in an era when nearly all business is carried on through natural or corporate agents—these are the factors which should determine the future of the election rule. For these are the factors upon which depends the real problem: Of what contemporary utility is the entire law of undisclosed principal? Failure of the courts to consider[20] these governing factors accounts for the vacuous unrealism which distinguishes the twentieth century case law in this area.

DUE PROCESS

BROAD SCOPE OF STATE REGULATORY POWER REAFFIRMED

The Family Security Life Insurance Company, a corporation, was promoted by South Carolina funeral directors. Most of its stockholders and agents were either owners or employees of mortuaries.[1] The company had qualified to do business and its agents had been duly licensed under the provisions of a very comprehensive and stringent state in-

20. Even the reporters of the Restatement of Agency failed to approach the election rule realistically. As to the undisclosed principal situation they followed what they perceived to be the weight of authority and adopted the election requirement. But the reporters voiced their dissatisfaction with the rule. RESTATEMENT, AGENCY, EXPLANATORY NOTES § 435 (Tent. Draft No. 4, 1929). At least in the partially disclosed principal situation they did not advocate the application of the election requirement. See RESTATEMENT, AGENCY §§ 184, 210, 336, 337 (1933). They should have felt no compulsion to follow such cases as Georgi v. Thomas Co., 225 N. Y. 410, 122 N. E. 238 (1919) and Barrell v. Newby, 127 Fed. 656 (7th Cir. 1904), supporting the rule because it "serves a good purpose" and is "founded upon a policy which forbids *T* to trifle with the courts." The rule perhaps is not as prevalent as the reporters thought it to be. Merrill, *supra* note 16. For a discussion which puts aside such question-begging assumptions as "alternate liability" and approaches the liability of *A* and *P* from a standpoint of public policy, see Comment, 39 YALE L. J. 265 (1939), which reaches the conclusion that *T* should be allowed to pursue *A* and *P* until satisfaction, but that in the usual *partially* disclosed situation involving factors, brokers, etc., an *early* election should be required.

1. Plaintiff insurance company had 34 stockholders, all but one of whom either owned, managed, or were employed by a mortuary. Of the company's 79 agents, 51 were connected with undertaking establishments. Its president, and four of the five directors were owners or managers of mortuaries. *See* Family Security Life Ins. Co. v. Daniel, 79 F. Supp. 62, 64 (E. D. S. C. 1948).

surance law.[2] Since its organization in early 1948, the company had been engaged in writing a large amount of "prepaid funeral" insurance.[3] Largely as a result of pressure by competing insurance companies,[4] the South Carolina legislature enacted a statute making it unlawful for an insurance company to own or operate a mortuary and for a funeral director or mortuary employee to be licensed as an insurance agent.[5]

With its existence at stake, the plaintiff insurance company brought suit in the federal district court to enjoin enforcement of the statute on the ground that it violated both the due process and the equal protection clauses of the Fourteenth Amendment.[6] The three judge court found itself unable to distinguish the 1928 case of *Liggett v. Baldridge*[7] and held in a 2-1 decision that the statute was unreasonable and arbitrary and hence a violation of due process of law.[8]

2. The act gave the state insurance commissioner plenary authority to deny or revoke licenses to any company whose operations or activities might be deemed a violation of law, unfair, unjust, or deceptive. S. C. Acts 1947, No. 232, p. 322.

3. The insurance sold by plaintiff insurance company was ordinary life insurance with a face value determined by the type of funeral desired by the policy holder. Business was solicited through the mortuary owners and employees as agents, and the premiums were collected at the mortuary home. Matured policy proceeds were sent to the undertaker-agent for delivery to the insured's beneficiary. A "facility of payment" clause might be interpreted as allowing payment of the insurance proceeds directly to an undertaker. Brief for Appellants, p. 6, Family Security Life Ins. Co. v. Daniel, 69 Sup. Ct. 550 (1949).

4. *See* Family Security Life Ins. Co. v. Daniel, 79 F. Supp. 62, 64-5 (E. D. S. C. 1948).

5. S. C. Acts 1948, No. 787, p. 1947.

The Indiana General Assembly has also sought to regulate the relationship between life insurance companies and mortuaries. The statute provides that the State Board of Embalmers and Funeral Directors may refuse to grant or renew a license, or may revoke a license if the holder thereof has participated in or is participating in any scheme or plan in the nature of a burial association or a burial certificate or membership certificate plan. IND. STAT. ANN. (Burns 1933) § 63-727 (d).

6. Suits in federal district court to enjoin enforcement of a state statute must be heard and determined by a court composed of three judges, of whom at least one must be a circuit judge. In such cases appeal to the Supreme Court exists as a matter of right. These provisions, previously found in 36 STAT. 557 (1910), as amended, 43 STAT. 938 (1925), 28 U. S. C. § 380 (1948), and 26 STAT. 827 (1891), as amended, 43 STAT. 938 (1925), 28 U. S. C. § 345 (1946), were repealed and substantially reenacted by the Judicial Code and Judiciary Act of 1948, 62 STAT. 992 (1948).

7. 278 U. S. 105 (1928).

8. Family Security Life Ins. Co. v. Daniel, 79 F. Supp. 62 (E. D. S. C. 1948). *Cf.* Kirtley v. State, 84 N. E.2d 712 (Ind. 1949), in

On appeal, the Supreme Court in an opinion by Mr. Justice Murphy unanimously reversed, stating, "We cannot say that South Carolina is not entitled to call the funeral insurance business an evil. Nor can we say that the statute has no relation to the elimination of those evils. There our inquiry must stop."[9] *Daniel v. Family Security Life Ins. Co.*, 69 Sup. Ct. 550 (1949).

Prior to 1937, the Court freely and frequently invalidated economic legislation on "substantive due process" grounds. Some businesses were said not to be "affected with a public interest," hence not subject to price regulation.[10] "Freedom of contract" became a hallowed right not to be restricted except for very substantial reasons.[11] In some instances at least, the Court seemed to adopt the criterion that where a statute gave rise to a very substantial deprivation

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which the Indiana court held an anti-ticket-scalping statute, IND. STAT. ANN. (Burns 1942 Repl.) § 10-4913, invalid under the *Indiana* Constitution. The Indiana court expressly disapproved the United States Supreme Court's post-1937 trend in due process review, and followed the theory laid down in such pre-1937 cases as Ribnik v. McBride, 277 U. S. 350 (1928), [overruled by Olsen v. Nebraska, 313 U. S. 236 (1941)] and Tyson & Bro. v. Banton, 273 U. S. 418 (1927) (expressly disapproved in Olsen v. Nebraska, *supra* at 245). *Liggett* v. *Baldridge* was also cited with approval.

9. If, and to the extent that, this language implies that such an inquiry can even *begin*, it represents a retreat by the minority of the Court from its doctrinal position that the due process clause, in itself, does not empower the Court to review economic regulation. "And I further contend that the 'natural law' formula which the Court uses to reach its conclusion . . . should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power." Mr. Justice Black dissenting for himself and Douglas, J., in Adamson v. California, 332 U. S. 46, 75 (1947). See also Black, Douglas, and Murphy, JJ., concurring in Federal Power Commission v. Natural Gas Pipeline Co., 315 U. S. 575, 599 (1942); Mr. Justice Black's concurrence in United States v. Carolene Products Co., 304 U. S. 144, 155 (1938). While Mr. Justice Murphy seems in substantial agreement with Justices Black and Douglas, the firmness of his position is somewhat shaken by his separate dissent in Adamson v. California, *supra* at 124. Mr. Justice Rutledge's exact position is similarly in some doubt in view of his joining Mr. Justice Murphy's dissent in the *Adamson* case. For a general discussion of the views of the individual justices in regard to the scope of due process review, see Note, 24 IND. L. J. 89, 91-4 (1948). It is probably grasping for straws, however, to read doctrinal significance into the somewhat ambiguous language of the instant case.

10. *E.g.*, New State Ice Co. v. Liebmann, 285 U. S. 262 (1932); Williams v. Standard Oil Co., 278 U. S. 235 (1929); Ribnik v. McBride, 277 U. S. 350 (1928); Tyson & Bro. v. Banton, 273 U. S. 418 (1927).

11. Adkins v. Childrens' Hospital, 261 U. S. 525 (1923); Coppage v. Kansas, 236 U. S. 1 (1915); Adair v. United States, 208 U. S. 161 (1908); Lochner v. New York, 198 U. S. 45 (1905).

of rights, the evils sought to be corrected should be reasonably commensurate. In other words, the test of constitutionality sometimes came very near being whether (in the opinion of the Court) the regulation was sufficiently necessary to justify its existence—whether or not the legislature should have taken fairer and less drastic steps.[12]

Since 1937, however, the Supreme Court has followed a policy of "judicial self restraint" in dealing with claims that economic regulatory statutes contravene the requirements of due process of law.[13] While the majority of the Court insists that it does retain power to invalidate "unreasonable" and "arbitrary" statutes on substantive due process grounds,[14] the bases of such invalidation have been narrowed almost to the vanishing point. *Nebbia v. New York*[15] established that, as a practical matter, all businesses are subject to statutory price regulation under the state police power. *West Coast Hotel Co. v. Parrish*[16] read "freedom of contract"

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12. *See e.g.*, New State Ice Co. v. Liebmann, 285 U. S. 262, 278 (1932); Nectow v. Cambridge, 277 U. S. 183, 188 (1928); Tyson & Bro. v. Banton, 273 U. S. 418, 442-3 (1927); Weaver v. Palmer Bros. Co., 270 U. S. 402, 414-5 (1926); Burns Baking Co. v. Bryan, 264 U. S. 504, 513 (1924); Adams v. Tanner, 244 U. S. 590, 595-6 (1917). The dictum of Mr. Justice Brown in Lawton v. Steele, 152 U. S. 133, 137 (1894), that the means must be "reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals," seems to have afforded the pre-1937 Court at least one of the bases for the development of the dogma of "necessity" as a test of constitutionality. See, *e.g.*, Burns Baking Co. v. Bryan, *supra* at 513. See also Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 955, 966-7 (1927).

13. See Comment, 26 TEX. L. REV. 47, 56 (1947). For a definition of "judicial self restraint," see Mr. Justice Stone, dissenting in United States v. Butler, 297 U. S. 1, 78-9 (1936): ". . . while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government."

14. Federal Power Commission v. Natural Gas Pipeline Co., 315 U. S. 575, 586 (1942); United States v. Carolene Products Co., 304 U. S. 144, 152 (1938); West Coast Hotel Co. v. Parrish, 300 U. S. 379, 399 (1937).

15. 291 U. S. 502, 536 (1934): "The phrase, 'affected with a public interest,' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good."

16. 300 U. S. 379 (1937). Two cases decided during the present term have reaffirmed the Court's position on this point. Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 69 Sup. Ct. 251 (1949); AFL v. American Sash & Door Co., 69 Sup. Ct. 258 (1949).

out of constitutional law. *Olsen v. Nebraska*[17] stated that the Court will not concern itself with the wisdom, need, or appropriateness of the legislation. Nor will the fairness of the statute[18] nor the hardship which it places upon those affected by the act[19] be considered. Motivation of the legislature is likewise irrelevant.[20] The present Court attaches a presumption of constitutionality to a statute, which places upon the party challenging it the burden of negativing every conceivable basis upon which the statute might be upheld.[21] Thus in order that a statute today be declared unconstitutional, it must be so plainly arbitrary and unreasonable that no rational man could think otherwise.[22] In view of these pronouncements of the post-1937 Court, it has been assumed in some quarters that as a practical matter the due process clause has been eliminated as a bar to legislation in the economic field.[23]

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17. 313 U. S. 236, 246 (1941). See also Queenside Hills Realty Co. v. Saxl, 328 U. S. 80, 82 (1946); Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. R., 321 U. S. 50, 64 (1944); Wickard v. Filburne, 317 U. S. 111, 129 (1942); Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, 394 (1940); Osborne v. Ozlin, 310 U. S. 53, 66 (1940); South Carolina State Highway Department v. Barnwell Bros., 303 U. S. 177, 190-1 (1938); West Coast Hotel Co. v. Parrish, 300 U. S. 379, 399 (1937).

18. *See* Wickard v. Filburne, 317 U. S. 111, 129 (1942); Watson v. Buck, 313 U. S. 387, 403 (1941).

19. "It is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others. The conflict of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination." Wickard v. Filburne, 317 U. S. 111, 129-30 (1942). *See* Illinois Cigarette Service Co. v. City of Chicago, 89 F.2d 610, 613 (7th Cir. 1937); United States v. Bernstein S. S. Line, 44 F. Supp. 19, 20 (S. D. N. Y. 1941).

20. *See* Fernandez v. Wiener, 326 U. S. 340, 362 (1945); Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, 401 (1940); Sonzinsky v. United States, 300 U. S. 506, 513-4 (1937).

21. *See* United States v. Carolene Products Co., 304 U. S. 144, 152 (1938); Madden v. Kentucky, 309 U. S. 83, 88 (1940). Previously, the establishment of but one irrational basis of the legislation was sufficient to shift the burden of justifying the statute to its proponent. *See* Georgia Ry. & Electric Co. v. Decatur, 295 U. S. 165, 170 (1935).

22. *See* Sage Stores v. Kansas, 323 U. S. 32, 35 (1944); Carolene Products Co. v. United States, 323 U. S. 19, 31-2 (1944); Madden v. Kentucky, 309 U. S. 83, 88 (1940); United States v. Carolene Products Co., 304 U. S. 144, 152 (1938); Carmichael v. Southern Coal & Coke Co., 301 U. S. 495, 509 (1937).

23. "It is at least fair to say that in the past few years the Due Process Clause has ambled right out of the U. S. Reports, at least so far as economic legislation is concerned. . . ." Braden, *Umpire to*

Nevertheless, despite the view of a minority of the present Court,[24] there remains a theoretical line of unreasonableness beyond which the legislature may not pass.[25] In determining whether a particular statute has passed this line, the announced test of "reasonableness" is of little value in itself. The test, for all the variety of verbal formulations in which it has been expressed,[26] is essentially a subjective one, becoming objective only to the extent that it has been translated by the Supreme Court into terms of decided cases.[27] Thus, if a lower court seeks guidance more reliable than its own ideas of reasonableness, it can look only to these decided cases. But, since the definite change in philosophy which took place in the 1930's concerning judicial review of legislation, the lower court will find no economic legislation has been invalidated on due process grounds. Therefore, if the statute under consideration seems more unreasonable than any of the statutes considered by the post-1937 Supreme Court, the lower court, aided only by the verbal tests set forth by the Court, is thrown back upon its own

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the Federal System, 10 U. OF CHI. L. REV. 27, 48 (1942). "The due process clause may be dead so far as it may be a device by which the Court will overturn legislation in the economic field." Comment, 26 TEX. L. REV. 47, 56 (1947).

24. Justices Black and Douglas and, less certainly, Justices Murphy and Rutledge constitute this minority. See note 9 *supra*.

25. See note 14 *supra*.

26. *E.g.*, ". . . the guaranty of due process demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." Nebbia v. New York, 291 U. S. 502, 525 (1934). "We are not concerned . . . with the wisdom, need, or appropriateness of the legislation." Olsen v. Nebraska, 313 U. S. 236, 246 (1941). ". . . regulatory legislation . . . is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." United States v. Carolene Products Co., 304 U. S. 144, 152 (1938).

27. Mr. Justice Holmes recognized that such standards are definable only in terms of concrete cases: "With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides." Noble State Bank v. Haskell, 219 U. S. 104, 112 (1911). While it is true, as stated by Mr. Justice Holmes, that indefinite standards exist in many branches of the law, the standard in most instances becomes "defined" in terms of decided cases which fall on either side of the line (*e.g.*, the "unreasonable restraint of trade" cases under the Sherman Act). However, since all the "substantive" due process cases decided under the post-1937 philosophy fall on the "reasonable" side of the line, the limit of "unreasonableness" is undefined and must be determined subjectively.

subjective conceptions of what is an unreasonable regulation.

The present case placed the district court in just such a position. The statute under consideration seems more nearly "unreasonable" than any considered by the post-1937 Court.[28] The lower court, in deciding upon the reasonableness of the statute unaided by modern precedent, found an analogy in the 1928 case of *Liggett v. Baldridge*.[29] That case concerned a Pennsylvania statute which required that all stockholders of corporations owning drug stores be licensed pharmacists. The state already had a comprehensive set of laws regulating pharmacies in the interest of public health. The Supreme Court concluded that mere stock ownership in a corporation could have no real and substantial relation to the public health and added that a state could not prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.[30]

Brief consideration of the *Liggett* case will suffice to show that it is inconsistent with modern due process decisions. The Court in that case was obviously concerned with the *necessity* of passing such a statute.[31] The drastic measure imposed by the legislature was not commensurate with the evil to be corrected, and therefore under the philosophy of the day was unreasonable.[32] Since the public health was already protected by other statutes, the Court's conclusion that the statute in controversy was unnecessary and thus unreasonable was more easily reached.[33] The Court also utilized a presumption of *unreasonableness*, since the burden of proving the statute a valid exercise of the police power

28. Compare, *e.g.*, the statute involved in Queenside Realty Co. v. Saxl, 328 U. S. 80 (1946); Olsen v. Nebraska, 313 U. S. 236 (1941); Railroad Commission v. Rowan & N. Oil Co., 310 U. S. 573 (1940); Osborn v. Ozlin, 310 U. S. 53 (1940); United States v. Carolene Products Co., 304 U. S. 144 (1938); West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937).

29. 278 U. S. 105 (1928).

30. *Id.* at 113.

31. The "public-health" jargon of the *Liggett* case was obviously fictional. While phrased in terms of public health legislation, and while the Court talked in those terms, the statute was really anti-chain store legislation. See Notes, 24 ILL. L. REV. 104, 104-5 (1929); 4 NOTRE DAME LAW. 397, 399-400 (1929); 7 TEX. L. REV. 474, 476 (1929); 3 U. OF CIN. L. REV. 169 (1929); 15 VA. L. REV. 376 (1929).

32. *See* Liggett v. Baldridge, 278 U. S. 105, 112-3 (1928).

33. *Ibid.*

was placed upon the state.[34] It is very probable that if the exact *Liggett* case should arise today, the statute would be upheld. However, since *Liggett v. Baldridge* had not been overruled,[35] it was rationally defensible for the district court to conclude as it did, that that case was still binding authority and was sufficiently similar to the present case to be determinative of the issue. Further, even though the district court might feel that the *Liggett* case would be decided differently under the modern theory of due process review, overruling of that case was not within its province.[36]

In reversing, however, the Supreme Court, probably because of judicial reluctance to overrule prior decisions when not absolutely necessary,[37] did not overrule *Liggett*. Content with pointing out the wide difference in due process philosophy between that utilized in the *Liggett* decision and that existing today, Justice Murphy bluntly and summarily distinguished the *Liggett* case on its facts.[38] The only rational interpretation of the decision is that the *Liggett* case has now been distinguished out of existence, or, at very least, has been confined to its exact fact situation.[39] It can certainly no longer serve as either a prop or a stumbling block for the lower courts.

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34. "If detriment to the public health thereby has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced, and so far as we are informed, either by the record or outside of it, none exists. The claim, that mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance. This is not enough. . . ." *Id.* at 114. *Cf.* Olsen v. Nebraska, 313 U. S. 236. 246 (1941): "There is no necessity for the state to demonstrate before us that evils persist despite the competition which attends the bargaining in this field."

35. It has not been cited by the Supreme Court since 1933, however.

36. *See* Family Security Life Ins. Co. v. Daniel, 79 F. Supp. 62, 68-9 (E. D. S. C. 1948).

37. And possibly to preserve unanimity.

38. *See* Daniel v. Family Security Life Ins. Co., 69 Sup. Ct. 550, 553 (1949).

39. The language of the opinion seems studiously calculated to avoid indicating any approval of the *Liggett* case over and above whatever approval may be implied from the failure to overrule it. *Ibid.* While the cases are obviously distinguishable on their facts, it is considerably more difficult to distinguish them on principle: in both statutes there was a complete prohibition of a class from engaging in an otherwise lawful business; in both the avowed public interest was already protected by a comprehensive set of laws. If, as Mr. Justice Murphy states, "The Pennsylvania statute was clearly less adapted to the recognized evil than the one now before us" *(Ibid.)*, then the difference is one of degree of wisdom, need, or appropriateness, with which the present Court is not supposed to concern itself. Olsen v. Nebraska, 313 U. S. 236 (1941).

The present decision demonstrates even more conclusively than previous cases the wide scope which the legislatures have in regulating economic matters. So far as due process is concerned, the field is entirely clear for the lower federal courts to uphold any and all economic regulatory statutes. It would seem advisable and entirely proper for them to do exactly that. If the elusive limit of legislative power in this area exists at all, it is known only to the Supreme Court. Unless and until the Court gives substance, in the form of decided cases, to the theory that a limit exists, the lower federal courts may very well operate upon the assumption that no economic regulation violates the Fourteenth Amendment.[40]

STATUTE OF FRAUDS

NECESSITY OF DELIVERY OF MEMORANDUM

Gall filed a complaint relying on an agreement by the Brashiers to lease certain Oklahoma oil land to him for five years. He alleged that the Brashiers were to complete the oil and gas lease on a form furnished by him and to forward the lease to a bank with draft attached for the lease price, payable at a specified date. The Brashiers filled out the lease in the office of their attorney, but the following day

40. So far as the due process clause of the Fourteenth Amendment is concerned, the same observation applies with equal force to state courts. But state courts of a mind to invalidate economic regulation have held that the due process clause (or some other provision) of their respective state constitutions places a greater limitation upon legislative power than does the Fourteenth Amendment. *Compare* Boomer v. Olsen, 143 Neb. 579, 10 N. W.2d 507 (1943), and State Board of Barber Examiners v. Cloud, 220 Ind. 552, 44 N. E.2d (1942), *with* Olsen v. Nebraska, 313 U. S. 236 (1941), and Nebbia v. New York, 291 U. S. 502 (1934). *Compare* Illinois C. R. R. v. Illinois Commerce Comm., 387 Ill. 256, 56 N. E.2d 432 (1944), *with* Federal Power Comm. v. Hope Natural Gas Co., 315 U. S. 575 (1942). *Compare* Cincinnati v. Correll, 141 Ohio 535, 49 N. E.2d 412 (1943), *with* West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937). See also the recent case of Kirtley v. State, 84 N. E.2d 712 (Ind. 1949), discussed note 8 *supra*.

In view of the holdings of the state courts in the cases compared above, it is possible that the petitioning insurance company in the present case may yet prevail if it should choose to carry its fight to the state courts. Montana and Kentucky have declared similar statutes unconstitutional under their state constitutions. Montana v. Gateway Mortuaries, 87 Mont. 225, 287 Pac. 156 (1930); Kenton & Campbell Benevolent Burial Association v. Goodpaster, 304 Ky. 233, 200 S. W.2d 120 (1946). And the issue of constitutionality under the state constitution is clearly not *res judicata*. Boomer v. Olsen, *supra*.