judicial Department proposal they can create courts inferior to the Supreme Court, but they could only have judicial powers. The legislature of course could delegate to a commission legislative powers, but it cannot delegate to them all these powers unless we give the legislature that authority.";}\]

\[\text{Mr. Pitzer, Id. at 1998; Mr. Abbott, Id. at 2001; Mr. Bryant, Id. at 1956. For earlier statements to the same effect, see Statements of Mr. Pitzer, Id. at 1556; Mr. Donohoe, Id. at 1559. See also note 112 infra. There were objections to this aspect of the proposal. See Statements of Mr. Bryant, Id. at 1556; Mr. Votava, Id. at 1981: "That is the fundamental question at stake in this proposal, and I am opposed to it and I do not think that the Convention will be in favor of the creation of a commission with such powers. Insofar as employers and employees and capital are concerned, this commission then would become the entire government; they would make the rules; they would determine whether or not those rules were violated, and they will enforce their judgments. ... I do not think we ought to give the legislature the power to go that far."}\]

\[\text{Statements of Mr. Kunz, Id. at 1549-50, 1561; Mr. Norman, Id. at 1551; Mr. Lute, Id. at 1940.}\]

\[\text{Statements of Mr. Donohoe, Id. at 1559: "In answer to the gentleman who suggests that the judicial department committee in its report has made a condition here that will cover this, I say it cannot, because that simply provides for the court. We must have a commission that has quasi-legislative and quasi-executive power....";}\]

\[\text{Mr. Epperson, Id. at 1940: "It was also the opinion of the Committee that these men, in order to do the things it was desired for them to do must have judicial, legislative and executive or administrative powers. The courts have held that the Legislature could not delegate judicial power to a Commission, and for that reason some provision of this character is necessary, in the estimation of the Committee, to perform the duties required of them.";}\]

\[\text{Mr. Flansburg, Id. at 1949: "While an Industrial Court or a Court of Industrial Relations could be created under the judiciary act, that court would have only judicial powers; but this board, which this Miscellaneous Committee has reported in favor of, a commission, if you please, will be endowed with}\]
create only a court of industrial relations instead of a commission was unsuccessful.\textsuperscript{113}

It was called to the attention of the convention that the Kansas legislation which had inspired the Nebraska proposal had not required a constitutional provision.\textsuperscript{114} Again, the answer was made that in Nebraska it was necessary to have constitutional authority for the desired delegation of powers.\textsuperscript{115} Article II, Section 1, was specifically cited to the convention during these debates as a reason why Article XV, Section 9, was necessary.\textsuperscript{116} Later decisions corroborate the fear that an attempt to delegate nonjudicial duties to a judicial body, as well as delegations of legislative powers without thorough standards to an administrative agency, thought to be necessary for effective labor-management relations legislation by the convention, will be invalidated under Article II, Section 1.\textsuperscript{117}

But the legislature may act under Article XV, Section 9, to delegate legislative and judicial powers to the Industrial Commission.

G. What is meant by "... investigation, submission and determina-

\textsuperscript{113}Proposal of Mr. Radke, Id. at 1552-53, 1961.

\textsuperscript{114}Statements of Mr. Lute, Id. at 1940; Mr. Kunz, Id. at 1561; Governor Allen of Kansas, Id. at 1637.

\textsuperscript{115}Statements of Mr. Abbott, Id. at 2001: "With all due respect to Governor Allen, of Kansas, if his Industrial Court in that state has no foundation except a provision similar to that in our Constitution, it will fall when attacked in the proper tribunal in the proper way, so that if we are to have this kind of tribunal we must provide for it." This statement followed the reading of Article II, Section 1.; Mr. Epperson, Id. at 1940 (stating the Nebraska committee's opinion that the Kansas legislation was unconstitutional on this ground).

\textsuperscript{116}Statement of Mr. Abbott, Id. at 2001: "In the first place, gentlemen, if you want to do anything of this kind it must be done in the Constitution. It cannot be left to the Legislature. Section I of Article II of our Constitution says: (reads section)."

tion of controversies between employers and employees . . ."? The phrase “... investigation, submission and determination of controversies between employers and employees . . .” remained un-amended, \(^{118}\) and comparatively unconsidered, during the convention debates on the proposal. The Industrial Commission, of course, can have only those powers which are given to it by legislative enactment. What this language boils down to is that the Industrial Commission can be authorized by the legislature to handle the “entire treatment of the controversy”\(^ {119}\) down to the point of a final determination, but without enforcement powers beyond the final determination.\(^ {120}\)

The jurisdiction of the Industrial Commission may be made mandatory upon the parties. Proposals to give the Commission jurisdiction only upon application of one or both of the parties failed to pass,\(^ {121}\) and so did a suggested amendment that the determination of the Commission be advisory only, absent such voluntary submission.\(^ {122}\)

Both the proponent and opponents of the bill recognized that the proposal would involve a power of compulsory arbitration of the employer-employee dispute.\(^ {123}\) The legislature has invoked this power of compulsory arbitration in the case of disputes in public utilities and governmental services in a proprietary capacity.\(^ {124}\) But

\(^{118}\)2 PROC. NEB. CONST. CONV. 1318, 1936 (1920).

\(^{119}\)Statement of Mr. Pitzer, Id. at 2455.

\(^{120}\)See notes 137-39 infra.

\(^ {121}\)Proposals of Mr. Sears, 2 PROC. NEB. CONST. CONV. 1561, 1692 (1920): “... upon application by either employer or employee, or by the state when necessary to protect the public against interruption in public service or in the operation of public utilities or in the production and distribution of commodities essential to the public safety and health . . .”; “... upon joint application by employer and employee . . .”; neither proposal came to a vote. See Proposals Nos. 220 and 237, note 33 supra.

\(^ {122}\)See Proposal of Mr. Bigelow, 2 PROC. NEB. CONST. CONV. 1547-48, 1992 (1920): “... to endeavor by investigation and recommendation to promote conditions favorable to a settlement. . . .”

\(^ {123}\)See Statements by Mr. Flansburg, Id. at 1947-49; Mr. Bigelow, Id. at 1546-47, 2460; Mr. Evans, Id. at 1942; Mr. Beeler, Id. at 2001. See also Peterson, Industrial Courts, 3 NEB. L. BULL. 487, 499 (1925).

\(^ {124}\)NEB. REV. STAT. § 48-810 (Reissue 1960). See NEB. REV. STAT. § 48-802 (Reissue 1960). Note that the provisions of this act cannot constitutionally be applied where the National Labor Relations Board has jurisdiction. Amalgamated Ass’n of Street Ry. Employees v. Wisconsin Employment Relations Board, 340 U.S. 383 (1951). Article XV, Section 9, has not been implemented except in this limited situation. In a hurried process to cope with a pending telephone strike, the limited bill was enacted at the request of the governor, and a bill providing for a fuller
there is no language in the Constitution, and no constitutional history, limiting this extreme power to just those situations. The

125 convention\textsuperscript{125} and the legislature\textsuperscript{126} have also regarded the section as including a power to prevent strikes or lockouts during such a settlement. In the case of trade regulation, it is probable that the convention had had in mind that the Commission could engage in price fixing activities as one means of preventing unfair business practices.\textsuperscript{127}

It was generally assumed in the debates that the Industrial Commission could be given any lesser sort of power relating to the investigation, submission and determination of controversies between employers and employees.\textsuperscript{128} From this, it would seem clear that the Commission could be given the powers to handle representation matters and to decide unfair labor practice issues in a

\textsuperscript{125}See Statements of Mr. Pitzer, 2 PROC. NEB. CONST. CONV. 1556, 2456 (1920); Mr. Ferneau, \textit{Id.} at 1978; Mr. Evans, \textit{Id.} at 2004; Mr. Ream, \textit{Id.} at 2457-58; Mr. Donohoe, \textit{Id.} at 1560. There was a proposal to limit this power. See Statements of Mr. Sears, \textit{Id.} at 1554-55, 1561, 1692.

\textsuperscript{126}NEB. REV. STAT. § 48-821 (Reissue 1960) (making it a felony to aid, conspire for, or participate in, in any manner, a lockout, strike, slowdown, or other work stoppage which interferes with governmental service or any governmental service in a proprietary capacity or the service of any public utility). An employee cannot be required to work without his consent, or denied the right to quit or withdraw from his place of employment unless done in concert or by agreement with others. NEB. REV. STAT. § 48-822 (Reissue 1960). But the view was expressed at the Constitutional Convention that persons working in these public utilities could be denied altogether their right to quit without notice, whether done individually or in concert. See Statement of Mr. Peterson, 2 PROC. NEB. CONST. CONV. 1564 (1920).

\textsuperscript{127} Cf. Statements of Mr. TePoel, 2 PROC. NEB. CONST. CONV. 1966 (1920); Mr. Peterson, \textit{Id.} at 1976-77.

\textsuperscript{128}See, e.g., Statement of Mr. Pitzer, \textit{Id.} at 2455: "... my view is that when you say in lines 1 and 2, that laws may be enacted providing for the investigation, submission and determination of such controversies, provision is made for the entire treatment of a controversy and the findings of the commission, when you provide in lines 5 and 6 and 7, for an industrial commission, for the purpose of administering such laws, you thereby give that commission such judicial power as is needed to that extent." See NEB. REV. STAT. § 48-123 (Reissue 1960).
labor-management relations bill. Border-line powers which the Commission might be given, but upon which the convention history is ambiguous, would involve the power to promulgate rules concerning general wage scales, hours of work, and working conditions. The convention consensus that the extreme powers could include compulsory arbitration of controversies, coupled with the dominant intent of the convention to combine legislative, executive and judicial functions in an Industrial Commission, seems persuasive in favor of permitting these powers as a matter of constitutional interpretation.

There is no contemporaneous history of the intended meaning of the terms “controversies,” “employers,” or “employees.” Consistent with the scope which has been attributed to the phrase “investigation, submission and determination,” the word “controversies” in this section should be read quite broadly so as not to require an existing, or even threatened, dispute between specific employers and employees. This, too, would seem to be in keeping with the underlying intent of the convention, and with the description of “controversies” in the plural and “employers” and “employees” as classes rather than as individual participants in a specific dispute.

The terms “employers” and “employees” must have been em-

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129 But the bills introduced in recent legislative sessions have not utilized the Industrial Commission. See notes 44 and 45 supra. The reason for this may be the limitation to “affected with a public interest.”

130 See Statements of Governor Allen of Kansas, 2 PROC. NEB. CONST. CONV. 1627 (1920): The Kansas Industrial Court was given combined powers so that it could not only adjudicate, but “... go out and adjust wage conditions, make wage conditions right, and fix minimum wage scales. That goes further than mere judicial power. It has the power to create conditions for the future.”; Mr. Flensburg, Id. at 1949 (power would also include authority to require safety appliances for machinery and health protection); Mr. TePoel, Id. at 1552. This would also appear to involve a power to make independent investigations of specific disputes or industrial conditions generally, either upon petition or its own initiative. The present Court of Industrial Relations may make temporary findings and issue temporary orders on its own motion. See note 142 infra. But a petition must be filed by “Any employer, employee, or labor organization, or the Attorney General of Nebraska on his own initiative or by order of the Governor, when any industrial dispute exists between the parties...” NEB. REV. STAT. § 48-811 (Reissue 1960).

131 In a later portion of this article, it is recognized that the powers granted on the face of Article XV, Section 9, may, themselves, be invalidated on other constitutional grounds. To the extent that might be applicable to the powers suggested here, the familiar rule of interpretation so as to preserve constitutionality should be applied.
ployed in a traditional master-servant context. There was no indication that this part of Article XV, Section 9, was meant to apply to bona fide independent contractor situations. In drawing the precarious line between employment and independent contract, the legislature and court would be justified, in my opinion, in utilizing either the same basic criteria as has been employed in other Nebraska social legislation such as workmen's compensation or unemployment compensation,\(^ {132}\) or the more liberal sort of "economic dependence" test applied under some comparable federal legislation.\(^ {133}\)

H. *Can the Industrial Commission be given "enforcement" powers?*

From the history of Article XV, Section 9, it appears that an Industrial Commission can have enforcement powers up to the point of its final determination, but that the final determination, once made by the Commission, can be enforced only in the courts. At a time when the constitutional proposal appeared to have passed its major hurdles, had been passed on second reading and had been reported back by the Committee on Arrangement and Phraseology, the last sentence stated, "An Industrial Commission may be created for the purpose of administering and enforcing such laws . . . ."\(^ {134}\) An amendment was adopted deleting the words "and enforcing."\(^ {135}\) The proposer explained that the purpose for this amendment was so that "the power of enforcement should not be in the commission. That is to say the power of enforcement of the laws which the commission is to administer ought properly be left to the law courts."\(^ {136}\)

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\(^{133}\)See, e.g., National Labor Relations Board v. Hearst Publications, 322 U.S. 111 (1944) (newsboys covered by National Labor Relations Act); United States v. Silk, 331 U.S. 704 (1947) (coal unloaders, but not driver-owners or cross-country truckmen, covered by social security); Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947) (meat boners employees of slaughterhouse under Fair Labor Standards Act); Ringling Bros. v. Higgins, 189 F.2d 865 (2d Cir. 1951) (circus acts employees under Federal Unemployment Tax Act). The "applicator" cases have split under federal legislation. Other than the Fair Labor Standards Act, the federal legislation has been amended to state a common law test, but this has not produced a noticeable change in the lower federal court decisions and the Supreme Court has not yet ruled under the amendments.

\(^{134}\)2 PROC. NEB. CONST. CONV. 2453 (1920).

\(^{135}\)Id. at 1459 (by vote of 51 to 36).

\(^{136}\)Statements of Mr. Pitzer, Id. at 2454, 2481. He had previously raised the same objection. Id. at 1556, 1998.
He stated that by “administering such laws,” the Commission could enforce the laws up to the point of a determination, but it could not fix a penalty or apply any other process resulting upon a final determination.\textsuperscript{137} Up to the point of a final determination, the Commission would apparently have power to enforce its orders as a part of the general administration of such laws.\textsuperscript{138} The Commission could enter a final determination which carries a penalty, but it could not enforce that penalty.\textsuperscript{139} The reason for this division of administrative and enforcement powers was that the tribunal should not necessarily be composed of lawyers or of men versed in the law.\textsuperscript{140}

If this interpretation is correct, then the present Court of Industrial Relations is an example of the “administrative” powers of Article XV, Section 9, pushed virtually to their fullest extent,\textsuperscript{141} but

\textsuperscript{137}Id. at 2455, 2480-81: “Mr. Abbott: Is the following your interpretation of the word ‘administer,’ that it includes ‘the investigation, submission and determination of controversies up to the point of a final decision, and not beyond that?’ Mr. Pitzer: I have stated that that is my interpretation of it several times on this floor. Mr. Abbott: And if this Proposal No. 333 as now amended by the Convention is adopted, is it your understanding that that is the purpose of the proposal? Mr. Pitzer: To grant all of the powers necessary from the beginning of the investigation to the entering of the findings and making the determination. Mr. Abbott: But not the enforcing of the decision whatever it may be? Mr. Pitzer: No. Mr. Weaver: . . . Your understanding then is that the enforcement of any of the orders of this Commission shall be for the courts? Mr. Pitzer: Yes.”

\textsuperscript{138}Statement of Mr. Pitzer, Id. at 2481. See Report of Joint Committee of the Committees of Miscellaneous Subjects and Industrial Conditions, Id. at 1910-11: “It is our judgment that a tribunal in the form of a commission with combined administrative, legislative and judicial powers, is the proper governmental agency to be entrusted with the powers and duties to be granted, and prescribed, the judicial power to extend to making findings and orders, leaving measures of enforcement by penalties or summary process with the judicial department of the state government.”

\textsuperscript{139}Statement of Mr. Pitzer, Id. at 2457.

\textsuperscript{140}Statement of Mr. Pitzer, Id. at 2457. But the argument was also made that deletion of the words “and enforcing” would not deprive the Commission of enforcement powers if the word “administering” was left in. See Statements of Mr. Flansburg (proponent), Id. at 2458, and Mr. Bigelow (opponent), Id. at 2460. A further attempt was made to delete the phrase “of administering,” so that the sentence would have read, “An industrial court may be created for said purposes . . .,” but it was defeated. Id. at 2475-2479.

\textsuperscript{141}In addition to its present powers, the Court of Industrial Relations could probably be given authority to enforce its temporary orders. These temporary orders are now enforceable only in the district courts. See NEB. REV. STAT. § 48-819 (Reissue 1960). But cf. Statements of Mr. Peterson, 2 PROC. NEB. CONST. CONV. 2004, 2454 (1920), opposing deletion of the
stopping short of "enforcement." On its own initiative, the court may issue temporary findings and orders pending a final determination of the issues.\textsuperscript{142} It may also order that collective bargaining be commenced or resumed in public utilities.\textsuperscript{143} After a hearing, it may enter orders establishing or altering wages, hours or conditions of employment, and may modify such orders on its own motion or on an application by any of the parties affected upon a showing of a change in circumstances.\textsuperscript{144} Orders of the Court of Industrial Relations, whether temporary or final, are given the same force and effect as like orders of a Nebraska district court, but they are enforceable only in the district courts.\textsuperscript{145} Unlike the status of orders of the National Labor Relations Board on the federal level, however, failure to comply with a Court of Industrial Relations order may be punishable as contempt in an action in a district court.\textsuperscript{146} In the words of the Constitutional Convention, the Court of Industrial Relations acts to the point at which a final determination is made

word "enforcing" because this would require the Nebraska Commission, like the Kansas Industrial Court, to go into District Court to compel attendance of witnesses, testimony, the examination of records, or the production of evidence.

\textsuperscript{142}\textit{NEB. REV. STAT.} § 48-816 (Reissue 1960) "The court shall have power and authority upon its own initiative to make such temporary findings and orders as may be necessary to preserve and protect the status of the parties, property and public interest involved, pending final determination of the issues." The Court has power to compel attendance and testimony of witnesses and to subpoena books, records and correspondence. \textit{NEB. REV. STAT.} § 48-815 (Reissue 1960).

\textsuperscript{143}\textit{NEB. REV. STAT.} § 48-816 (Reissue 1960).

\textsuperscript{144}\textit{NEB. REV. STAT.} § 48-818 (Reissue 1960) (containing legislative standards for wage determinations).

\textsuperscript{145}\textit{NEB. REV. STAT.} § 48-819 (Reissue 1960).

\textsuperscript{146}\textit{NEB. REV. STAT.} § 48-819 (Reissue 1960): "Failure on the part of any person to obey any order, decree or judgment of the Court of Industrial Relations, either temporary or final, shall constitute a contempt of such tribunal in all cases where a similar failure to obey a similar order, decree or judgment of a district court would constitute a contempt of such tribunal, and upon application to the appropriate district court of the state shall be dealt with as would a similar contempt of the said district court." This appears to be the most debatable part of the enforcement powers of the present Court of Industrial Relations. Whether the entry of a final determination which is in the form of injunctive relief, punishable by contempt, is "determination" or "enforcement" is highly questionable. Arguably, the sort of relief which carries with it punishment by contempt for its violation constitutes "enforcement" and not mere administration. Cf. Statement of Mr. Pitzer, 2 \textit{PROC. NEB. CONST. CONV.} 1556 (1920): "... I believe it is the view of the members of the committee that an industrial court should probably not have the power of injunction..."
and a penalty is imposed, in the form of a contempt for refusal to abide by the determination (or appeal to the Supreme Court), but the district court must enforce all orders of the Court of Industrial Relations and punish for any contempt of an order of the Court of Industrial Relations.

I. What are the general constitutional limitations upon an exercise of the powers under Article XV, Section 9? The provisions of Article XV, Section 9, may themselves be subject to federal and state constitutional limitations which would prevent the section from being used to the fullest extent its terms would literally permit. In its broadest sense, this section would allow compulsory arbitration of labor disputes and the power to limit the rights to picket, strike, slowdown, lockout, quit work, discharge, or engage in other activities during the determination of the controversy.

Opponents of the proposal at the Constitutional Convention expressed the fear that the section would abrogate other rights granted by the Nebraska Constitution, especially the Bill of Rights. The proponents denied this assertion. They reasoned that no constitutional provision overrides the statement of individual rights, but that individual rights must accommodate themselves in certain instances so as not to be exercised in a manner inimical to the general public interest; the individual rights are not abrogated, but are merely subordinated to a degree in the interests of the public cause. A specific amendment to add a proviso that, "This section shall not be construed to abrogate rights guaranteed elsewhere in this Constitution," was defeated.

The federal constitutional guarantees are, of course, controlling, even concerning a state constitutional provision. But it is submitted that the essential question of the accommodation which must be made with respect to what may be competing constitutional rights is basically the same whether the federal constitutional "rights" or state constitutional "rights" are involved.

How the United States Supreme Court and the Nebraska Supreme Court might approach the problem and resolve the underlying issues of accommodation or balancing of rights might be markedly different, however. The United States Supreme Court has

147 NEB. REV. STAT. § 48-812 (Reissue 1960).
148 See Statements of Mr. Bigelow, 2 PROC. NEB. CONST. CONV. 1546, 1549, 2460, 2473-74, 2721 (1920).
149 See Statements of Mr. Pitzer, Id. at 1557, 2474.
150 Amendment of Mr. Bigelow, Id. at 2459, 2373, 2475 (by a vote of 63 to 22). The proposal itself carried by votes of 54 to 28 on first reading 63 to 23 on second reading; and 71 to 21 on final reading. Id. at 2004, 2161, 2721.
shown a considerably greater inclination to permit a legislative determination of the balance. The Nebraska Court might well utilize the doctrine of substantive due process of law, now abandoned on the federal level. A Nebraska opinion would probably on its face give a greater weight to so-called individual and property rights and less to the alleged public rights than would an opinion on the same legislation by the United States Supreme Court. To the extent the litigation involved a balancing of an asserted personal right with an asserted property right, the Nebraska Court might be more liberal in favor of the property right than the United States Supreme Court.

Neither Court has ruled definitely concerning compulsory arbitration of labor disputes and the incidental aspects of limitations on economic pressures in the meantime. It is likely that either Court would uphold an Act such as the Nebraska Court of Industrial Relations statute calling for compulsory arbitration of public utility labor disputes and labor disputes involving a governmental function in a proprietary capacity. The Kansas Industrial Court Act was held unconstitutional by the United States Supreme Court because of its compulsory arbitration aspect as applied to packing plants and coal


mines on the basis that these businesses were not charged with a public interest for the purpose of this regulation.\textsuperscript{153} Inferentially, these opinions would have permitted compulsory arbitration had the compulsory arbitration been limited to public utilities or governmental service in a proprietary capacity.\textsuperscript{154} Arguably, Nebraska has acquiesced in this aspect of the Kansas Industrial Court decisions.\textsuperscript{155}

Where the two Courts might split on this issue is illustrated by the employment agency fee regulation cases. In this litigation, the United States Supreme Court, reversing the Nebraska Supreme Court, overruled one of its own earlier decisions, again repudiated the business affected with a public interest test, and held the Nebraska employment agency fee statute constitutional.\textsuperscript{156} Upon re-litigation in the Nebraska Supreme Court, however, the Court upheld the power of the legislature to regulate employment agencies and upheld the entire method of the regulation, but struck down the maximum fee provision under the Nebraska Constitution on the basis that the legislative means was arbitrary, capricious and


\textsuperscript{154}See Wolff Packing Co. v. Industrial Court, 262 U.S. 522, 535-39 (1923); Wolff Packing Co. v. Industrial Court, 267 U.S. 552, 567 (1925): "Care was taken to point out that operating a railroad, keeping an inn, conducting an elevator and following a common calling are not all in the same class, and particularly to point out the distinctions between a quasi-public business conducted under a public grant imposing a correlative duty to operate, a business originally private which comes to be affected with a public interest through a change in \textit{pais}, and a business which not only was private in the beginning but remained such." See Simpson, \textit{Constitutional Limitations on Compulsory Arbitration}, 38 HARV. L. REV. 753, 775-76 (1925).

\textsuperscript{155}See Boomer v. Olson, 143 Neb. 579, 586-87, 10 N.W.2d 507, 511 (1943): "... except in a business in which the owner by devoting it to a public use, in effect, grants the public an interest in the use and subjects himself to public regulation to the extent of that interest. Included in the exception are railroads, bus lines, street car lines, and similar businesses in which the extent of the public interest is such as to require protection from duplication and competition, and a fixing of rates and charges as a matter growing out of and reciprocal thereto."

\textsuperscript{156}Olsen v. Nebraska, 313 U.S. 236 (1941), \textit{reversing} 138 Neb. 574, 293 N.W. 393 (1940). In the anti-closed shop amendment decision, the Nebraska Court quoted the language from this case in note 73 \textit{supra} that the Court is not concerned with the wisdom, need, or appropriateness of the legislation. See Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 149 Neb. 507, 511, 31 N.W.2d 477, 481 (1948).
unreasonable as applied to employment agencies.\textsuperscript{157} From this, it is possible to draw an inference that the United States Supreme Court would uphold a general scheme of compulsory arbitration of labor disputes for a class of businesses, including employment agencies, over which the Nebraska Supreme Court would strike down the statute under the Nebraska Constitution. There is no essential difference between the accommodation which the police power under the Nebraska Constitution must make to the other constitutional rights and that required of Article XV, Section 9.

The relatively recent decision concerning the union shop provision of the Railway Labor Act\textsuperscript{158} also indicates a difference in approach to labor matters between the two Courts. There, a unanimous Nebraska Supreme Court, reversed by a unanimous United States Supreme Court, held that the union shop provision violated the Due Process Clause of the Fifth Amendment in that it was unreasonable, arbitrary and capricious, and had no real relationship to the legislative objective, and also contravened First Amendment rights of nonunion members.\textsuperscript{159} We might also expect these Courts to disagree on the extent to which a state can prohibit peaceful picketing during an industrial dispute. The United States Supreme Court would probably still find that peaceful picketing involves free speech and could not be absolutely prohibited.\textsuperscript{160} In putting greater emphasis on the rights of employers and nonunion employees, the Nebraska Supreme Court might be less inclined to emphasize the free speech aspect of picketing.

The rulings of the Courts on the limitations on the rights to strike or lockout would depend initially on the same sort of factors involved in the compulsory arbitration question. At least on the state level, there would be an additional issue whether the limiting statute provided enough of a mechanism for solving the underlying labor problem as to constitute due process of law. An absolute prohibition on discharge for cause or voluntary quits during settlement of the controversy is apt to be invalidated by either Court, with the Nebraska Supreme Court taking a considerably broader view as to when contemporaneous voluntary quitting may

\textsuperscript{157} Boomer v. Olson, 143 Neb. 579, 10 N.W.2d 507 (1943). Note that the social and economic conditions existing at the time the right is asserted rather than at the time the Constitution was adopted is controlling. See note 101 supra.


\textsuperscript{159} Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956), reversing 160 Neb. 669, 71 N.W.2d 526 (1955).

\textsuperscript{160} For a discussion of the cases, see GREGORY, LABOR AND THE LAW c. XI (2d ed. 1958).
become a strike. The Courts might also disagree on whether a concerted bona fide quit could be prohibited, even in cases involving public utilities, during the settlement of the controversy.

On what is a more realistic level, it is not likely that either Court would impose constitutional objections on the basis of due process to a general labor-management relations act providing for an enforceable system of collective bargaining through representation and unfair labor practice procedures, and applicable generally to all businesses or vocations. This would undoubtedly be a more difficult case for the Nebraska Supreme Court, however, which would need to distinguish its union shop objections of due process and right of assembly under the Nebraska Constitution as applied to a statutory bargaining agent.\(^1\)

Generally, then, we might conclude that the Nebraska Supreme Court is apt to prescribe a smaller area for permissible activity under Article XV, Section 9, than the United States Supreme Court. Just where either line would actually be drawn must await specific legislation and litigation.

### III. LIMITATIONS ON ENFORCEABILITY OF VOLUNTARY ARBITRATION AGREEMENTS

Most collective labor agreements contain grievance machinery which ends in arbitration with respect to disputes that arise during the existence of the agreement. This seems to be the normal, accepted and most advantageous method of resolving controversies during the term of the collective agreement.\(^2\)

In Nebraska, however, a provision to arbitrate all disputes arising under a contract,\(^3\) or even merely the amount of loss or damages,\(^4\) will be enforced, and a refusal to arbitrate is not a de-

\(^1\)Hanson v. Union Pacific R.R., 160 Neb. 669, 71 N.W. 526 (1955), rev'd 351 U.S. 225 (1956). The Nebraska Court is, of course, the final arbiter of the Nebraska Constitution.

\(^2\)See Levett, *Lawyers, Legalism and Labor Arbitration*, 4 N.Y. L. F. 379, 381 (1960): "... labor arbitration has received such apparent public acceptance that today more than 90% of our collective bargaining agreements provide in one fashion or another for arbitration of disputes as to the interpretation or application of the agreement."

\(^3\)See, e.g., Union Ins. Co. v Barwick, 36 Neb. 223, 54 N.W. 519 (1893) (agreement to arbitrate "any question, matter, or thing, except the validity of the contract or the liability of this company").

\(^4\)The earliest Nebraska case invalidating an arbitration clause was such a case. German-American Ins. Co. v. Etherton, 25 Neb. 505, 41 N.W. 406 (1889) (clause to arbitrate "loss or damage to property partially or
fense to an action growing out of the contract. The award of an arbitrator does become enforceable once made upon a voluntary and unrevoked submission of the parties.

From an early date, the Nebraska Court has held that unexecuted agreements to arbitrate claims under an insurance policy, a private contract, or a collective labor agreement, are invalid. The reason assigned initially seemed to be the common law concept of invasion of the jurisdiction of the courts. Later opinions totally destroyed). Also see Wilson & Co. v. Fremont Cake & Meal Co., 153 Neb. 160, 174, 43 N.W.2d 657, 665 (1950), cert. denied, 342 U.S. 812 (1951).

See, e.g., National Masonic Acc. Ass'n v. Burr, 44 Neb. 256, 268, 62 N.W. 466, 470 (1895); see also notes 167-169 infra.

See, e.g., Connecticut Fire Ins. Co. v. O'Fallon, 49 Neb. 740, 745, 69 N.W. 118, 119 (1896); "An award, whether under the statute or at common law, is, in the absence of fraud or mistake, binding upon the parties there-to, and the burden of alleging and proving its invalidity rests upon the party seeking to impeach it."; Bentley v. Davis, 21 Neb. 685, 33 N.W. 475 (1887).


See, e.g., German-American Ins. Co. v. Etherton, 25 Neb. 505, 508, 41 N.W. 406 (1889); Union Ins. Co. v. Barwick, 36 Neb. 223, 54 N.W. 519 (1893); German Ins. Co. v. Eddy, 36 Neb. 461, 54 N.W. 856 (1893) (relying in part on overriding provisions of insurance statutes where total loss was involved); National Masonic Acc. Ass'n v. Burr, 44 Neb. 256, 62 N.W. 466, (1895); Home Fire Ins. Co. v. Kennedy, 47 Neb. 138, 66 N.W. 278 (1896) (stating that the failure to specify a particular person or tribunal as arbitrator leaves the agreement to arbitrate wholly revocable).
have placed reliance upon the specific constitutional provisions in the Nebraska Bill of Rights that, "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay,"172 and that, "The right of trial by jury shall remain inviolate . . ."173

Both logically and practically, these positions seem indefensible. Arbitration is consensual only. There can be no arbitration without agreement of the parties, and the arbitrator can decide only those issues which the parties have consented to his arbitrating. By arbitration, the parties are effectuating their agreement rather than remedying its breach. In reality, prior to the time the arbitration has been carried out, there has been no damage or injury to anyone. The parties are receiving precisely that for which they have bargained, and neither the jurisdiction of the court nor the right of trial by jury would seem to have been violated.174

The case for labor arbitration in the current field of industrial relations is especially strong. The subject matters of most controversies handled under the grievance procedure are not the sort of things suited to litigation in court, and the court process is ill-suited to their effective resolution.175 This is not to say, however, that every disagreement between labor and management during the existence of a collective agreement should be handled by arbitration. But labor arbitration, as usually employed by the parties, serves an entirely different purpose than commercial arbitration. Whereas commercial arbitration is a direct substitute for litigation, labor arbitration is intended as a sort of industrial self-


173NEB. CONST. art. I, § 6. See Hartford Fire Ins. Co. v. Hon, 66 Neb. 555, 92 N.W. 746 (1902); Phoenix Ins. Co. v. Zlotky, 66 Neb. 584, 588-89, 92 N.W. 736, 737-38 (1902) (Pound, C., concurring): "I do not think the constitutional provision with reference to trial by jury has any bearing upon the question involved in this case. The same provision is to be found in the constitution of the United States and in the constitutions of several states. . . ."

174For the Court's answer to this line of reasoning, in a case considering an arbitration clause with respect to loss or damage, see Hartford Fire Ins. Co. v. Hon, 66 Neb. 555, 92 N.W. 746 (1902). For an approach similar to that of the text, however, see notes 176, 183 and 184 infra.

175See Cox, Reflections Upon Labor Arbitration, 72 HARV. L. REV. 1482 (1959); Shulman, Reason, Contract, and Law in Labor Relations, 68 HARV. L. REV. 999, 1024 (1955): "I suggest that the law stay out—but, mind you, not the lawyers."
government to handle labor relations problems in the most expeditious and effective manner.\textsuperscript{176}

Having committed itself to the proposition that an agreement to arbitrate is invalid under the Nebraska Constitution, it may now be impossible for the Court to reject the common-law limitations on labor arbitration clauses, as distinguished from commercial arbitration generally, as has been done by some courts, on the ground that these rules are meaningless in terms of current labor conditions.\textsuperscript{177} And in the face of these same constitutional limita-

\textsuperscript{176} United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 578-82 (1960): "A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement. . . . In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes is part and parcel of the collective bargaining process itself. The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators. Courts and arbitration in the context of most commercial contracts are resorted to because there has been a breakdown in the working relationship of the parties; such resort is the unwanted exception. But the grievance machinery under a collective bargaining agreement is at the very heart of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement. . . . The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. . . . The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." See note 175 \textsuperscript{supra}. For a more restrained view, see Livingston, Arbitration: Evaluation of Its Role in Labor Relations, 12th ANN. N.Y.U. CONF. ON LABOR 109 (1959).

\textsuperscript{177} See discussion in United Ass'n of Journ. & App. of Plumbing v. Stine, 351 P.2d 965, 977 (Nev. 1960): "We have noted what appears to us to be an ever-increasing trend to depart from or to abrogate the common-law rule,
tions, there is little that the legislature can do by way of statutory enactment in this area.\textsuperscript{178} Article XV, Section 9, can be construed to authorize the legislature to set up a binding private arbitration system enforceable by an Industrial Commission,\textsuperscript{179} but that section, itself, contains serious limitations. The parties to any industrial dispute could today refer the dispute by mutual agreement to the

and the reasons for such trend. . . . This court does not suffer from the embarrassment of the courts that have felt impelled to bow to \textit{stare decisis} in their own jurisdictions.” \textit{But cf.} Machine Products Co. v. Prairie Local Lodge No. 1538, 230 Miss. 809, 827-28, 94 So.2d 344, 350 (1957).

\textsuperscript{178}It is interesting to note that Nebraska has a general arbitration act on the books which dates back into the territorial laws, and applies to any civil action which can be litigated in court. \textsc{Neb. Rev. Stat.} § 25-2103 to -2120 (Reissue 1956). This act is not suitable to routine labor arbitration because the parties must specify particularly in writing what demands are to be submitted, the names of the arbitrators, and the court by which the judgment on their award is to be rendered. \textsc{Neb. Rev. Stat.} § 25-2104 (Reissue 1956). Either party may revoke the submission at any time before the award is made, and possibly even if the arbitrators may have themselves decided the issue but have merely not delivered their written (and signed) opinion. See Butler v. Greene, 49 Neb. 280, 68 N.W. 496 (1896). And the failure to comply with the technical procedure of the statute renders an award invalid, even following a voluntary submission. See Burkland v. Johnson, 50 Neb. 858, 70 N.W. 388 (1897) (voluntary submission agreement acknowledged by notary public rather than justice of peace). But it is significant, nevertheless, that some form of arbitration has been considered useful throughout the history of Nebraska, and that to this extent there has been no unconstitutional invasion of the jurisdiction of the courts. See also Hughes v. Sarpy County, 97 Neb. 90, 149 N.W. 309 (1914): “Submissions of controversies to arbitration are to be liberally construed so as to give effect to the intention of the parties. It is the policy of the law to encourage the settlement of disputes without litigation, and awards are favored in law.” Held: county boards have authority to submit matters to arbitration either under statute “or the principles of the common law”; award irrevocable when signed and given to one arbitrator for delivery, even though delivery to parties not completed. It seems doubtful whether an attempt to amend this statute to provide generally for labor arbitration could withstand constitutional attack, although such an amendment has been proposed. \textit{Cf.} L.B. 708, 69th Neb. Leg., Sess. § 15, p. 16 (1959); L.B. 670, 72d Neb. Leg. Sess. § 7(1), pp. 6-7 (1961).

\textsuperscript{179}This would constitute “the investigation, submission and determination of controversies between employers and employees.” The section would seem to allow the legislature to permit the Industrial Commission, itself, whether acting in its judicial capacity or otherwise, to act as arbitrator under a private agreement. See note 180 infra. But the Industrial Commission would have no more authority under the Nebraska Constitution than a regular court to appoint an arbitrator or enforce a private arbitration award. Article XV, Section 9, would not seem to allow a delegation of arbitration powers to others in violation of the open court provisions of the Constitution.
Court of Industrial Relations for arbitration, with the consent of the court.\textsuperscript{180} The legislature does not now seem to have power to provide generally for the enforcement of labor arbitration clauses by Nebraska district courts.\textsuperscript{181}

By contrast, the federal law is that arbitration arrangements are favored in labor relations, and clauses to arbitrate are given the broadest possible scope by the federal courts. Doubts are resolved in favor of coverage of the arbitration clause.\textsuperscript{182} Even arbitration of apparently frivolous claims will be ordered because of the therapeutic effect in industrial relations,\textsuperscript{183} and an award of an

\textsuperscript{180}NEB. REV. STAT. § 48-820 (Reissue 1960): “Any industrial dispute, not within the jurisdiction of the Court of Industrial Relations under sections 48-801 to 48-823, may by mutual agreement in writing, signed by the parties thereto and with the consent of the court, be referred to the Court of Industrial Relations for arbitration. Upon such referral the court shall investigate, hear and determine such industrial dispute.” This does not make an agreement to arbitrate specifically enforceable. Should one party refuse to join in an application to the Court of Industrial Relations at the time the particular dispute were to be submitted, the Court would not have jurisdiction. But this statute may be unconstitutional. It was enacted under Article XV, Section 9. See NEB. REV. STAT. § 48-802 (Reissue 1960). But its jurisdiction under section 48-820 is not limited to businesses or vocations affected with a public interest. One of the objections made to the proposed Article XV, Section 9, on the floor of the Constitutional Convention was the unanswered assertion that the section would not permit the Commission to undertake to investigate and publicize or to mediate (rather than arbitrate) controversies where the business was not affected with a public interest. Statement of Mr. Bigelow, 2 PROC. NEB. CONST. CONV. 1993–94 (1920).

\textsuperscript{181}See note 178 supra. Action could be taken under the first sentence of Article XV, Section 9. But it might not only be subject to the same constitutional objections as action taken under the judicial power, but as an unconstitutional delegation of powers. A Michigan statute was held unconstitutional for delegating authority to a judge to act as a compulsory arbitrator because this gave administrative authority to a judicial officer. Local 170 v. Gadola, 322 Mich. 332, 34 N.W.2d 71 (1948).

\textsuperscript{182}United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582–83 (1960): “An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.”

\textsuperscript{183}United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 567–68 (1960): “The collective agreement requires arbitration of claims that courts might be unwilling to entertain. In the context of the plant or industry the grievance may assume proportions of which judges are ignorant. Yet, the agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious. . . . The question is not whether in the mind of the court there is equity in the claim. Arbitration is a stabilizing influence only as it serves as a vehicle
These federal rules constitute a federal body of substantive law of labor relations, controlling with respect to collective agreements entered into under the federal labor law. United States district courts have jurisdiction to compel or enforce arbitration without respect to the amount in controversy and without regard to diversity of citizenship of the parties. Thus, Nebraska parties to a collective agreement entered into under the National Labor Relations Act can secure enforcement of an arbitration provision in a Nebraska United States district court.

In fact, it seems quite possible that a party can enforce arbitration under a collective agreement entered into under federal labor law in a Nebraska district court. It is generally assumed that state courts may exercise concurrent jurisdiction with federal courts in enforcing the collective agreements entered into under the National Labor Relations Act, although in so doing the Nebraska courts would be bound by the federal substantive law. The district courts of Nebraska have general civil and equitable

for handling any and all disputes that arise under the agreement. In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve. The law of some states is to the contrary. See, e.g., International Ass'n of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N.Y.S.2d 317 (1947), aff'd, 297 N.Y. 519, 74 N.E.2d 464 (1947).

* * * It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."

The question then is, what is the substantive law to be applied in suits under § 301 (a)? We conclude that the substantive law to be applied in suits under § 301 (a) is federal law, which the courts must fashion from the policy of our national labor laws. Federal interpretation of the federal law will govern, not state law. But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights."


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jurisdiction, both by the Constitution\textsuperscript{188} and by statute.\textsuperscript{189} This power would appear to permit a Nebraska district court to entertain a suit to enforce or determine rights under a federal contract, even if the specific right happens to be arbitration. At least, if the Nebraska arbitration cases are construed as a jurisdictional limitation on the power of the Nebraska district courts to compel or enforce arbitration, rather than as rendering the contractual provisions void as the cases say on their faces, then this is a subject all the more suited to constitutional revision.

The Nebraska Supreme Court has stated that where arbitration is sought in Nebraska courts under the Federal Arbitration Act,\textsuperscript{190} the issue is one of procedure and not of substantive right, and the Nebraska prohibitions against arbitration are controlling.\textsuperscript{191} As

\textsuperscript{188} NEB. CONST. art. V, § 9.
\textsuperscript{189} NEB. REV. STAT. § 24-302 (Reissue 1956).
\textsuperscript{191} Wilson & Co. v. Fremont Cake & Meal Co., 153 Neb. 160, 43 N.W.2d 657 (1950), cert. denied, 342 U.S. 812 (1951). This decision rested on the procedural unenforceability of arbitration clauses and not upon a limitation of the jurisdiction of Nebraska district courts. But cf. Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 406, 409 (2d Cir. 1959), cert. granted, 362 U.S. 909 (1960), cert. dismissed, 81 Sup. Ct. 27 (1960): "We think it is reasonably clear that the Congress intended by the Arbitration Act to create a new body of federal substantive law affecting the validity and interpretation of arbitration agreements. . . . We hold that the body of law thus created is substantive not procedural in character and that it encompasses questions of interpretation and construction as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce or maritime affairs, since these two types of legal questions are inextricably intertwined."; noted in 60 COLUM. L. REV. 227, 229 (1960): "While no case authority exists in the thirty-four years of the act's history for the conclusion that section 2 of the act establishes a rule of law binding in state as well as federal courts, both the wording of the statute and the legislative history support this conclusion."; and in 73 HARV. L. REV. 1382, 1385 (1960): "It is arguable that if a state does not provide the necessary enforcement procedures, its courts will not be required to grant any relief."
applied to labor arbitration agreements, this holding would appear to be inapplicable and erroneous. Whether technically labeled as procedural or substantive, a valid arbitration provision contained in an enforceable contract under a foreign law, should be enforced by the local forum, since it affects the meritorious outcome of the litigation.\textsuperscript{192} And insofar as arbitration under a federal collective agreement is concerned, this involves a subject over which the parties are required to bargain,\textsuperscript{193} (in fact, it is considered as a part of the collective bargaining process, itself),\textsuperscript{194} and, as such, is a part of the "substantive" federal law of labor relations which is controlling as a matter of federal preemption over inconsistent state provisions.\textsuperscript{195}

There are several reasons why the matter of labor arbitration should be considered for constitutional revision. The present limitations on labor arbitration are out of keeping with sound industrial policy. Some of the present constitutional provisions have apparently taken on a meaning in this regard which now works against their basic purpose of effectively resolving disagreements between interested persons. There seems to be no real reason for differentiating insofar as arbitration is concerned between parties covered by federal labor contract law and Nebraska labor contract law, whether the issue is raised in a federal court or in a Nebraska court. As a minimum, the whole subject of labor arbitration in Nebraska is one for legislative policymaking in the light of modern day industrial conditions, and the Constitution should permit such a legislative determination.

\textsuperscript{192}Cf. Bernhardt v. Polygraphic Co., 350 U.S. 198, 202-205 (1956) (diversity jurisdiction decision refusing to order arbitration in Vermont federal court under a Vermont contract where arbitration could not be compelled in the Vermont courts, but without labeling arbitration as "substantive").

\textsuperscript{193}See, e.g., United Gypsum Co., 94 N.L.R.B. 112 (1951).

\textsuperscript{194}See, e.g., United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 578, 581 (1960): "For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself. . . . The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement."; United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960): " . . . the arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process."

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IV. CONCLUSION

Continued industrialization will underscore Nebraska's need for labor-management relations legislation. Nebraska was a pioneer in this field in 1920. The work of its Constitutional Convention in proposing Article XV, Section 9, was a significant and constructive accomplishment.

In the intervening years, our industry, economy, society, and their related legal doctrines, have developed almost beyond recognition. In two critical respects insofar as labor-management relations is concerned, the Constitution has not kept pace. In 1920, the concept of "business or vocation affected with a public interest" was a rule used by courts to uphold legislative economic regulation. Since then, the concept has been abandoned in its American spawning grounds, the federal courts, as being incorrect, unworkable and essentially incapable of definition. Having been frozen into the Nebraska Constitution, however, it has become a pillory which may immobilize future legislative action.

To a considerable degree, the "business or vocation affected with a public interest" requirement leaves the legislature in precisely the same position it was in before 1920. It can select a single shot weapon under the police powers, and possibly even divide the labor-management relations field unnaturally into two or more separate components and select two or more single shot weapons. For the arsenal of high powered equipment containing flexible powers of the executive, legislative, and judicial branches of government, considered the most desirable means of approaching the problem in 1920, and still the most meaningful today, Article XV, Section 9, must be employed. But the "business or vocation affected with a public interest" requirement in that section has nullified its intended effectiveness in present day terms.

Similarly, voluntary arbitration agreements were once regarded merely as devices to avoid the jurisdiction of the courts and were invalidated on that basis. In the modern day economic picture, voluntary arbitration agreements become a means of industrial self-government under nearly all of the existing collective agreements, and exist for industrial purposes and concern subject matters over which the courts might not, and should not, be empowered or equipped to deal.

As a minimum, the Nebraska Constitution should be amended in two ways. The language "in any business or vocation affected with a public interest" should be deleted from Article XV, Section 9. Constitutional recognition should be given to legislative authority
to regulate the legality and enforceability of voluntary labor arbitration agreements.

The other problems discussed in this article should be given consideration as a part of the thorough and technical analysis of a Constitutional Convention, if one is called, or of a constitutional study committee. The main defects in our Constitution are the matters of "business or vocation affected with a public interest" and the unenforceability of voluntary arbitration agreements. The solution of these two matters would contribute much to the industrial well-being of the state.