

No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
WEST VIRGINIA CITIZEN ACTION
GROUP, an incorporated association
of State citizens and taxpayers,

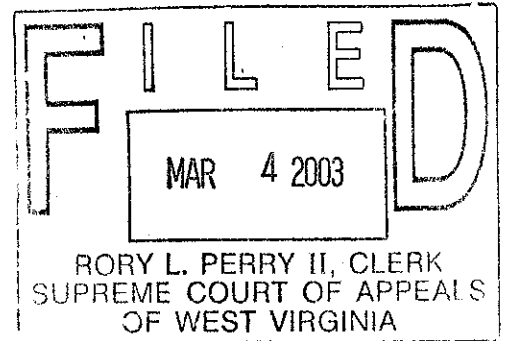
Petitioner,

v

CASE NO. 02-MISC-352
(Cir. Ct. of Kan. Cty.)
(W. Va. S. Ct. No. 021831)

WEST VIRGINIA ECONOMIC
DEVELOPMENT GRANT COMMITTEE;
CITY OF WHEELING (including
its Urban Renewal Authority),
a municipal corporation; and
WVOC ASSOCIATES, L.P., a private
partnership and corporation,

Respondents.



PETITIONER'S SUPPLEMENTAL BRIEF

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COUNSEL FOR PETITIONER

I. ARGUMENT

A. "173 despots would surely be as oppressive as one"

1. Jefferson and Madison

Thomas Jefferson observed in reference to Virginia's colonial legislature, "173 despots would surely be as oppressive as one" because "[a]n elective despotism was not the government we fought for." Thomas Jefferson, Notes on the State of Virginia, in Thomas Jefferson: Writings 215 (Library of America ed. 1984).

Madison: "I conceive that if any power whatsoever is in its nature Executive, is the power of appointing, overseeing, and controlling those who execute the laws. 1 Annals of Cong. 463 (Joseph Gales ed. 1789). 2

"It was the celebrated maxim of Montesquieu, that there can be no liberty where the legislative and executive powers are united in the same person or body of magistrates; * * *. [T]he reason, tersely given, is, 'because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner' * * *." G. & D. Taylor & Co., 4 R.L. at 341 (quoting Montesquieu).

"The union of all the powers of government in the same hands is but the definition of a despotism. To guard against such a government was one great object of the Constitution. This was to be done by this distribution of powers. This is the great principle of American liberty. The rights, the property, and the liberties of the people, depend upon the due observance by each department of the constitutional limitations and restrictions upon its authority." Id. at 301 (emphases added).
see Judgment Against Dorr, 3 R.L. 299, 301 (1854).

"If the law-making department in our government, has also the power to interpret and to enforce their interpretation of the laws, either acting wholly by itself, or by directing and controlling, as a superior tribunal, all other tribunals of the state, every friend to a settled and well-ordered administration of justice amongst us—every lover of freedom government itself—has, indeed, cause to mourn." 4 R.L. at 341 (emphasis added).

1 As the United States Supreme Court has noted: "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions." *Sprenger v. Government of the Philippine Islands*, 277 U.S. 189, 202, 48 S.Ct. 180, 482, 72 L.Ed. 845, 849 (1928); see also *Buckley v. Valeo*, 424 U.S. 1, 139, 96 L.Ed. 612, 692, 46 L.Ed.2d 659, 756 (1970); *Myers v. United States*, 272 U.S. 52, 128, 47 S.Ct. 21, 29, 71 L.Ed. 160, 171 (1926) (quoting James Madison) ("The Legislature creates the office, defines the powers, limits its duration and annexes a compensation. This done, the Legislative power ceases. They ought to have nothing to do with designating the [person] to fill the office.")

Citizens
for Abatement
of Aircraft
Noise.
501
U.S.
252
(1991)

2 It also would subvert the bicameralism and presentment requirements that must be satisfied before the Legislature can enact any valid laws: if the General Assembly could control administrative agencies by staffing them with legislators or their designees, then laws in the form of agency regulations could be promulgated and administered without any gubernatorial involvement whatsoever, let alone without any need to overcome the possibility of a gubernatorial veto that would apply to all legislation enacted directly by the General Assembly. Thus, an engine for avoidance of the veto in the formulation of statutory policy [would be] created." Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L.Rev. 573, 651 (1984).

2. John Locke: Second Treatise of Civil Government:

Of the Legislative and Executive Power of the Common-wealth.

" too great a temptation to human frailty, apt to grasp at power, for the same persons to have the power of making laws, to have also in their hands the power to execute them."

THE legislative power is that, which has a right to direct how the force of the common-wealth shall be employed for preserving the community and the members of it. But because those laws which are constantly to be executed, and whose force is always to continue, may be made in a little time; therefore there is no need, that the legislative should be always in being, not having always business to do. because it may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, where they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government: therefore in well ordered commonwealths, where the good of the whole is so considered, as it ought, the legislative power is put into the hands of diverse persons, who duly assembled, have by themselves, or jointly with others, a power to make laws, which when they have done, being separated again, they are themselves subject to the laws they have made; which is a new and near tie upon them, to take care, that they make them for the public good. Sec. 144.

But because the laws, that are at once, and in a short time made, have a constant and lasting force, and need a perpetual execution, or an attendance thereunto; therefore it is necessary there should be a power always in being, which should see to the execution of the laws that are made, and remain in force.

" supreme executor of the law "

In some commonwealths, where the legislative is not always in being, and the executive is vested in a single person, who has also a share in the legislative; there that single person in a very tolerable sense may also be called supreme: not that he has in himself all the supreme power, which is that of law-making; but because he has in him the supreme execution, from whom all inferior magistrates derive all their several subordinate powers, or at least the greatest part of them: having also no legislative superior to him, there being no law to be made without his consent, which cannot be expected should ever subject him to the other part of the legislative, he is properly enough in this sense supreme. But yet it is to be observed, that tho' oaths of allegiance and fealty are taken to him, it is not to him as supreme legislator, but as supreme executor of the law, made by a joint power of him with others; allegiance being nothing but an obedience according to law, which when he violates, he has no right to obedience nor can claim it otherwise than as the public person vested with the power of the law, and so is to be considered as the image, phantom, or representative of the common-wealth, acted by the will of the society, declared in its laws; and thus he has no will, no power, but that of the law. But when he quits this representation, this public will, and acts by his own private will, he degrades himself, and is but a single private person without power, and without will, that has any right to obedience; the members owing no obedience but to the public will of the society. Sec. 151.

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Absolute arbitrary power, or governing without settled standing laws, can neither of their nature for, and tie themselves up under, if they shall have armed one, or a few men with the joint power of a multitude, to force them to obey at pleasure the exorbitant and unlimited decrees of the sudden thoughts, or unrestrained, and till that moment unknown wills, without having any measure set down which may guide and justify their actions: for all the power the government has, being only for the good of the society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws; that both the people may know their duty, and be safe and secure within the limits of the law; and the rulers too kept within their bounds, and not be tempted, by the power they have in their hands, to employ it to such purposes, and by such measures, as they would not have known, and own. This is not much to be feared in governments where the legislative consists, wholly or in part, in assemblies which are variable, whose members, upon the dissolution of the assembly, are subjects under the common laws of their country, equally with the rest. But in governments, where the legislative is in one lasting assembly always in being, or in one man, as in absolute monarchies, there is danger still, that they will think themselves to have a distinct interest from the rest of the community; and so will be apt to increase their own riches and power, by taking what they think fit from the people.

Sec. 137.

"The power of the legislative being only to make laws, and not to make legislators"

Fourthly, The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the common-wealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, We will submit to rules, and be governed by laws made by such men, and in such forms, no body else can say other men shall make laws for them; nor can the people be bound by any laws, but such as are enacted by those whom they have chosen, and authorized to make laws for them. The power of the legislative, being derived from the people by positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands. Sec. 141.

These are the bounds which the trust, that is put in them by the society, and the law of nature and reason, have set to the legislative power of every common-wealth, in all forms of government.

First, They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at court, and the country man at plough.

Secondly, These laws also ought to be designed for no other end ultimately, but the good of the people.

Thirdly, They must not raise taxes on the property of the people, without the consent of the people.

Fourthly, The legislative neither must nor can transfer the power of making laws to any body else, or place it any where, but where the people have. Sec. 142.

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3. THE PERSONAL NAMING OF SIX (6) OF THE NINE (9) MEMBERS OF THE GRANT COMMITTEE BY THE HOUSE SPEAKER AND THE SENATE PRESIDENT, IS DIRECTED BY THE W. VA. CODE § 29-22-18a(d) (3), VIOLATES THE REQUIREMENT FOR SEPARATION OF GOVERNMENTAL POWERS UNDER THE W. VA. CONST., ART. V, § 1, AND ART. VII, § 8

The Legislature in H.B. 4005, W. Va. Code § 29-22-18a(d) (March 9, 2002), has flagrantly invaded and usurped the exclusive powers of the Governor and the executive department of State government to the extent of totally vitiating this Act, W. Va. Const., Art. V, § 1 and Art. VII, § 8, and all attendant decisions and actions of the respondent Grant Committee. State ex rel. Meadows v. Hechler, 462 S.E.2d 586 (W. Va. 1995); Harkey v. Manchin, 279 S.E.2d 622 (W. Va. 1981); State ex rel. Wallace v. Bone, 286 S.E.2d 79 (N.C. 1982); Legislative Research Commission v. Brown, 664 S.W.2d 907 (Ky. 1984); Commissioner of Administration v. Kelley, 350 Mass. 501, 215 N.E.2d 653 (1966); Zemprelli v. Thornburg, 47 Pa. Cmwlth. 43, 407 A.2d 102 (1979); Alexander v. State, 441 So. 2d 1329 (Miss. 1983); and see Citizens for Abatement of Aircraft Noise, 501 U.S. 252 (1991); Bowsher v. Synar, 478 U.S. 714, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986); Buckley v. Valeo, 424 U.S. 1 (1976); I.N.S. v. Chadha, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983).

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B. "ECONOMIC DEVELOPMENT"1. Revenue bonds

Many states have some revenue bond financing mechanism whereby the bonds can be issued for funding . . . projects designed to benefit the public, to reduce unemployment and increase tax revenues.

Such bonds do not impose any obligation on the issuing authority to redeem the bonds . . . but provide that the bonds are to be liquidated from the proceeds of the particular venture. [Emphasis added]

Ohio County Comm. v. Samol, 275 S.E.2d 2 (W. Va. 1980);

See, e.g., *Smith v. Industrial Dev. Bd. of Andalusia*, 455 So.2d 839 (Ala.1984); *Wright v. City of Palmer*, 468 P.2d 326 (Alaska 1970); *Industrial Dev. Auth. of Pinal Co. v. Nelson*, 109 Ariz. 368, 509 P.2d 705 (1973); *Aridres v. First Ark. Dev. Fin. Corp.*, 230 Ark. 514, 324 S.W.2d 97 (1959); *In Re Interrogatory Propounded by Governor*, 814 P.2d 875 (Colo.1991); *Wilson v. Connecticut Prod. Dev. Corp.*, 167 Conn. 111, 355 A.2d 72 (1974); *Roan v. Connecticut Indus. Bldg. Comm'n*, 150 Conn. 383, 189 A.2d 399 (1963); *In re Opinion of Justices*, 54 Del. 366, 177 A.2d 205 (1962); *Linscott v. Orange Co. Indus. Dev. Auth.*, 443 So.2d 97 (Fla.1983); *Nations v. Downton Dev. Auth. of Atlanta*, 255 Ga. 324, 338 S.E.2d 240 (1985); *State ex rel. Amemiya v. Anderson*, 56 Haw. 565, 545 P.2d 1175 (1976); *Potter v. Judge*, 112 Ill. App.3d 81, 67 Ill. Dec. 585, 444 N.E.2d 821 (1983); *Hawkins v. City of Greenfield*, 248 Ind. 591, 230 N.E.2d 396 (1967); *Brady v. City of Dubuque*, 495 N.W.2d 701 (Iowa 1993); *Duckworth v. City of Kansas City*, 243 Kan. 386, 758 P.2d 211 (1988); *Hayes v. State Property & Bldgs. Comm'n*, 731 S.W.2d 797 (Ky. 1987); *Farlois v. LaRock*, 315 So.2d 50 (La. Ct. App.1975); *Common Cause v. State*, 455 A.2d 1 (Me.1983); *Williams v. Anhe Arundel Co.*, 334 Md. 109, 638 A.2d 74 (1994); *Reyes v. Prince George's Co.*, 281 Md. 179, 380 A.2d 12 (1977); *Opinion of the Justices to the House of Representatives*, 368 Mass. 880, 335 N.E.2d 362 (1975); *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981); *City of Gaylord v. Beckett*, 378 Mich. 273, 144 N.W.2d 460 (1966); *Minnesota Energy & Econ. Dev. Auth. v. Princy*, 351 N.W.2d 319 (Minn.1984); *Board of Supervisors of Lamar Co. v. Hattiesburg Coca-Cola Bottling Co.*, 448 So.2d 917 (Miss. 1984); *State ex rel. Hattiesburg Coca-Cola Bottling Co. v. St. Louis Co. Port Auth.*, 604 S.W.2d 592 (Mo.1980); *Ficks v. Mts-*

soula Co., 155 Mont. 258, 470 P.2d 287 (1970); *Chase v. Douglas Co.*, 195 Neb. 838, 241 N.W.2d 334 (1976); *State ex rel. Brennan v. Bowman*, 89 Nev. 330, 512 P.2d 1321 (1973); *Opinion of the Justices*, 112 N.H. 42, 288 A.2d 697 (1972); *Roe v. Kervick*, 42 N.J. 191, 199 A.2d 83 (1964); *Kennecott Copper Corp. v. Town of Hurley*, 84 N.M. 743, 507 P.2d 1074 (1973); *Village of Deming v. Hasdreg Co.*, 62 N.M. 18, 303 P.2d 920 (1956); *Yonkers Community Dev. Agency v. Morris*, 37 N.Y.2d 478, 335 N.E.2d 327, 373 N.Y.S.2d 112, appeal dismissed, 423 U.S. 1010, 96 S.Ct. 440, 46 L.Ed.2d 381 (1975); *Gripentrog v. City of Wahpeton*, 126 N.W.2d 230 (N.D.1964); *Stark Co. v. Ferguson*, 2 Ohio App.3d 72, 441 N.E.2d 816 (1981); *Burkhardt v. City of Enid*, 771 P.2d 608 (Okla.1989); *Carruthers v. Port of Astoria*, 249 Or. 329, 438 P.2d 725 (1968); *Basehore v. Hampden Indus. Dev. Auth.*, 433 Pa. 40, 248 A.2d 212 (1968); *In Re Advisory Opinion to Governor*, 113 R.I. 586, 324 A.2d 641 (1974); *Nichols v. South Carolina Research Auth.*, 290 S.C. 415, 351 S.E.2d 155 (1986); *Clem v. City of Yarkton*, 83 S.D. 386, 160 N.W.2d 123 (1968); *West v. Industrial Dev. Bd. of Nashville*, 206 Tenn. 154, 332 S.W.2d 201 (1960); *Arwood v. Willacy Co. Navigation Dist.*, 271 S.W.2d 137 (Tex. Ct. App.1954), appeal dismissed, 350 U.S. 804, 76 S.Ct. 66, 100 L.Ed. 723 (1955); *Utah Technology Fin. Corp. v. Wilkinson*, 723 P.2d 406 (Utah 1986); *Vermont Home Mortgage Credit Agency v. Montpelier Nat'l Bank*, 128 Vt. 272, 262 A.2d 445 (1970); *City of Charlottesville v. DeHaan*, 228 Va. 578, 323 S.E.2d 131 (1984); *Mayor of Lexington v. Industrial Dev. Auth. of Rockbridge Co.*, 221 Va. 865, 275 S.E.2d 888 (1981); *State ex rel. Ohio Co. Comm'n v. Samol*, 165 W.Va. 714, 275 S.E.2d 2 (1980); *State ex rel. Hattiesburg Paper Co. v. LaPlante*, 58 Wis.2d 32, 205 N.W.2d 78 (1973); *Powers v. City of Cheyenne*, 435 P.2d 418 (Wyo. 1967).

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2. Indirect and in-kind unrepaid state aid: one state only:

See Maready v. City of Winston-Salem, 467 S.E.2d 615 (N.C. 1977).

3. State Economic Development:

The right and practice of the United States and its separate states to engage in the direct production of all types of goods and services have been conclusively established by law.

See Wolf Packing Company v. Court of Industrial Relations of Kansas, 262 U.S. 522 (1923) (a state of the United States may engage in "almost any private business if the legislature thinks the state's engagement in it will help the general public and is willing to pay the cost of the plant and incur the expense of operation")

In 1980, the United States Supreme Court in Reeves, Inc. v. State, 447 U.S. 429, which upheld the interstate sales policies of the South Dakota cement plant, reaffirmed the right of the separate states to operate publicly owned enterprises engaged in the direct production and sale of goods as follows:

A State's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit. . . . A State may deem it as essential to its economy that it own and operate a railroad, a mill, or an irrigation system as it does to own and operate bridges, street lights, or a sewage disposal plant. What might have been viewed in an earlier day as an improvident or even dangerous extension of state activities may today be deemed indispensable.

100 S. Ct. at 2280.

Publicly Owned Flour Mills in North Dakota

North Dakota State Code,
§§ 54-17-01 through -09;
and §§ 54-18-01 through
-17

Since 1980, the State of North Dakota has owned and operated the largest flour manufacturing operation between Minneapolis and the West Coast. In 1986, the sales of these three flour mills to customers throughout the Midwest, the eastern United States, Europe and Japan exceeded \$67 million.* (Their pizza flour is a particularly popular item, with much of their bran flour sold to the Kellogg Corporation for breakfast cereals.)

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These publicly owned flour mills and related grain elevators, which obtain most of their raw wheat from North Dakota farmers, are completely self-supporting.

In fact, each year these plants transfer between \$3 million and \$5 million of their net revenues to the general state treasury.* Among other public uses, these revenues have financed a state home for handicapped children and bonuses for North Dakota's war veterans.

During the past several years, \$25 million in capital improvements for the three plants have been exclusively financed from their sales revenues. The production and maintenance workers belong to the Grain Millers Union, AFL-CIO, with the union contract currently providing an average wage of \$9.61 an hour, or \$19,988.80 a year, as well as extensive health care, pensions and other benefits.*

Incidentally, in 1969 a North Dakota legislator introduced a bill to have the flour plants sold to private enterprise. This proposal was defeated in the North Dakota Legislature by a vote of 98 to 1.

Publicly Owned Cement Plant in South Dakota: South Dakota State Code, §§ 5-17-1 through -37

The State of South Dakota has operated a cement manufacturing plant and seven related "terminals" since 1920. This publicly owned enterprise manufactures around 640,000 tons of cement a year.

Its revenues in 1986 exceeded \$38 million, with \$9 million in net revenues transferred to the state treasury for public uses.* Like the North Dakota flour mills, this cement plant is self-supporting. The plant, which is an environmental leader in the cement industry, burns coal to convert the limestone and other ores into cement.

The plant's production and maintenance workers belong to the United States Steelworkers Union, AFL-CIO. The average wage under the union contract is \$11 an hour, or \$22,880 a year.* The contract also includes substantial health care, pensions and other benefits.

* 1988

The United States Code,
Chap. 16, § 831

TVA: manufactures agricultural fertilizers

One of the largest electric power plant systems in the world is operated by the Tennessee Valley Authority ("TVA"), a public corporation owned by the United States government. Began in 1933 by the administration of President Franklin D. Roosevelt, the TVA also manufactures agricultural fertilizers as well as electric power.

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Like the North Dakota flour mills and South Dakota cement plant, the TVA is completely self-supporting and finances all of its capital improvements from its own sales revenues.

The TVA's 33,000-plus employees are covered by two AFL-CIO union contracts. The average pay rate for these employees is \$13.54 an hour, or \$28,163 a year.* Their benefits are also substantial.

The TVA was held constitutional in Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).

Publicly Owned "Bank of North Dakota"

North Dakota has operated a publicly owned bank for nearly 70 years. The "Bank of North Dakota," which has assets in excess of \$900 million, aids that State's economic development and makes loans to its numerous farmers, as well as financing homes for the State's residents. It also operates an extensive student loan program. By law, all state funds must be deposited in the bank.

* 1988

The statute providing for the creation and operation of the publicly owned Bank of North Dakota is contained in the North Dakota State Code, §§ 6-09-1 through -35. 3

3. In Green v. France, 253 U.S. 233 (1920), the United States Supreme Court upheld the right of the State of North Dakota "to manage, operate, control and govern utilities, enterprises and business projects . . .", including the North Dakota flour mills discussed in 3. The North Dakota statutes challenged in that case provided as follows:

"The State shall engage in the business of manufacturing farm products and for that purpose shall establish a system of warehouses, elevators, flour mills, factories, plants, machinery and equipment, owned, controlled and operated by it . . . and acquire by purchase, lease or right of eminent domain, all necessary property or properties, etc.; to buy, manufacture, store, mortgage, pledge, sell and exchange all kinds of raw and manufactured farm food products, and . . . operate exchanges, bureaus, markets and agencies within and without the State, and in foreign countries . . ."

253 U.S. at 236-37.

In addition, the Homebuilding Act of North Dakota directed the State "to engage in the enterprise of providing homes for its residents," 253 U.S. at 237, while the Bank of North Dakota Act "establish[ed] a bank under the name of the 'Bank of North Dakota' operated by the State." Id. (See n.8) Apart from the above legislative acts, the North Dakota State Constitution authorized the State to engage in business enterprises, with another statute having authorized the levy of taxes and sale of state bonds to establish the foregoing publicly owned enterprises.

When the North Dakota state government sought to levy taxes and sell bonds to establish its economic enterprises, 47 North Dakota residents filed suit in federal court claiming that these legislative enactments were directed to "private purposes" and violated the Due Process Clause of the United States Constitution.

The federal circuit court upheld the right of North Dakota to engage in these state enterprises and to establish them with public funds. Scott v. Frazier, 253 F. 669 (Dist. Ct. N. Dakota 1919). The federal judge who wrote the court opinion could well have been speaking of West Virginia today, if one changes the date and a label or two:

The people of North Dakota are farmers,
 Nearly all their live stock and grain is shipped to terminal markets at St. Paul, Minneapolis, and Duluth. There these products pass into the hands of large commission houses, elevator and milling companies, and live stock concerns. These interests are combined in corporations, chambers of commerce, boards of trade, and interlocking directorates,

The people have come to believe that the whole system of shipping the raw materials of North Dakota to these foreign terminals is hostile to the best interests of the state. They say in substance:

The raw materials of the state ought to be manufactured into commercial products within the state. In no other way can its industrial life be sufficiently diversified to attain a healthy economic development.

The present movement began at least as far back as 1911 The movement has gone straight forward (for) the correction of the existing system of marketing the state's products. Year by year the conviction has deepened, in steadily increasing majorities, that public ownership of terminal elevators, mills, and packing houses is the only effective remedy to correct the evils from which they believe themselves to be suffering

The only means through which the people of the state have had any experience in joint action is their state government. If they may not use that as the common agency through which to combine their capital and carry on such basic industries as elevators, mills, and packing houses, and so fit their products for market and market the same, they must continue to deal as individuals with the vast combinations of these cities, and suffer the injustices that always exist where economic units so different in power have to deal the one with the other.

258 F. at 678-80.

The judge then proceeded to uphold the challenged law and, as noted above, his decision was upheld by the United States Supreme Court.

Respectfully submitted,

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