"affects" interstate commerce, and that the question of such affectation is to be determined as a matter of economic fact in each particular case, then the Constitution has been amended by statute into a document which would never have been adopted or ratified originally, and—what is more serious—the whole theory upon which our system of government is founded and upon which it has been maintained is gone.

4. The power now claimed by the Government is not granted by the express language of the Commerce Clause; has never heretofore been claimed or exerted in our history; and the Constitution could not have been adopted or ratified had it been claimed originally.

The truth of these statements is patent and the point need not be labored. The power now asserted is not in terms granted by the Commerce Clause or by any other provision of the Federal Constitution. No instance exists in our history of the exertion of such a power by the Federal Government, nor is there any precedent, judicial or historical, to sustain its existence. The Administration's theory of constitutional construction, no less than this statute, rests upon nothing more solid than a supposed "change in social theory" (R. 150). Unless we are now to adopt the view that the Constitution may be amended by statute, the acceptance of such change by the people and their agreement in the extension of the powers of the Federal Government must be evidenced by a constitutional amendment. *Kansas* v. *Colorado,* 206 U. S. 46, 89, 90.

A single example is sufficient to show that the Commerce Clause was not deemed by the framers to have the meaning

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now attributed to it, and could not have been included in the Constitution if it had. In the case at bar the Federal Government asserts its power under the Commerce Clause to regulate the wages, hours and working conditions of labor in the production of commodities, because such matters "affect" interstate commerce either in the same or in other commodities. That theory is the basis of the Recovery Act and the sole basis of the wage and hour counts in the indictment in the instant case. Had the Congress possessed any such power under the Commerce Clause in the early days of our history, a Northern majority in the Congress could have settled the slave question by a statute prohibiting or conditioning the movement of products of slave labor in interstate commerce (cf. *Hammer* v. *Dagenhart,* 247 U. S. 251); or, as in the case at bar, it could have directly regulated the wages and hours of slaves. It is no answer to suggest that we live in an era of different moral, social and economic views and conditions. The question of power is just the same; so, too, is the effect, actual or potential, of labor and labor earnings on interstate commerce.

If the Government's present view of the scope of the power granted to it by the Commerce Clause is correct, what need was there of the Thirteenth Amendment to abolish slavery? On the Government's theory, a temporary political majority in any Congress had from the outset of the Government the power at any time to make the ownership of slaves practically valueless. What need, moreover, was there for an Eighteenth Amendment to prohibit the manufacture and sale of intoxicating liquor? Certainly it cannot be denied that these "affect" interstate commerce in the sense in which the Government uses that term.

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5. Under the construction of the Commerce Clause now advanced by the Government, the United States loses its character as "a government of laws, and not of men", and the doctrine of enumerated powers is gone.

Every schoolboy knows the distinctions between the character of the States and their powers and the character and powers of the United States and the historic reasons therefor. Having experienced the tyranny that comes of a central government of undefined power capable of arbitrary use, the States were fearful lest the Constitution should result merely in a change of masters,—not in a realization of the freedom so bitterly won. To that end no general grant of legislative power was given to the Federal Government and every specific grant of definite power was scrutinized with jealous eye before the Constitution was ratified. As appears from contemporaneous and authoritative documents quoted from in the margin,[1] the friends of the new

[1]Madison, a member of the Federal Convention, a co-author of The Federalist and one well qualified to speak upon the subject, thus described the purposes of the Commerce Clause to the Virginia Convention during the debate upon the question of the adoption of the Federal Constitution (3 Elliot's Debates, pp. 259-260):

> "The powers of the general government relate to external objects, and are but few. But the powers in the states relate to those great objects which immediately concern the prosperity of the people. Let us observe, also, that the powers in the general government are those which will be exercised mostly in time of war, while those of the state governments will be exercised in time of peace. But I hope the time of war will be little, compared to that of peace. * * *
>
> "All agree that the general government ought to have power for the regulation of commerce. I will venture to say that very great improvements, and very economical regulations, will be made. It will be a principal object to guard against smuggling, and such other attacks on the revenue as other nations are subject to. We are now obliged to defend against those lawless attempts; but, from the interfering

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Constitution "found it necessary to urge", as Chief Justice Marshall points out, that the United States was to be a government "of enumerated powers" (*McCulloch* v. *Maryland,*

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lations of different states, with little success. There are regulations in different states which are unfavorable to the inhabitants of other states, and which militate against the revenue. New York levies money from New Jersey by her imposts. In New Jersey, instead of co-operating with New York, the legislature favors violations on her regulations. This will not be the case when uniform regulations will be made."

And Hamilton pointed out that, since the United States was a government of enumerated powers only, no express reservation of the rights and liberties of the people was necessary, and might even be dangerous. Said he (The Federalist, No. LXXXIV):

> "But a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the Nation, than to a Constitution which has the regulation of every species of personal and private concerns. If, therefore, the loud clamors against the plan of the Convention, on this score, are well founded, no epithets of reprobation will be too strong for the Constitution of this State. But the truth is, that both of them contain all which, in relation to their objects, is reasonably to be desired.
>
> "I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. *For why declare that things shall not be done which there is no power to do?* * * *
>
> "There remains but one other view of this matter to conclude the point. The truth is, after all the declamation we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, a *Bill of Rights.*"

The adoption of the first ten amendments in the face of this clear exposition is an indication of the strongest kind of the grave fear of encroachment by the new government upon individual liberty and of the determination of the people that it should never occur.

Madison in No. XLV of The Federalist in reassuring the people that the new constitution would not prove fatal to the state governments stated:

> "The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are

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4 Wheat. 316, at 405). It was on this understanding, and on this understanding alone, that the Constitution was adopted. "That principle is now universally admitted" (*McCulloch* v. *Maryland, supra*), and "it has become an accepted constitutional rule that this is a government of enumerated powers" (*Kansas* v. *Colorado,* 206 U. S. 46, 81). The new government was also to be "a government of laws, and not of men" (*Marbury* v. *Madison,* 1 Cranch. 137, 163).

No one will question that these were the fundamental principles upon which this Government was framed. Their existence is the only excuse for any written Constitution at all. With these fears and these principles in mind, the Constitution, at least in respect of the provisions granting power to the Federal Government, was written with a

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to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

"The operations of the Federal Government will be most extensive and important in times of war and danger; those of the State Governments, in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State Governments will here enjoy another advantage over the Federal Government. The more adequate, indeed, the Federal powers may be rendered to the National defence, the less frequent will be those scenes of danger which might favor their ascendency over the Governments of the particular States.

"If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the Union, than in the invigoration of its ORIGINAL POWERS. The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained".

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studied definiteness and care which has been too frequently the subject of comment to need reiteration here. A grant of the indefinite power to regulate *all matters* "affecting" commerce among the several states would have been thoroughly out of keeping with the definiteness and precision of every other specific grant of power contained in the Constitution.[2] Yet that is how the Government would have us read the Commerce Clause now. The result would be an enumerated power of such indefinite extent and such general scope as to render futile the maintenance of any Constitution at all. Not only would this subvert the principle of a government of restricted and definitely enumerated powers but this record proves that it would result in a government of men and not of laws in a sense never sanctioned in our history.[3] It is true that in a highly complex society statutes cannot be too detailed, and men must take some chances that they read the law aright. *Nash* v. *United States,* 229 U. S. 373, 377. That is not to say, however, that a power specifically restricted to a particular subject shall be construed to extend to all matters which "affect" that subject, and the question of "affectation" then left to the determination of a jury. Yet that is just what has happened in this case.[4]

[2]No less than four attempts in the Constitutional Convention of 1787 to confer a broad general welfare power upon the Congress as a specific grant of power were defeated (Farrand, Records of the Federal Convention, I, p. 229; II, pp. 25, 26, 367).

[3]In its administration through the Code System the Recovery Act has most certainly had this result, as pointed out previously herein in discussing delegation of legislative power.

[4]A result of acceptance of the government's theory would be to have the question of the extent of the government's power over intrastate business determined by the juries of the land. The government relied very largely upon opinion evidence of so-called expert witnesses, being economists and members of the poultry slaughtering business, on the question whether the business of the defendants "affects"

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The inquiry as to the power of the State governments is wholly different, at least in so far as the Federal Constitution is concerned. They are invested with general legislative power over all subjects not expressly prohibited to them, and are limited only by general guaranties of liberty and due process. In the case of a government admittedly armed with broad general powers to legislate for the public welfare (*Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398), we may well expect to find that the liberty guaranteed by the Bill of Rights has a meaning which varies with the changing moral, social and economic conditions of the

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terstate commerce. The judge, without defining interstate commerce, and over the objection of the counsel for defendants, left the question whether the activities "affect" interstate commerce to the jury for determination (R. 1510, 1530, 1531, 1532) and there is no criticism of this in the opinion of the Circuit Court of Appeals. Not only did the court neglect to define interstate commerce, but with the possible exception of the court also, an incidental remark in its charge, left the impression that if defendants' acts *in any way* affected interstate commerce, such acts were within the power of Congress to prohibit under the code. The only remarks made by the court which might arguably be said to leave the impression that defendants' acts must substantially affect interstate commerce, in order to lie within Federal control were as follows (R. 1532):

> "The question is whether the violations, or any of them, affected interstate commerce in any of the ways alleged in the indictment. Of course, the violation must have been substantial and not merely incidental."

But the court in the same paragraph of its charge added the following qualifying remark to the statement just quoted:

> "although small, and however small a violation it is, if it is a violation of a provision and it affects interstate commerce, then that is what the act says shall not be done."

And in the next paragraph of its charge the court further delimits its only statement to the effect that defendants' acts must have substantially affected interstate commerce when it stated (R. 1533):

> "The law says that if those acts are done which it says shall not be done and which are acts which affect interstate commerce, then it is not the size of the act; it is the act in and of itself that is the violation. Do you understand me? Is that plain?"

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times (*Nebbia* v. *People,* 291 U. S. 502, 537). But, for reasons which are obvious and have been stated above, the principles applied to the construction of constitutional restrictions upon State power can have no valid place in determining the scope of *grants of power* to the Federal Government—if the doctrine that it is a government of enumerated powers is to remain as "an accepted constitutional rule" (*Kansas* v. *Colorado, supra*).

6. Acceptance of the Government's view as to the extent of the Commerce Clause is inconsistent with the maintenance of our dual system of government.

It can scarcely be denied that if the Government's view of the scope of the Commerce Clause be accepted there is little human activity that is not potentially subject to regulation by the National Government. Matters heretofore considered as solely within the domain of the regulatory powers of the States, or as not subject to any governmental interference at all, will fall within the purview of the Federal power. This potentiality is self-evident. In the light of the exercises of power of the present Administration in the multitudinous codes promulgated under this statute, as hereinbefore detailed, it cannot be contended that the fear is fanciful. Nor is the abrogation of the Tenth Amendment the only danger. The very existence of the States is placed subject to the will of a majority in Congress. If the wages paid to labor in productive activity "affect" interstate commerce, certainly the taxes paid to the State in such productive activity have an equal effect upon that commerce. If the Federal Government can regulate the one, it can regulate the other. The taxes which are the lifeblood of the State are, therefore, on the logic of the Government's

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theory, collected by the State only by the forebearance of the Federal Government.

7. If the Government's view as to the scope of the commerce power be accepted, the field of individual liberty heretofore regarded as secure from governmental encroachment in certain fundamental aspects will be greatly restricted and potentially subject to complete extinction.

It is settled that the "liberty" guaranteed by the Constitution is not confined to mere liberty of the person but includes, among other things, the right to enter into contracts for the purpose of enabling the citizen to carry on his business. *Allgeyer* v. *Louisiana,* 165 U. S. 578; *United States* v. *Joint Traffic Association,* 171 U. S. 505, 572. It was the fear of undue encroachment by the Federal Government upon this liberty which, among other things, was responsible for the addition to the Constitution of the Bill of Rights contained in the first Ten Amendments.[1] The grants in the Constitution, including the commerce power, must be read in the light of this limitation. This is not to say that the commerce power, within its proper sphere, may be limited or excluded from operation by private contracts (*Addyston Pipe and Steel Co.* v. *United States,* 175 U. S. 211, 228, 229); nor is it to deny that in proper circumstances freedom of contract in the matter of hours and wages may be limited in the direct regulation of interstate

[1]The adoption of these express limitations upon the authority of a Government which had no general legislative authority is the strongest possible indication of the fear of the People of the possible encroachments of a central government upon individual liberty, and of their determination to make such encroachments impossible. See Hamilton, The Federalist No. LXXXIV.

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commerce (*Wilson* v. *New,* 243 U. S. 332). But the Government's view of the commerce power would admit of regulation of all private transactions, including the fixing of prices and of wages and hours of labor in all activities of whatever character, provided only that they "affect" interstate commerce in some degree. Surely the facts that a continent was settled with a purpose of securing liberty, that a nation was established for that purpose, and that its organic law has from the outset contained an express guaranty of that liberty against governmental encroachment, have a bearing upon the construction of the grants of power to that government. Yet, on the government's view of the commerce power, that fundamental aspect of the liberty guaranteed vanishes whenever the activity of the citizen "affects" interstate commerce. What activity does not affect it?

8. While the exigencies of the present depression do not authorize the Congress to transgress the limits of its constitutional authority, adherence to the Constitution has not prevented measures of the broadest kind which are apt and efficacious for relief and recovery.

What has been said must make it plain that no such power as that assumed in the Recovery Act and the codes was ever conferred upon the National Government. The "emergency" brought about by the depression, so much stressed in the Government's argument, can make no difference on the issue of constitutional power and can have no effect upon the performance by this Court of its limited function under the Constitution. Early in its history this Court announced upon a famous occasion that:

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> "No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its [the Constitution's] provisions can be suspended during any of the great exigencies of Government."[1]

And it has since consistently adhered to the view that emergency does not increase constitutional power, nor diminish constitutional restrictions.[2]

If the measures which the Federal Government properly may take within its conceded authority should prove insufficient for relief and recovery, the responsibility, the duty, and the authority to enlarge the scope of the power of that Government lies with the People who created it, limited its authority, and reserved the right to change it, not with the Court, whose duty is to apply the Constitution. The limited character of the Federal Government, the doctrine of the enumerated powers, the historical reasons for each, and, conclusively, the specific reservation of the power of the people contained in the Tenth Amendment, alike, compel this conclusion. The problem of duty and authority is not new. Emergencies are not novel. In the present case the scenery is new, but the issue is old—as old as the life of this Court. The solution is to be found in one form or another in every volume of its reports. A single example is sufficient. In *Kansas* v. *Colorado,* 206 U. S. 46, 90, speaking in answer to a contention by the Government basically the same as that now presented, this Court pointed out that the Government's plea had been foreseen by the People at the time of the framing of the Constitution and

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[1]*Ex parte Milligan,* 4 Wall. 2, 121.

[2]*Home Building & Loan Ass'n.* v. *Blaisdell,* 290 U. S. 398, 426; *Wilson* v. *New,* 243 U. S. 332, 348.

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that they had then answered it forever in the negative by the Tenth Amendment. This Court said:

> "this amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. . . . The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated."

The wisdom of the fathers finds vindication in the conditions of today. While the validity and not the wisdom of the National Recovery Act is the point at issue in this case, it is not impertinent to note that the framers were not insensible of the fact that panaceas for industrial ills most frequently prove but Utopian dreams. The Recovery Act is based, as herein demonstrated, upon the theory that an increase in wage levels and a spread of work is the first essential step in the ending of the depression which has gripped the nation. This is but the prophecy of those temporarily in power in our national councils. Experience has demonstrated the vanity of that prophecy and the most reputable authorities in the field of economics now say that the plan of attempting to bring back prosperity by raising wage levels before price levels advance is a fallacy and

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will not work out.[3] Wisely, the framers intended that it should never be within the competency of the National Government to experiment with the liberties of the people in the pursuit of a nebulous ideal for the promotion of the public welfare.

While the dangerous, novel and clearly unconstitutional measures forced upon the nation by the statute under review have thus proven not only ineffective but positively detrimental in the opinion of those best qualified to judge, a host of other measures, appropriate to the occasion and within the conceded authority of the Congress, have been at hand and have been used lavishly for relief and recovery. Acting under its authority under clause 1 of Section 8 of Article I of the Constitution "to lay and collect

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[3]The Brookings Institution has recently published (New York Herald Tribune, April 9, 1935, p. 2) the first independently organized investigation of the net effects of the Recovery Act. The report concludes that the Recovery Act has retarded recovery; that the rise in wages effected thereby has been counter-balanced by an equal or greater rise in prices; that the internal readjustments resulting have been haphazard and unplanned; that funds which would otherwise have been available for capital expenditure have been diverted and that bank credit has not been expanded. The report suggests that the enlargement of spending sought to be created by the Recovery Act should have been sought by

> "(1) the removal of the deterrent to the free and prompt utilization of the existing money of the country, and (2) monetary expansion."

Three of the six experts who prepared the report hold or have held high positions in the National Recovery Administration, Mr. Leon C. Marshall being at the present time a member of the supervisory board which has been invested with the functions formerly exercised by General Johnson, Mr. Leverett C. Lyon, being a former Deputy Assistant Administrator and Mr. Paul T. Homan being economist. The other three experts have also occupied governmental positions, Mr. George Terborgh being with the Federal Reserve Board, Mr. Charles L. Dearing having written the highway section of the Coolidge Transportation Report and Mr. Lewis L. Lorwin having been an economic expert of the New York State Department of Labor.

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Taxes * * * to provide for * * * general Welfare of the United States"[4], the Congress has:

> Appropriated $3,300,000,000 for various projects intended to provide employment and to aid the recovery of business (Title II of the National Industrial Recovery Act):
>
> Placed vast funds in the hands of the Reconstruction Finance Corporation (47 Stat. 5) for similar purposes;
>
> Created a Civilian Conservation Corps (48 Stats. 22) and appropriated large sums of money for the employment of the youth of the land in the conservation of our natural resources, and proposes now to expend further large sums for the same purpose;
>
> Within the past month, appropriated the unprecedented sum of $4,800,000,000 for work relief; and taken innumerable other actions for the preservation of the homes and savings of the people, the stimulation of business and the relief of the destitute.

These measures are familiar to all. In addition, acting under its bankruptcy power it has enacted measures of unprecedented scope for the relief of debtors, and acting under its authority to conduct our foreign affairs, it has held council with the great nations of the earth in respect of the common economic problems which concern the world.

In the face of these instances of the exercise of a vast authority, who will contend that adherence to the Constitution leaves the nation impotent to deal with the emergency?

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[4]This is not a "general welfare clause" in the common meaning of the term. It merely authorizes the collection of taxes with which to provide for the general welfare. See Madison, The Federalist, No. XLI; 1 Story, Commentaries, Secs. 908, 911.

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II

THE MINIMUM WAGE AND MAXIMUM HOUR PROVISIONS OF THE CODE ARE BEYOND THE PURVIEW OF THE COMMERCE CLAUSE AND ARE IN CONTRAVENTION OF THE FIFTH AMENDMENT.

The Government has appealed from the decision of the Circuit Court of Appeals holding these provisions unconstitutional.

The provisions regulating hours and wages, for alleged violations of which defendants were convicted, must be sustained, if at all, as regulations, not of transactions "in interstate commerce", but as regulations of transactions or conduct "affecting" interstate commerce.

1. The scope of the power asserted, as evidenced by the maximum hour and minimum wage provisions of the Recovery Act and of the codes adopted thereunder, and the arguments advanced in support of the asserted power, together with the implications as to the extent of power arising therefrom.

It is not necessary to go to the codes for the purpose of finding an assertion of Federal authority over minimum wages and maximum hours. The Act requires that all employers in an industry covered by a code shall observe the "maximum hours of labor and minimum rates of pay * * * approved by the President" (Section 7(a)(3)). The Congress thus undertook affirmatively and directly through the President to regulate the wages and hours of persons subject to codes, established under the Act. The Act did not require the insertion of such provisions in every code. Its legislative history and the history of the times,

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however, disclose that it was contemplated that all codes should contain minimum wage and maximum hour provisions, and that one of the chief purposes of the Act was to bring the regulation of all wages and hours within the control of the Federal Government. The hours and wages of labor thus sought to be brought within Federal control were not the hours and wages of the employees of persons or corporations engaged in interstate transportation, but the hours and wages of the employees of persons engaged in commerce and industry, and as administered (see preceding discussion), the hours and wages of employees of persons engaged neither in commerce nor industry, in the ordinary meaning of these words, but engaged in many other activities such as the rendering of personal service, etc.

The exercise of this power is not sought to be supported as a direct regulation of commerce but upon the theory that wages and hours "affect commerce". Nor is the power asserted confined to the regulation of hours and wages of employees themselves engaged in interstate commerce. It extends and was intended to extend to the regulation of the employees of persons engaged in production of goods from raw materials coming from outside the State, and of goods intended for subsequent movement in interstate commerce (from whatever source of origin the raw material may have come), of persons engaged in the subsequent local sale of such goods after production, and of persons engaged in other pursuits, having no relation whatsoever either to the production or distribution of goods.

That such is the scope of the power asserted appears not only from the Recovery Act itself and from its administration, but from the arguments hitherto advanced by the Government in kindred cases in support of the validity of code provisions regulating maximum hours and minimum

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wages. Succinctly stated, the argument is that regulation of wages and hours is within the Commerce Clause because wages paid and hours worked affect:

(1) the price at which goods produced may be sold and the competitive relation of producers, and hence affect, in various ways described by the Government in considerable detail, the flow of interstate commerce; and

(2) the purchasing power of a large section of the population affected (a) directly, by the quantum of wage received by each wage earner, and (b) indirectly, by reducing unemployment through shortened hours, hence affecting the demand, and consequently the volume and flow of interstate commerce.[1]

The wages and hours of persons engaged in production are incidents of production and only indirectly affect the commerce which follows production.[2] Regulation of wages and hours is therefore regulation of persons engaged in the production of goods. As said in *Kidd* v. *Pearson,* 128

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[1]These arguments in one form or another are repeated over and over again in the Government's brief in this case. It may be fairly stated that all, or substantially all, of the arguments submitted in support of Federal authority to regulate wages and hours are predicated upon one or the other of the hypotheses stated in the text. In respect of the second of the two hypotheses, viz.: stimulation of purchasing power, the Government frankly concedes in its brief that such was one of the prime purposes of the Recovery Act, to be accomplished through regulation of wages and hours, and that hence provisions regulating wages and hours have been inserted in all Codes, irrespective of the occupation of the persons affected thereby.

[2]In a later subdivision of this brief we shall endeavor to point out that regulation of production is not regulation of commerce, either state or interstate. We are concerned at this point only with the extent of the power asserted, the basis upon which it is sought to be supported and the resulting consequences upon both our political and economic institutions of the acceptance of the fundamental bases of the Government's argument.

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U. S. 1, a construction of the Commerce Clause which would draw within its reach the regulation of production, would bring within it "not only manufacture, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry", for "there is not one of them that does not contemplate more or less clearly an interstate or foreign market." The Court in that case, therefore, recognized the conceded fact that production "affects" interstate commerce, but pointed to the logical consequences of extending the Commerce Clause by construction so as to include the power to regulate production.[3]

While wages only indirectly affect commerce in the ordinary sense, there are many other factors affecting the same much more directly, such as price fixing or price control, the control of production itself, the allocation of production as between States, communities and persons, and the geographical distribution of the goods produced. The logical consequence of the argument that the Congress may regulate wages because they affect interstate commerce is that it may regulate prices, and may control and allocate production and the distribution of the goods produced. That this is not a fanciful statement of the consequences attendant upon the Government's contentions in support of the provisions of codes adopted under the Recovery Act is evidenced by the brief of the Government itself in the *Belcher* case. At page 111 of that brief it is said:

> "* * * Congress might have attempted a solution through general price-fixing, but such a course

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[3]See also *United States* v. *Knight,* 156 U. S. 1, and *Heisler* v. *Thomas Colliery Company,* 260 U. S. 245.

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> would have involved great practical difficulties and danger of abuse. * * *"[4]

At page 83 (speaking of the Lumber Code, to which that case related) the Government says:

> "* * * The subjects of greatest importance covered by the code, apart from the labor provisions, are production control, conservation, and price protection."

On the same page it says:

> "In order that a 'reasonable balance' between consumption and production may be maintained, the Code Authority is empowered to make estimates every three months of expected consumption and to apportion the same (upon the basis of relative shipments during a representative past period) among the divisions and subdivisions of the industry. (Art. VIII, Appendix B, pp. 36-37.) Each division and subdivision agency is authorized, subject to the approval of the Code Authority, to adopt a formula for the assignment of production allotments to individual operators. (*Ibid.*)"

The Government has thus courageously recognized the logical consequences of the doctrine asserted, viz., that under the Commerce Clause the Congress may not only regulate wages and hours but may regulate prices, control

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[4]Hasty examination of the preliminary draft of the Government's brief fails to reveal that it expressly includes the contention that the Federal Government may regulate the prices of commodities sold in interstate commerce. Since the argument made in its brief in this case, however, is, in part, that wages affect prices and that prices affect the flow and distribution of interstate commerce, it follows logically that, if the Federal Government may regulate wages, because they affect prices and prices affect interstate commerce, it may regulate prices. This is one-half of the Government's argument. The other half is that wages and hours affect purchasing power. But so do prices. So if the Government may regulate wages and hours because of their effect upon purchasing power, it may equally regulate prices for the same reason.

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production and allocate the same to individuals, all for the purpose of bringing about, by the exertion of Federal authority, a " 'reasonable balance' between consumption and production".[5] During the depression we have heard much of "planned economy". The logical consequence of the Government's theory of the relation of the Commerce Clause to the codes is that the Congress may impose either a comprehensive scheme of "planned economy" upon the nation, or so much as it deems at the time expedient, reserving to itself the right to impose at a later time so much of the remainder as it deems necessary and proper.[6] Such is

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[5]The Government in its brief in this case does not refer to "production control", including the power to determine volume of goods to be produced and the allotment of production to individual operators, as among the beneficent effects of the Poultry Code as it did in the *Belcher* case in respect of the lumber code. This is probably because the lumber code operated upon producers of goods intended for shipment in interstate commerce, while the Poultry Code operates upon the producers of articles which have ceased to be in interstate commerce and are being prepared for local consumption. But these logical consequences of the extent of the power asserted follow from the fundamental basis of the argument made in this case as well as in the *Belcher* case, and this is not only recognized by the Government's brief but is put forward therein as illustrating the beneficent effect of the nationalization of all industry and the regimentation of the population under the benign guidance of a supreme bureaucratic Administration at Washington. All of this, of course, is to be accomplished under the Commerce Clause.

[6]We have no doubt but that the Congress, through a removal of the restrictions of the anti-trust laws, might, within reasonable limits, permit persons engaged in interstate commerce to enter into agreements limiting production, fixing prices, etc. Such an act, however, would be *permissive* in character and would merely restore to the interested parties the right to contract upon these subjects free from the restrictions of the Sherman Act. The Recovery Act is not a permissive statute. While it contemplates that the members of any industry shall, in the first instance, write the code, such code, when approved by the President of the United States, is made the law of the land, is imposed upon all members of the industry whether subscribers thereto or not, and a violation thereof is made a penal offense. Moreover, the President (Sec. 3d) is empowered of his own motion to impose a code upon any industry, whose members fail to submit one for approval.

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the extent of the Federal power asserted by the Government itself in justification of the establishment of codes of regulations having the force of law, to be drawn from so much of its argument as is predicated upon its right to regulate persons engaged in the production of goods, whether by regulation of wages and hours or otherwise.

Nor is the power asserted confined to the regulation of persons engaged in the production of goods in interstate commerce, for as said in the brief in the *Belcher* case (at p. 82):

> "The effect of low wage rates and other terms of employment upon interstate prices * * * is not dependent upon whether the particular work was performed upon lumber which ultimately was shipped into the state."

The logical consequence of the doctrine asserted is that the power of the Congress reaches to the regulation of producers who do not ship in interstate commerce, but with whom producers shipping in interstate commerce are in competition. Moreover, hours and wages of persons employed by retailers affect interstate commerce. Consequently, if wages and hours of employees engaged in production may be brought within Federal control because "affecting interstate commerce", so, it would seem, may the wages and hours of employees of persons engaged in retail trade be brought within control of the Federal Government for the same reason. Those charged with the administration of the Act have so interpreted the power conferred by prescribing minimum wages and maximum hours of employees engaged in such trade, and the Act, we think, contemplated that they should.

Finally, insofar as the argument is addressed to the effect of wages and hours upon purchasing power, it

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plies equally to all wage earners, in whatever pursuit engaged. The arguments hitherto advanced by the Government in support of the wage and hour provisions of the Live Poultry Code thus disclose the extent of the asserted Federal authority under the Commerce Clause upon subjects hitherto regarded as beyond its scope.[7]

It may be properly said that the convictions below may not be set aside because under the Recovery Act Federal authority has sought to impose conditions upon industries not within the reach of Federal authority, if the industry of which the defendants were members was subject thereto. It may also be argued that if any of the provisions, for whose violation defendants were convicted, are themselves sustainable within the commerce clause, they may not be set aside because the Code contains other provisions not within the commerce power. With this we do not agree, since the Code was adopted as a whole and its several parts are mutually interdependent.[7] But the purpose of the foregoing review of the contentions of the Government is not to provide a means of escape for these defendants by questioning the validity of the action taken under the Recovery Act in respect of other industries or other persons. Its purpose is to set forth the fundamental basis of the arguments made by the Government in support of the validity of the Code provisions, regulating wages and hours, for alleged violations of which these defendants were convicted, and to state fairly and without exaggeration the effect of such arguments upon the division of powers as between State and Federal governments and upon the political and economic institutions of the nation developed under the Constitution as hitherto interpreted. The effects stated

[7]See discussion *infra,* Part II, Point VII.

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above are not only the logical consequence of the fundamental basis of the Government's argument, but are disclosed by the briefs of the Government in kindred cases to be recognized by it as such.

2. Production, whether by way of manufacture, mining, farming or any other activity, is not commerce and is not subject to regulation under the Commerce Clause. In so holding in previous cases this Court has been guided by the consideration that to hold otherwise would be destructive of our dual system of government and extend to the Federal Government the power to nationalize industry.

The defendants are engaged in the business of slaughtering and selling poultry.

The poultry slaughtered had ceased to be articles of interstate commerce at the time of its slaughter.[1] The defendants are primarily slaughterers. The function of the defendants is precisely the same as that of the operator of a packing house producing dressed meat, or of any other manufacturer engaged in transforming raw material of any description into a finished or semi-finished product for subsequent use or consumption. The wage and hour provisions of the Live Poultry Code thus undertake to regulate the conduct of manufacture by regulating the wages and hours of the manufacturer's employees. Since such is

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[1]Interstate commerce begins when an article is committed to a carrier for interstate transportation (*Coe* v. *Errol,* 116 U. S. 517), and ends when it arrives at its destination (*Brown* v. *Houston,* 114 U. S. 622). See also *Arkadelphia Co.* v. *St. Louis, Etc. Co.,* 249 U. S. 134; *Crescent Cotton Oil Company* v. *Mississippi,* 257 U. S. 129; and the very recent case of *Federal Compress & Warehouse Company* v. *McLane,* 291 U. S. 17.

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the essential nature of the defendant's business, the question first presented is whether the Commerce Clause confers upon Congress power to regulate the conduct of manufacture, and particularly the wages and hours of employees in a manufacturing business.

The power conferred is the power "to regulate commerce among the several states and with foreign nations". Unless that which is regulated is commerce, it is not within the delegated power. Production, whether by way of manufacture, mining, farming or otherwise, is not commerce. The function of production is to prepare articles for subsequent use in commerce after which, but not until which, they may or may not be brought within the Federal authority under the Commerce Clause according to the circumstances of the particular case.

"Commerce" was first defined by the Court in *Gibbons* v. *Ogden,* 9 Wheat. 1, 189. The sole question was whether navigation was included within the term "commerce". In determining this question, Chief Justice Marshall, speaking for the Court, found it necessary to define the word commerce itself, which he did in the following language:

> "The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is

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> regulated by prescribing rules for carrying on that intercourse."

Under this classic definition, subsequently reiterated by the courts on many occasions, "commerce" is "intercourse" embracing traffic, buying and selling, the interchange of commodities, and navigation. Such definition, however, necessarily excludes manufacture or other productive processes, the purpose and effect of which is to prepare articles in their raw state for the commerce in the finished product which is to follow.

The modern definition of commerce as contained in The Century Dictionary and Encyclopedia is as follows:

> "1. Interchange of goods, merchandise, or property of any kind; trade; traffic; used more especially of trade on a large scale, carried on by transportation of merchandise between different countries, or between different parts of the same country, distinguished as *foreign commerce* and *internal commerce:* as, the *commerce* between Great Britain and the United States, or between New York and Boston; to be engaged in *commerce.*"

Under this definition, as well as under the judicial definition of the word as employed in the Constitution, production or manufacture is not commerce, but something that precedes it, or, as related to the raw materials transformed by manufacture, follows it.[2]

[2]As stated by the Chief Justice in *Gibbons* v. *Ogden, supra,* the words of the Constitution should be construed in "their natural and obvious import" (p. 188). The word "commerce", construed in its natural and obvious import, excludes production. In the same opinion the commerce power was defined as a power to prescribe "rules for carrying on * * * interstate commerce." This also excludes the prescription of rules for carrying on production, which is not intercourse.

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This Court has upon a number of occasions held that production is not commerce and not within the power of Congress to regulate.

In *Kidd* v. *Pearson,* 128 U. S. 1, it was contended that a statute of Iowa, prohibiting the manufacture of intoxicating liquors and construed by the highest court of that State as prohibiting such manufacture for purpose of interstate transportation, as well as of local consumption, violated the Commerce Clause. The precise question presented was the extent to which the police powers of the State were limited by such clause. The Court approached this question, however, not from the standpoint of the limits of state power but from the standpoint of the limits of the Federal power under the Commerce Clause.

That such was its method of approach is evidenced by the following excerpt from its opinion (at p. 20):

> "We think the construction contended for by plaintiff in error would extend the words of the grant to Congress, in the Constitution, beyond their obvious import, and is inconsistent with its objects and scope. The language of the grant is, 'Congress shall have power to regulate commerce with foreign nations and among the several States', etc. These words are used without any veiled or obscure signification. 'As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense and to have intended what they have said'. *Gibbons* v. *Ogden, supra,* at page 188."

It held that the Commerce Clause did not empower the Congress to regulate the production of articles intended

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for shipment in interstate commerce and that consequently the State Act was not in contravention of that clause.

The reasons for the conclusion thus expressed were thus stated (at pp. 20-21):

> "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term, as given by this court in *County of Mobile* v. *Kimball,* 102 U. S. 691, 702, is as follows: 'Commerce with foreign countries, and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities'. If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at

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> pool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are and must be, local in all the details of their successful management.
>
> "It is not necessary to enlarge on, but only to suggest the impracticability of such a scheme, when we regard the multitudinous affairs involved, and the almost infinite variety of their minute details."[3]

In *United States* v. *Knight Company,* 156 U. S. 1, the Court again distinguished between production and commerce, saying (at p. 12)

> "commerce succeeds to manufacture and is not a part of it."

In this case, as in *Kidd* v. *Pearson, supra,* the Court remarked (at p. 16) that if regulation of commerce extended to the regulation of "productive industries whose ultimate result may affect internal commerce, there would be but little of business operations and affairs that would be left for state control."

In the first *Coronado* case (*United Mine Workers* v. *Coronado Coal Company,* 259 U. S. 344), this Court set aside a treble damage verdict upon the ground that the evidence failed to show an intent and purpose upon the

[3]This decision was foreshadowed by the decision in *McCready* v. *Virginia,* 94 U. S. 391, in which the Court held that a Virginia statute regulating the planting of oysters in a navigable stream was not in conflict with the Commerce Clause, saying (p. 396):

> "There is here no question of transportation or exchange of commodities, but only of cultivation and production. Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade."

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part of the conspirators to restrain, prevent or obstruct interstate commerce. It appeared that the strikers, charged with conspiracy under the Sherman Act, had by their acts, including acts of violence, caused the plaintiff's mine to be shut down and thus had prevented the mining of coal. It also appeared that the product of the mine was shipped largely in interstate commerce. The effect of their acts, therefore, was to prevent or obstruct interstate commerce by preventing production. The Court held that this was not enough, saying (at pp. 407-408):

> "Coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such. In *Hammer* v. *Dagenhart,* 247 U. S. 251, 272, we said: 'The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof. *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis,* 238 U. S. 439.' Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce."

In *Heisler* v. *Thomas Colliery Company,* 260 U. S. 245, the Court observed that a conception of the Commerce Clause which would bring within it the regulation of production

> "would nationalize all industries, it would nationalize and withdraw from State jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts, and the woolen industries of other

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> States, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof', wool yet unshorn, and coal yet unmined, because they are, in varying percentages destined for and surely to be exported to States other than those of their production" (at pp. 259-260).

Consequently, the Court, as in the first *Coronado* case, held that a conspiracy the purpose of which was to prevent production, thus affecting interstate commerce but without intent or purpose directly to prevent shipments in interstate commerce, was not within the purview of the Sherman Act.

See also *United Leather Workers* v. *Herkert,* 265 U. S. 457, and *Oliver Iron Co.* v. *Lord,* 262 U. S. 172, 178-179.

In the second *Coronado* case, the Court held that, upon a retrial, evidence of the necessary intent and purpose to prevent the movement of coal in interstate commerce had been supplied and that hence the acts of the conspirators, of whatever character and wherever undertaken, were within the Act. Far from overruling the doctrine that production is not commerce it restated the rule laid down in the first *Coronado* case, citing in support of it the first *Coronado* case itself and other cases.

In *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, the Court again distinguished between production and commerce saying "commerce does not begin until manufacture is finished" (p. 181), and quoting its statement in *United States* v. *Knight, supra,* that "commerce succeeds to manufacture and is not a part of it".

In *Champlin Refining Co.* v. *Corporation Commission of Oklahoma,* 286 U. S. 210, an Oklahoma statute prohibiting the production of oil except in accordance with regulations imposed by the State was held not to be in violation

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of the Commerce Clause. The effect of the State regulation in this case was to limit and restrict the volume of oil produced and, hence, the volume capable of movement in interstate commerce.

See also *Chassaniol* v. *Greenwood,* 291 U. S. 584, in which the Court said (at p. 587):

> "Ginning cotton, transporting it to Greenwood, and warehousing, buying and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate or foreign commerce. * * *"

The decision in *Hammer* v. *Dagenhart,* 247 U. S. 251, in which the Court held that, under the guise of regulating interstate commerce, Congress could not regulate the production of goods by closing the channels of interstate commerce to goods produced by child labor, is but the logical application of the distinction between production and commerce made in cases which both preceded and followed. Even the dissenting justices in that case recognized (p. 277) that Congress could not directly "meddle" with production by establishment of regulations governing it and dissented only upon the ground that the Act was sustainable as the exercise of the power of Congress to determine what might move in interstate commerce, its effect upon production being only indirect.

Reading these cases together from *Kidd* v. *Pearson* to *Utah Power & Light Company* v. *Pfost* and *Chassaniol* v. *Greenwood,* two things are plain: first, that the Court applying the rule laid down by Chief Justice Marshall in *Gibbons* v. *Ogden,* has construed the word "commerce" in its natural import and hence as excluding the existence in the Federal Government of a power to regulate production;

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second, that in so doing, it was not concerned with the meaning of words alone or employing a legalistic approach, but was guided primarily by the consideration that, so to construe the Commerce Clause as to draw within it power to regulate production or the activities of producers in their capacity as such, would be destructive of our dual system of government and place it within the power of Congress to nationalize industry.[4]

Regulation of hours and wages is a regulation of production, not of commerce, and beyond the power of Congress.[5] The Government would bring such regulation with-

[4]A number of cases referred to in this section of the brief are cases involving the limits of the States' police power or the power to tax. The Government in its brief would brush all these cases aside upon the ground that the permissible limits of the State power in these respects do not "necessarily" mark the limits of the Federal power. No one will dispute this proposition. The difficulty with the argument is twofold: it ignores (1) the fact that the permissible limits of State power in these respects *may* also mark the permissible limits of Federal power; and (2) that in the cases we have cited, such as *Kidd* v. *Pearson,* and others, the Court, as stated in the text, arrived at its determination of the permissible limits of State authority by first defining the permissible limits of Federal authority and held that the authority sought to be exercised by the State was not in violation of the Commerce Clause because in a field exclusively committed to the States and withheld from any grant to the Federal Government.

[5]The Government in its brief weakly suggests that the fact that the Government has never hitherto sought to regulate production or hours and wages, and that it was hitherto supposed to be without such power, are without significance. In support of this it comments upon the fact that the power of Congress over interstate transportation was not exercised for a long time and then only gradually. But the subject-matter being regulated in the two cases is, of course, entirely different. In the one case it is a subject-matter clearly within the Commerce Clause. In the other, the subject-matter of the regulation is not only outside the express power granted, construed in the light of the natural and ordinary import of the words employed, but outside the scope of such power as commonly understood by all, including this Court, throughout the whole course of our constitutional history, and would involve the extension of Federal power to activities never dreamed of by those who framed the Constitution or by the people who adopted it.

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in the Commerce Clause because wages and hours "affect" interstate commerce. They would thus substitute for the words of the grant a broader grant. Whatever the limitations of the words "affecting interstate commerce" may be, it admits of little doubt that if the framers had undertaken to confer this power upon the Federal Government, the Constitution would not have been ratified by the constitutional convention, and it admits of no doubt that it would never have been ratified by the people.

3. Prior decisions of this court contain no warrant for the existence of the power asserted, but on the contrary clearly indicate that it is wanting.

The Government cites prior decisions of this court as affording support for its view that the Commerce Clause grants authority to the Federal Government to regulate the wages and hours of labor of persons engaged in the purely local activities of the production or sale of goods because such hours and wages "affect" interstate commerce in two ways:

(1) By affecting prices and the competitive relations of producers; and

(2) By affecting purchasing power.

An examination of the decisions of this Court in the fields referred to, both those decisions cited by the Government and others, not only fails to afford any support for the Government's theory, but clearly shows an express negative of the existence of any power in the Federal Government to regulate the wages and hours of persons engaged in the production and sale of goods.

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(a) THE CASES SUSTAINING FEDERAL ACTS PROHIBITING THE MOVEMENT OF CERTAIN ARTICLES IN INTERSTATE COMMERCE ARE NOT IN POINT.

Neither the Recovery Act nor the labor and wage provisions of the Live Poultry Code are in the nature of a prohibition against the movement of any articles in interstate commerce. They represent, on the contrary, an attempt upon the part of Congress directly to regulate production and as such constitute neither the regulation of commerce nor the exercise of any other power entrusted to the Federal Government.

Moreover, were the Act in form, or were it regarded in substance, an act prohibiting the movement of articles produced under conditions other than those prescribed by the maximum hour and minimum wage provisions of the Code, the case would be clearly distinguishable from those in which prohibitions against the movement of various articles in interstate commerce have been sustained. In every such case the purpose of the Act has been to prohibit the movement in interstate commerce of noxious articles in themselves harmful,[1] of persons or property the use of which gave rise to social evils of general recognition,[2] or which would induce the commission of crimes contrary to state law, in which case the purpose of the Act was to supplement the criminal statutes of the states themselves by

[1]The exclusion of diseased livestock (*Thornton* v. *United States,* 271 U. S. 414; *Reid* v. *Colorado,* 187 U. S. 137), and of adulterated foodstuffs (*Hipolite Egg Company* v. *U. S.,* 220 U. S. 45).

[2]The White Slave Act (*Hoke* v. *U. S.,* 227 U. S. 308; *Caminetti* v. *U. S.,* 242 U. S. 470); lottery tickets (*Champion* v. *Ames,* 188 U. S. 321).

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preventing the movement in interstate commerce of the subject matter of the crimes committed.[3]

There is, of course, no analogy between these acts and acts prohibiting the transportation in interstate commerce of useful articles of commerce, themselves harmless whether considered from the standpoint of their physical characteristics or of the results of their intended use. Were this a prohibitory statute, instead of a statute purporting directly to regulate the conduct of production, it could be sustained only upon the theory that Congress, under the guise of regulating interstate commerce, may impose upon all persons in the United States those economic and social concepts which may constitute the view prevalent in Congress at the time of their adoption and arrogate to the Federal Government the control of the processes of production as well as the regulation of interstate commerce. This Congress may not do.

(b) The Railroad Cases.

The most obvious example of the commerce power is the power to regulate interstate transportation and its instrumentalities. It is also in this field that the exercise of the power has been most greatly extended, with the largest consequent limitation upon powers theretofore exercised by the states.

This is due to the nature of the subject matter regulated. Interstate transportation is the most familiar example of

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[3]Transportation in interstate commerce of stolen automobiles (*Brooks* v. *U. S.*, 268 U. S. 432) and the various acts enacted by Congress in aid of state laws against the use of consumption of intoxicating liquors (*Clark Distilling Co.* v. *Western Md. Ry. Co.*, 242 U. S. 311; *United States* v. *Hill*, 248 U. S. 420).

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interstate commerce. Its regulation is a matter specifically committed to Congress by the Commerce Clause. To render such regulation effective it is essential (1) that state control, when inconsistent with the exercise of this specially conferred power, must yield to that of the Federal Government, and (2) that for purposes of effective regulation Congress may, where conditions require, interfere with state activities. But in either event the subject matter of the regulation is commerce—transportation—and not activities which either precede or follow commerce, such as production or sale, although both affect transportation, its volume and distribution.

Consequently, for the purpose of removing burdens upon or preventing interference with interstate commerce and its effective regulation by Federal authority, such authority, may require state rates to be so adjusted as not to discriminate against interstate commerce (the *Shreveport* case, *Houston & Texas Ry.* v. *United States,* 234 U. S. 342), or impose undue burdens thereon (*Railroad Comm. of Wisconsin* v. *Chicago, B. & Q. R. R. Co.,* 257 U. S. 563) and may authorize the abandonment of lines located wholly within a single state, the continued operation of which constitutes such a burden (*Colorado* v. *United States,* 271 U. S. 153). But the power exercised in the *Shreveport* case did not extend to the power to regulate the production of goods in Texas, or the conditions under which produced or the wages and hours to be observed in their production, for the purpose of insuring "fair competition" between Texas merchants and producers on the one hand and those in Louisana on the other hand. The *Shreveport* case was a regulation of transportation and had for its basis the right of the Federal Government to prevent the State of Texas from fastening upon the rail-

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roads rates which would operate to the disadvantage of persons located in Shreveport in the commerce in which both the parties and the railroad were engaged.

Under the commerce power, as applied to railroads, the Congress may also regulate instrumentalities and activities of interstate commerce where so commingled with state commerce as to be incapable of separate regulation, as in the cases of Uniform Safety Appliance Laws—cars moving in state and interstate commerce being moved together in the same train—, regulation of security issues of railroads, etc. Similarly, the Act prohibiting the issuance of fraudulent bills of lading was sustained by the Court as the regulation of an instrumentality of interstate commerce, as it was (*United States* v. *Ferger,* 250 U. S. 199).

It must therefore be borne in mind at all times that the subject matter of all laws regulating the operation of railroads, whether indirectly affecting intrastate commerce or not, is the regulation of interstate commerce in the narrowest sense, *i.e.,* the regulation of interstate transportation.

But even in this field the decisions of this Court establish that the power of the Congress does not extend to interference with state control over purely intrastate activities, constituting no burden upon or interference with the interstate transportation operations of an interstate carrier, and does not authorize Congress to regulate either the conduct or liabilities of the carriers in such respects (see the *First and Second Employers Liability Act Cases* (207 U. S. 463 and 223 U. S. 1), and *N. Y., N. H. & H. R. R. Co.* v. *Bezue,* 284 U. S. 415).[1]

[1]Had the decision in the *First Employers' Liability* case been different, it would not have been helpful to the Government. Its subject-matter was the regulation of interstate transportation or of the liabilities of persons engaged therein, growing out of the

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The Commodities Clause case (*United States* v. *Delaware & Hudson Co.,* 213 U. S. 366) is not an exception. On the contrary, it supports the contentions hereinbefore made. The Act in question prohibited a carrier from transporting goods which it had produced or in which it had an interest. The Government contended that the law should be literally construed. As so construed it prevented a railroad company from ~~producing~~ carrying coal which it had mined. The court, invoking the rule that a construction should be avoided which would give rise to serious constitutional questions, limited the act to the transportation of coal or any other commodity in which the carrier at the time of its transportation had an interest. The basis for this limitation was that, construed otherwise, it might be regarded as an attempted regulation of production, *i.e.,* of mining. It found the purpose of the act to be to regulate the transportation operations of the carrier for the purpose of preventing it from obtaining an undue preference over other shippers of the same commodity compelled to pay full tariff rates, while the true transportation cost to a carrier-owner in competition therewith would be represented by the bare cost of carriage, citing in support of this interpretation of the act its previous decision in *New Haven R. R.* v. *Interstate Com. Comm.,* 200 U. S. 361.

It is unimportant to consider whether under the present state of the law, governing the extent of the Congressional

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mingling of interstate and intrastate transportation. The line of demarcation between the permissible exercise of the authority of the Federal Government over interstate carriers and that which is not permissible is necessarily fine, since almost anything that affects such a carrier affects interstate transportation. The extension of the power of Congress to regulate production and the wages and hours of labor in private industry is something entirely different. It is neither the regulation of interstate commerce nor of an instrumentality thereof.

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power over companies engaged in interstate transportation, the act would be now so interpreted or not. It may well be that, despite the resulting indirect effect upon production, the literal prohibition of the act would be sustainable as a regulation of an instrumentality of interstate commerce in respect of matters having a direct bearing upon such transportation and only an indirect effect upon production. In any event it is no authority for the contention now made.

The Government cites *Texas & N. O. R. Co.* v. *Ry. Clerks,* 281 U. S. 548, for what purpose is not apparent. In that case the Court sustained the validity of an act regulating to a very limited extent the relations between interstate carriers and their employees. The decision is wholly predicated upon the power of Congress to regulate such carriers. It affords no support for the proposition that under the Commerce Clause the Federal Government may regulate the hours and wages of the employees of persons engaged in production whether by way of manufacture or otherwise, or, for that matter, of employees of persons engaged in interstate commerce.

The Government refers to certain language in the case to the effect that Congress may enact laws for the purpose of fostering and encouraging interstate commerce. Similar expressions are to be found in other cases concerning the regulation of interstate carriers and interstate transportation in harmony with the policy of Congress expressed in the Transportation Act to provide for an adequate system of interstate transportation. If the Government means that the commerce clause empowers Congress to to pass any act deemed by it wise or expedient for the purpose of fostering and encouraging interstate commerce, including acts regulating production and the hours and wages of persons

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gaged therein, then the commerce clause is made the equivalent of a general welfare clause conferring upon Congress the power to pass any act designed to promote the general welfare and prosperity of the people of the United States. The Court in the *T. & N. O.* case and other cases relating to the regulation of interstate transportation and interstate carriers was not, of course, giving any such broad interpretation to the commerce clause.

Predicated upon the *T. & O.* case and *Wilson* v. *New,* 243 U. S. 332 (hereinafter discussed in detail in subdivision 6 of this Point), the Government contends that the power to regulate wages and hours of persons engaged in productive activities may be supported as a measure designed to prevent strikes. Indeed, the argument apparently goes to the extent of asserting that Congress may regulate the hours and wages of all workers for such purpose in order to prevent the effect of strikes not only upon movements of interstate commerce but upon the interruption of demand, etc. This, like substantially all other arguments of the Government, is but a specious and thinly disguised assertion that under the commerce clause Congress may regulate wages and hours of persons not only engaged in productive enterprises but in any other pursuits because strikes interrupt the orderly flow of commerce and the maintenance of a stable purchasing power upon the part of the population.

(c) The Anti-Trust Cases.

The purpose of the anti-trust act is to prevent contracts, combinations or conspiracies in restraint of interstate commerce. It thus operates directly upon interstate commerce and only indirectly upon intrastate activities which may be

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affected by the prohibition of such contracts, combinations or conspiracies. That the constitutional theory upon which it is based is not one which accords to the federal government the right to regulate production is evidenced by the *Knight* case, when read in connection with the subsequent decisions of the court. In that case it was held, as hereinbefore pointed out, that production is not commerce but precedes it. Consequently, it was held that a combination among producers was not in violation of the anti-trust laws. Thereafter, in the *Oil* and *Tobacco* cases (*Standard Oil Co.* v. *United States,* 221 U. S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 106) the Court held that since such combinations, when resulting in monopoly or undue restraint of interstate commerce, were within the prohibitions of the Sherman Act, although indirectly affecting production. In this the court was obviously right. Otherwise Congress under its power to regulate interstate commerce would be powerless to prevent at their source contracts, combinations or conspiracies, the intent and purpose of which was to monopolize or restrain the same. Although qualified to this extent, the court, however, has repeatedly in the cases hereinbefore cited, adhered to its ruling that production is not commerce but precedes it and, hence, is in itself beyond the reach of the commerce power.

The line of demarcation between the constitutional authority of Congress over production on the one hand and commerce on the other and the limits of its power to affect either the former, or activities carried on within a single state, under the guise of protecting interstate commerce is likewise disclosed by the conspiracy cases which have arisen under the anti-trust laws. These cases are two kinds: conspiracies upon the part of members of labor unions, and conspiracies upon the part of buyers or sellers of

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goods. Where the conspiracy is between sellers of goods in interstate commerce, the resulting restraint thereon is plain and the right of the federal government to prevent the same equally clear.

Where the conspiracy is between members of labor unions involved in a labor dispute, the line of demarcation is made equally plain by the cases. The established rule is that such conspiracies are beyond the reach of federal authority unless the intent and purpose of the conspiracy is to restrain or prevent the movement of interstate commerce as such (*Coronado Co.* v. *U. M. Workers,* 268 U. S. 295). Where this intent is wanting the conspiracy is beyond the reach of federal authority, although the effect of the same may be to prevent or impede the movement of goods in interstate commerce by preventing or impeding the production of goods intended for interstate sale and transportation (*Coronado Co.* v. *U. M. Workers, supra; United Leather Workers* v. *Herkert,* 265 U. S. 457; *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103). In each of these cases, held to be beyond the reach of federal authority, the argument was that the acts complained of, although local and without specific intent and purpose to impede or prevent the movement of interstate commerce, had such effect. The court has consistently refused to recognize this doctrine. In all such cases there was not only lack of intent (declared by the court to be a necessary element) but the effect upon interstate commerce, although substantial, was indirect, the acts complained of being leveled directly at production and not commerce.

In those cases on the other hand, where the necessary element of intent was present, the effect and intended effect upon interstate commerce was direct and not indirect. (See cases, *supra.*)

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In *Industrial Assn. of San Francisco* v. *United States,* 268 U. S. 64, the same rule was applied to the activities of an employers' association seeking to insure the maintenance of an open shop by preventing the use of materials except under permit. That the agreement of the association constituted a combination or conspiracy in restraint of trade admits of no doubt, since all the necessary elements of agreement and confederation were present (*Binderup* v. *Pathe Exchange,* 263 U. S. 291). The question was whether the restraint operated upon interstate or intrastate commerce. It appeared that the conspiracy affected the volume of goods moving into the state in interstate commerce. The purpose of the conspiracy, however, was not to prevent or curtail such movement, but to control activities within the state, *i.e.,* the erection of buildings and the performance of other work through the maintenance of an open shop. The court held that the conspiracy was not within the reach of federal authority because of the absence of an intent and purpose to prevent, curtail or affect the movement of interstate commerce, the effect thereon being incidental and not direct.

These cases, therefore, clearly mark the limits of federal authority. Where the intent and purpose of the conspirators or of the confederators is to prevent and restrain interstate commerce and their acts operate directly thereon, they are within the reach of federal authority. Where, however, the intent and purpose is to restrain or control local activities, such conspirators and confederators are not within the reach of federal authority, although the indirect effect of their acts may be to affect interstate commerce.

Similarly, combinations of buyers having for their purpose the restraint or interference with the free flow of interstate commerce, are within the reach of federal

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ity, although the activities of such buyers may be confined to the limits of a single state because constituting an intended restraint upon interstate commerce directly affecting the same (*Local 167* v. *United States,* 291 U. S. 293).[1] On the other hand, it has never been supposed that local retailers, acting independently, could not fix prices for their own wares, however high or low, although it is obvious that the prices charged by them would affect the volume of

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[1]The Government for some reason places great reliance upon this case. In its brief the Government seeks to convey the impression, if it does not make the direct statement, that in this case there was lacking that element of intent to restrain or burden interstate commerce, in the absence of which the court had hitherto declined to enjoin conspiracies charged to be contrary to the Anti Trust laws. The opinion of the court itself shows that the element of intent was present. As stated in the opening of the opinion it was an appeal from an injunction "against a conspiracy * * * to restrain and monopolize interstate commerce" (p. 294). At page 297 the court says:

> "Appellants' contention that there is no proof that they intended to restrain or did interfere with interstate commerce has no merit.
>
> The evidence shows that they and other defendants conspired to burden the free movement of live poultry into the metropolitan area."

On the same page it said that the various acts of the defendants therein recited operated "substantially and directly to restrain and burden the untrammeled shipment and movement of the poultry while unquestionably it *is* in interstate commerce."

All conspiracy cases are essentially border line cases, the determination of which depends upon the particular facts of each case. In this case the court found the elements of intent, direct interference and substantial and direct burden and restraint. Moreover, as in the other cases reviewed, all of the acts of the defendants were in commerce, *i.e.,* they consisted of activities pursued in connection with the buying and selling of articles of commerce, which the court found were carried on in that case while such articles were still "in" interstate commerce. The suggestion that this case lends any support to the contention that the Federal Government under the guise of regulating interstate commerce may regulate production and hours and wages of persons engaged therein is beyond comprehension.

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interstate commerce through the effect of the price charged upon probable sale and consumption.

Moreover, it should be borne in mind at all times that in all of these conspiracy cases arising under the interstate commerce act the direct subject matter sought to be regulated or controlled was commerce, *i.e.*, in the case of buyers' combinations the interchange or sale of goods, and in the case of labor disputes the prevention of interstate transportation. Where the effect of the acts complained of were leveled solely at production or productive processes, the federal government has been held to be without authority to restrain such acts even though affecting, as interference with production must always affect, actual or potential transportation in interstate commerce.

The Federal Trade Commission cases are akin to the anti-trust cases. The Federal Trade Commission Act has been denominated one of the anti-trust acts. The only power conferred upon the Federal Trade Commission in respect of trade practices is to prevent the pursuit of unfair methods of competition in interstate commerce[2] by orders to cease and desist therefrom. In every case in which it has exercised this power the commission has made a finding that the respondent was guilty of the use of unfair methods of competition in interstate commerce and its order has been confined as to an order to cease and desist therefrom. Indeed the act itself requires such a finding as a predicate for the order. Such an order may affect the intrastate activities of

[2]The Recovery Act on the other hand provides simply for codes of "fair competition." There is much talk in the Government's Brief about the alleged violation of the minimum wage and maximum hour provisions of the Live Poultry Code by defendants being "unfair competition," but no one could suggest that such alleged violation was unfair competition in interstate commerce, or, indeed, intrastate commerce.

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the respondent as well, but this effect is incidental and indirect. Moreover, in these cases again it is commerce that is being regulated, *i.e.,* trade practices in the exchange and sale of goods, not the production thereof.

The only other power which the Federal Trade Commission has is that to enforce Section 7 of the Clayton Act prohibiting the acquisition by one company engaged in interstate commerce of the stock of a company with which it is in competition where the effect of same is substantially to lessen competition. The power of the Commission to enforce this section (*Federal Trade Commission* v. *Western Meat Co.,* 272 U. S. 554) rests upon the same principle as does the Sherman Act, *i.e.,* the prevention of monopoly or restraint in interstate commerce through the elimination of competition. Its exercise may indirectly affect intrastate activities or even the production of goods, but it is neither a regulation of such activities or of production. If, however, Congress should undertake to confer upon the Federal Trade Commission authority to require a manufacturer to run his plant at half capacity in order to improve the competitive condition of a competitor, such an act, under all conceptions of the commerce power heretofore entertained, would be clearly invalid as an assumed regulation of production and not of commerce, however beneficial such an act or order might be in bringing about a more equitable distribution of production and distribution.

(d) The Swift, Stafford, Olsen and Tagg cases.

The Government in various places in its brief refers to the four cases named, which may be properly considered together.

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Swift and Company v. *United States,* 196 U. S. 375, was a case arising under the Sherman Act. It appeared that the principal beef packers of the country, who constituted a dominant proportion of the packers and dealers in fresh meat throughout the United States, had entered into a combination not to bid against each other at livestock markets in the purchase of livestock and to commit other acts having the intent and effect of monopolizing commerce among the states. This combination was declared to be an illegal combination in restraint of trade. The *Swift* case is but an example of the familiar exercise of the power of Congress under the Commerce Clause to prevent monopoly and undue restraint in interstate commerce, although many of the acts enjoined were committed within the borders of a single state. Indeed, it may be said in passing that in any anti-trust case the acts complained of must, of necessity, be acts the *locale* of which is a single state, although the intent and purpose is to restrain and monopolize interstate commerce.

Stafford v. *Wallace,* 258 U. S. 495, involved the constitutionality of the "Packers and Stockyards Act of 1921" in so far as it provided for the supervision by Federal authority of the business of the commission men and livestock dealers in the great stockyards of the country. The passage of this act was the direct outgrowth of the *Swift* case and had for its purpose making the decree therein more effective (p. 520). The act was passed after careful investigation and the submission of a report by the Federal Trade Commission. As appears from the statement of the case, the packers, whose combination was enjoined in the *Swift* case, had come into possession of the stockyards constituting both the receiving depots for the movement of livestock in interstate commerce and the markets at which

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it was sold. As also appears therefrom, the Commission found that these packers controlled such markets and held "a whiphand over the commission men who act as the intermediaries in the sale of livestock." In the course of its opinion, the Court observed:

> "If Congress could provide for punishment or restraint of such conspiracies after their formation through the Anti-Trust Law as in the *Swift Case,* certainly it may provide regulation to prevent their formation. * * *"

It appeared from the investigation preceding the passage of the act, as recited in the statement of the case, that only a small proportion of the livestock moving in or out of the stockyards was shipped to or from the state in which such yards were located. It also appeared from the investigation preceding the adoption of the act, as recited in the statement of the case (p. 502), that the shippers of livestock complained that the practices of the commission men and dealers worked to their prejudice through the suppression of competition, monopoly of prices, imposition of excessive charges and the pursuit of other practices leading to monopoly. It was for the purpose of arresting these practices restraining interstate trade and tending to monopoly that the act was passed providing for the supervision by Federal authority of the business of such commission men and dealers. That act, like the Sherman Act, therefore, had for its primary purpose the prevention of monopoly or unreasonable restraint of interstate commerce. There appeared, in the investigation preceding the passage of the act, ample factual foundation for the enactment of a statute having such purpose. The act was sustained as a regulation of the business of persons whose activities were so directly related to and so directly affected the movement of a constant

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stream of commerce as to bring the act within the Commerce Clause.

The purpose of the act thus sustained was primarily to prevent restraint and monopoly in interstate commerce through the regulation of the practices of persons directly connected therewith. Moreover, it should be observed that in that case, as in all others where the Federal power has been sustained, it was commerce that was being regulated, *i.e.,* trading in the articles composing the same, which in that case were found to be articles of interstate commerce moving in continuous stream into and out of the yards where the persons regulated conducted their business. There is certainly nothing in that case that supports the contention that Congress may regulate conditions under which goods are produced.

Chicago Board of Trade v. *Olsen,* 262 U. S. 1, involved the constitutionality of the Grain Futures Act, the purpose of which was to prevent obstructions and burdens upon interstate commerce in grain by regulating transactions on grain future exchanges. As in the act sustained in the *Stafford* case, prevention of undue restraint and monopoly was the purpose of the act under review. It is, of course, proper for Congress under the Commerce Clause to take any measures appropriate to this end. As in the *Stafford* case, the Court also found that there was a constant flow of interstate commerce through the great grain markets which came to rest only temporarily in such markets. It accepted the finding of Congress that the practices pursued in transactions in grain futures had the effect of restraining and obstructing the free flow of such commerce. The act was sustained solely upon the theory that it was competent for Congress to provide for the regulation of such restraint and obstruction. It is significant that in the

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course of the opinion which, like the opinion in the *Stafford* case, was predicated in part upon the *Swift* case, the Court characterized that case as one in which it had "refused to permit local incidents of great interstate movement, which, taken alone, were intrastate, to characterize the movement as such". But in all three of these cases these local incidents were incidents of commerce, not of production or manufacture preceding commerce. Moreover, in both the *Stafford* and *Olsen* cases the decisions were based upon findings that the practices in question burdened and restrained the free flow of interstate commerce, operated directly thereon, the arrestment at the markets of the articles moving therein being merely temporary. This Court itself in subsequent cases has had occasion to refer to the extraordinary basis of the decision in these cases in such a way as to render them inapplicable to any ordinary situation.[1]

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[1]In distinguishing these cases in *United Leather Workers* v. *Herkert,* 265 U. S. 457 the Court said:

> "The cases of *Stafford* v. *Wallace,* 258 U. S. 495, and *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, are also supposed in some way to sustain the view that a strike against the manufacture of commodities intended to be shipped in interstate commerce is a conspiracy against that commerce. What those cases decided was that when Congress found from investigation that more or less constant abusive practices and a course of business, usually only within state police cognizance, threatened to obstruct or unduly to burden the freedom of interstate commerce, it could by law institute supervision of such course of business in order to prevent the abuses having such effect * * *" (p. 649).

And in *Atlantic Coast Line Railroad Company* v. *Standard Oil Company,* 275 U. S. 257:

> "Reliance is put on *Stafford* v. *Wallace,* 258 U. S. 495, to sustain the claim that this transportation of plaintiff's oil in Florida is interstate commerce. In that case the question under consideration was the validity of the Packers and Stockyards Act of Congress of 1921, chap. 64, 42 Stat. at L. 159, U. S. C. title 7, § 182, providing for the supervision by Federal authority of the business of the commission men

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Tagg Bros. & Moorehead v. *United States,* 280 U. S. 420, like *Stafford* v. *Wallace,* arose under the Packers and Stockyards Act. It involved the validity of an order of the Secretary of Agriculture fixing the charges of commission men at the Omaha stockyards, described as market agencies. It appears from the opinion that all such agencies were members of the Omaha Livestock Exchange, whose members had a monopoly of acting as such market agencies. They conceded that they were subject to Federal regulation under the doctrine of the *Stafford* and *Olsen* cases. The opinion discusses the constitutional questions arising under the due process clause only (pp. 436-439).

It is believed that the *Stafford* and *Olsen* cases mark the extreme limit of the power of Congress under the Commerce Clause to enact regulations affecting intrastate activities.

In any event, they afford no support for the Government's position in the case at bar. They may be briefly and clearly distinguished:

> (1) As the Government in its argument clearly recognizes, they are predicated upon the existence of a constant stream of interstate commerce coming

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and of the live stock dealers in the great stockyards of the country, and it was held that for the purpose of protecting interstate commerce from the power of the packers to fix arbitrary prices for live stock and meat through their monopoly of its purchase, preparation in meat, and sales, Congress had power to regulate the business done in the stockyards, although there was a good deal of it which was, strictly speaking, only intrastate commerce. It was held that a reasonable fear upon the part of Congress, that acts usually affecting only intrastate commerce when occurring alone, would probably and more or less constantly be performed in aid of conspiracies against interstate commerce, or constitute a direct and undue obstruction and restraint of it, would serve to bring such acts within lawful Federal statutory restraint" (p. 272).

See also, *First Coronado Case,* 259 U. S. 344; *Minnesota* v. *Blasius,* 290 U. S. 1.

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to rest at a market place only temporarily and continuing thereafter in interstate commerce. In the instant case there is no such stream. As previously demonstrated herein, interstate commerce ceased at least when the chickens reach the slaughterhouses of these defendants, if not at the railroad terminals. Every sale of chickens with which these defendants are charged and every sale proved in the record was a sale to a retail dealer in Brooklyn, New York, in the same state, city and borough in which defendants' slaughterhouses are located. There was no proof that any slaughterer in the metropolitan area in and about New York ever sold a single chicken intended for an interstate destination or which ever moved to an interstate destination.

(2) In the *Stafford* and *Olsen* cases the flow of interstate commerce was obstructed by the constant repetition of practices giving rise to monopolistic tendencies or at least to the manipulation of markets, thus disrupting the flow. There is no evidence whatever in this case that the activities of these defendants tended to monopoly or to the manipulation of markets. No combination between slaughterers is charged or involved (except "a conspiracy" to refuse to obey the unconstitutional Recovery Act). The alleged effect of the wages paid by defendant upon interstate prices is clearly negatived by the Government's proof that the interstate price is fixed upon the basis of the market quotations at the terminals at which time the defendants and other slaughterers have not acquired the chickens and the wages they pay have not entered into the wholesale price fixed.

(3) Moreover, there is nothing in the *Stafford* and *Olsen* cases inferring the existence of Federal power under the Commerce Clause to regulate the wages and hours of labor of persons engaged in

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productive enterprises, either in the production of goods in the raw state or in their transformation into finished or semi-finished products for further consumption and use in the commerce which follows such transformation.[2] The practices involved in the *Stafford* and *Olsen* cases were not only found to be a restraint and burden upon interstate commerce but to affect the same directly. It was commerce that was being regulated. Wages and hours affect commerce only indirectly in the effect which they have upon the ability of the manufacturer paying the same to find a market for his goods. As clearly appears from the decision in the *Olsen* case, the practices therein involved were "the incidents" of commerce. Wages and hours in manufacture are not "incidents of commerce" but incidents of production.

4. The argument that regulation of wages and hours may be sustained because of the necessity for uniformity in all the states finds no support in the Constitution, and the conception of Federal power upon which it rests has already been rejected by this Court.

The Constitution established a dual system of government under which certain powers were delegated to the United States, all others remaining with the States. Each within its field was to be supreme. Moreover, the power of the Congress, whenever exercised in its field, is exclusive and excludes regulation of the same subject matter by the States. To the extent, therefore, that the Congress under the Commerce Clause may regulate industry or the conduct

[2]The halting of commodities for transformation by processing or manufacture is inconsistent with the theory of the *Stafford* and *Olsen* cases, *i.e.*, of a flow of commerce into and out of a market place with only temporary pause.

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of persons engaged either in the manufacture or sale of goods, the power of the State to regulate the same vanishes.

The Government argues that to deny to the Congress the power to control price cutting and wage cutting in manufacturing within the several states will have the anomalous result that neither the nation nor the states will have any authority to take effective action to remedy a nation-wide evil which must be dealt with by measures of national scope, for no single state can regulate wages and hours in its manufactories unless all do, for the products of regulated states will be driven out of trade by the competition of price cutters in unregulated states.[3] It is urged that the Constitution could never have intended such a result; and that the power to regulate commerce should be here construed as conferring power adequate to insure uniformity of wages and hours in the same industry in all the states.

As said by Chief Justice Marshall in *M'Culloch* v. *State of Maryland,* 4 Wheat. 316, 405:

> "This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted."

In *Kansas* v. *Colorado,* 206 U. S. 46, the Court said (at pp. 81-82):

> "By reason of the fact that there is no general grant of legislative power it has become an accepted con-

[3]This argument of the Government assumes, of course, that the several states have the power to fix minimum wages and maximum hours of those engaged in private production,—a most shaky assumption (see discussion in subdivision 6 of this Point).

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> stitutional rule that this is a government of enumerated powers."

And after referring to the statements of Chief Justice Marshall in *M'Culloch* v. *Maryland, supra,* the Court added:

> "* * * no independent and unmentioned power passes to the National Government or can rightfully be exercised by the Congress" (p. 88).

In *M'Culloch* v. *Maryland* the Chief Justice said (at p. 423):

> "* * * should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land."

The power to bring about uniformity of conditions or costs of production, through regulation of wages and hours or by any other means, is not within the enumerated powers. The power delegated by the Commerce Clause, from which such power is sought to be implied, is delegated in very simple language capable of understanding by the most humble. The words employed admit of the existence of no such implied power nor of any such interpretation. To give to it such an interpretation would be subversive of our dual system of government, as already pointed out.

Moreover, the theory upon which this argument is advanced, viz., that the Federal Government must be possessed of power to act in any situation where States acting separately cannot meet the situation, was made and rejected

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in *Kansas* v. *Colorado, supra.* The contention of the Government, an intervenor in that case, was that it was possessed of the power to control waters of the Arkansas River to the exclusion of either of the contending States.[4] The Court answered the contention as follows:

> "His argument runs substantially along this line: All legislative power must be vested in either the state or the National Government; no legislative powers belong to a state government other than those which affect solely the internal affairs of that State; consequently all powers which are national in their scope must be found vested in the Congress of the United States. But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in

[4]In that case Kansas brought an original action in this Court to restrain Colorado and certain Colorado corporations from diverting water of the Arkansas River for the irrigation of lands in Colorado especially preventing the natural and customary flow of the river into and through Kansas. The United States intervened, claiming a right to control the waters of the river to aid in the reclamation of arid lands, but not asserting that the diversion of the water by the states tended to diminish navagability of the river. The intervening petition of the United States was dismissed, the Court ruling that the Constitution has given to the United States no authority or duty to legislate for the reclamation of arid lands, and that its power to regulate commerce among the several states authorized it in respect of rivers within states to prevent or remove any obstructions to navigability, but no more. The Government rested its argument,

> "upon its alleged duty of legislating for the reclamation of arid lands; alleges that in or near the Arkansas River, as it runs through Kansas and Colorado, are large tracts of those lands; that the National Government is itself the owner of many thousands of acres; that it has the right to make such legislative provision as in its judgment is needful for the reclamation of all these arid lands and for that purpose to appropriate the accessible waters" (pp. 86, 87).

The Court answered that it was very settled doctrine that the United States was a government of limited and enumerated powers and it found no power given to the Congress by the Constitution to legislate with respect to the reclamation of arid lands.

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the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. *This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act.* It reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to wit, 'the people.' Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it, 'we the people of the United States,' not the people of one State, but the people of all the States, and Article X reserves to the people of all the States the powers not delegated to the United States. The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all powers of a national character which are

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> not delegated to the National Government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning" (pp. 89-91).
>
> "One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none" (p. 97).

The doctrine that the Constitution leaves no twilight zone was thus affirmatively laid to rest. The Court was unmindful of the attempts of President Theodore Roosevelt to establish the principles of constitutional construction embodied in what was then termed "New Nationalism". It condemned them in *Kansas* v. *Colorado,* and the subsequent efforts of that President to secure a Constitutional amendment giving general police powers to the Federal Government to legislate for the general welfare failed. That movement failed just as four attempts in the Constitutional Convention of 1787, to confer upon the Congress a power "to legislate in all cases for the general interests

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of the Union, and also in those to which the States are severally incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation," were all defeated. (Farrand Records of the Federal Convention of 1787, I, p. 229; II, pp. 25, 26, 367).

An examination of the briefs before the United States in *Kansas* v. *Colorado* fully establishes that the basic contention which the Government is really making in the present case was there fully presented and defeated. In that brief the Government contended in terms that "to satisfy the increasing demand in this country for food, clothing and shelter it is apparent that sooner or later resort must be had to the possibilities of arid lands, and it is also apparent that these lands can be depended upon to supply such demand only when brought under cultivation, and they would be brought under cultivation only by means of irrigation" (Brief, p. 72). The Government further contended that under the doctrine of riparian rights in western streams held in the several States it would never be possible to provide for the irrigation and cultivation of the arid lands and that the public lands many of which were owned by the United States "cannot be reclaimed" nor could the policy of the United States with respect thereto be carried out unless the United States be accorded authority to deal with the whole situation through the control of the source of irrigation and that the State doctrines with respect to water rights would defeat the policy of the United States with regard to its arid lands. The answer of this Court was that that was not a matter with respect to which the Congress was entitled to have any policy.

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5. In the final analysis the contention made rests upon a non-existent power in the Federal Government to enact any act deemed by it necessary or desirable to promote the general welfare.

The Committee Reports in the House, as well as the statements in the hearings before the Committees in both Houses, demonstrate that the proponents of the bill which became the Recovery Act relied in part upon the "General Welfare Clause of the Constitution" as affording a constitutional basis for the statute.[5]

It is well settled that the preamble of the Constitution, which contains a general welfare clause, does not confer upon the Congress any powers in addition to those granted in the Constitution itself. *Jacobson* v. *Massachusetts,* 197 U. S. 11; *Yazoo Railroad Co.* v. *Thomas,* 132 U. S. 174; Story, 1 Commentaries 462; 1 Willoughby on Constitution 37.

It is also clear that the General Welfare Clause in the first paragraph of Section 8 of Article I merely empowers the United States to levy taxes with which to provide for the general welfare, and is not a "general welfare" grant in the ordinary sense of that term. The contrary argument recently made at this bar in one of the Gold Clause cases (*The Missouri Pacific* case) was not accepted. See also The Federalist, No. XLI; Story, 1 Commentaries 907; 1 Willoughby on Constitution 61.

Hitherto in cases of this description the Government has not specifically relied upon the General Welfare Clause.

[5]House Report No. 59, May 23, 1933; Hearings before the House Committee on Ways and Means, May 18-20, 1933, p. 116; Hearings before the Senate Finance Committee, May 22, June 1, 1933, p. 419.

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That the Committee relied thereon is, however, significant. Moreover, the broad extent of the power resulting from construing the Commerce Clause as though it conferred the power to regulate "anything affecting (or substantially affecting) interstate commerce" makes it plain that, even though the Government may not rely upon the general welfare clauses, it has given to the Commerce Clause an interpretation, under which it becomes in effect a grant of power to enact any statute deemed to promote the general welfare of the nation at least in so far as commerce, trade, industries and activities affecting commerce or trade are concerned. But, as is apparent from the previous discussion, the Commerce Clause was not intended to confer a general welfare power, the attempted insertion of which in the Constitution was four times defeated in the Convention (*Farrand, ubi supra*). If it had been, it admits of little doubt that the Constitution would not have been adopted by the Convention and of no doubt that it would have been rejected by the people.

It is also apparent from the previous discussion, that any argument based upon construing the Constitution in the light of changed economic conditions (see *Home Bldg. & Loan Ass'n* v. *Blaisdell,* 290 U. S. 398, 442) is without validity. We are not dealing with a government of general legislative authority but with one of defined and enumerated powers. Here we have a clause defining that power whose meaning is fixed by the words of the grant itself, by contemporary history, and by the whole history of this nation since the adoption of the Constitution. Although under peculiar conditions and to a limited extent the Commerce Clause has become, as it was intended to be, an instrument whereby federal authority may be exerted over local activities for the purpose of preventing burdens or

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straints upon or obstructions to interstate commerce, it has never been construed so as to permit regulation by Congress of everything which may "affect" interstate commerce and thus draw within the authority of the Federal Government, complete control over industry and of all activities carried on within the states "affecting commerce" either before interstate commerce is begun or after it is ended. To give it such a construction is subversive of the very principles of the grant and of the dual system of government established by the Constitution.

6. The wage and hour provisions of the Code are in violation of the Fifth Amendment.

The unconstitutionality of the wage and hour provisions of the Live Poultry Code is emphasized when considered from the standpoint of the application of the Fifth Amendment. An elaborate discussion of the cases is unnecessary to establish that the "due process" clause in said Amendment prohibits the arbitrary and capricious exercise of an admitted power and enactments having no real and substantial relation to the objects embraced within the source of Federal power upon which predicated.[1] If such provisions of the Code be considered as legislation, they are plainly arbitrary and capricious legislation bearing no real and substantial relation to the power conferred upon the Government to "regulate commerce * * * among the several States," upon which they must be based.

[1]*Blodgett* v. *Holden,* 275 U. S. 142, 147; *Untermyer* v. *Anderson,* 276 U. S. 440, 445; *Heiner* v. *Donnan,* 285 U. S. 312, 330; *Nebbia* v. *New York,* 291 U. S. 502, 525; *Adair* v. *United States,* 208 U. S. 161, 180.

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Even if such provisions were limited in their application to persons engaged exclusively in the interstate shipment of poultry, there would be grave doubt as to their constitutionality. All of the contracts made by people engaged in interstate commerce are not such commerce, nor do they have a substantial relation thereto. The wage contract of a person engaged therein is certainly not such commerce, and *prima facie* has no substantial relation thereto, but concerns merely the private relation of employer and employee (Cf. *Adair* v. *United States,* 208 U. S. 161, 178; *Wilson* v. *New,* 243 U. S. 332, 347; *Adkins* v. *Children's Hospital,* 261 U. S. 525). In all business, whether interstate or intrastate, freedom of contract is the general rule (*Adair* v. *United States, supra,* pp. 172-175; *Coppage* v. *Kansas,* 236 U. S. 1, 14; *Adkins* v. *Children's Hospital, supra,* at p. 554; *Wolff Co.* v. *Industrial Court,* 262 U. S. 522, 534; *Nebbia* v. *New York, supra,* at p. 523). This all-pervading consideration would, in and of itself, create an almost conclusive presumption (*Cf, Coppage* v. *Kansas, supra,* at p. 14) against the inclusion of wage contracts of persons engaged exclusively in interstate shipment of poultry within the power to regulate commerce among the several states. As stated by this Court in 1931, per Mr. Justice Hughes, in *Near* v. *Minnesota,* 283 U. S. 697, 707-708:

> "The limits of * * * sovereign power must always be determined with appropriate regard to the particular subject of its exercise. * * * while liberty of contract is not an absolute right, * * * this Court has held that the power of the State stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured, *notably with respect to the fixing of prices and wages.* * * *" (Italics ours.)

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There is nothing to rebut such presumption. Interstate shipment of poultry is purely private business. There has been no legislative investigation, no legislative finding, that it is clothed or affected with a public interest, or requires any kind of regulation in the public interest. Nor has there been any legislative finding showing any peculiar necessity for fixation of minimum wages in said business, by virtue of any substantial relationship between such wages and interstate commerce in its products or otherwise.[2] Nor, as previously pointed out, has there been any such investigation or any such finding by the President, or any administrator to whom he has delegated authority, or anyone else.[3] There is a bare determination by Congress that minimum wages *may* be fixed in *any* business the President sees fit to codify.

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[2]Compare the long investigation by the Federal Trade Commission preceding, and the findings of fact by Congress in, the Packers and Stockyards Act sustained in *Stafford* v. *Wallace, supra,* showing the substantial relationship between the practices regulated and interstate commerce in cattle; the similar findings in the Grain Futures Act sustained in *Board of Trade* v. *Olsen, supra,* showing the relationship between the practices regulated and interstate commerce in grain; and the exhaustive legislative investigation preceding, and the findings of fact contained in, the New York Milk Law sustained in *Nebbia* v. *New York, supra,* showing the peculiar necessity for regulation of milk prices in a "paramount industry".

[3]Any such finding, either by the legislature or by an administrator, though evidencing the views thereof, would not, of course, be controlling on this Court (*Wolff Packing Company* v. *Industrial Court, supra,* at pp. 536, 542.) This is particularly true of findings by administrators, as is evidenced by the decision of this Court in the *Wolff* case, where, in holding unconstitutional the regulation attempted, the Court assigned the following reason, among others, for its action (at p. 542):

> "Whether such danger exists has not been determined by the legislature, but is determined under the law by a subordinate agency, and on its findings and prophecy, owners and employers are to be deprived of freedom of contract and workers of a most important element of their freedom of labor."

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Wage regulation has been upheld by this Court in only one instance (*Wilson* v. *New,* 243 U. S. 332)[4], and then only with respect to employees of common carriers engaged in interstate transportation,—a public business,—when it appeared that such regulation was for a temporary period and was made necessary by a dispute which threatened to interrupt and completely disrupt all interstate transportation by such carriers. This Court has since characterized the legislative excursion in that instance as one going to the "border line" of the law (*Wolff Co.* v. *Industrial Court, supra,* at p. 544). In any event, in order to

[4]The Government seems to suggest that *Tagg Bros.* v. *United States,* 280 U. S. 420, and *O'Gorman & Young* v. *Hartford Fire Insurance Company,* 280 U. S. 251, involved wage regulation, but this was plainly not the case. In the case first cited, regulation was permitted of the rates charged by *brokers* engaged in the business of buying or selling live stock in interstate commerce. Such brokers, who operated in the stockyards and rented space therein at a monthly rental for the purpose of storing cattle, in addition to incurring other expenses in connection with their businesses, had a virtual monopoly and had previously eliminated rate competition among themselves. They were thus engaged in a business affected with the public interest, under the test of *Nebbia* v. *New York, supra,* and the purpose of the regulation was to prevent their service charges from becoming an undue burden upon, and an obstruction to, the interstate commerce flowing through the stockyards. This Court pointed out that there was "no attempt to fix anyone's wages" (at p. 439). In the second case, the New Jersey statute provided that the commissions paid to its agents by a foreign insurance company should be "reasonable" and uniform. Under the decisions of this Court insurance is a business affected with a public interest and subject to regulation as to premium rates. The regulation in question was upheld against attack by an insurance broker because agents' commissions, being a percentage of premiums, bear a direct relation to the rate charged, constitute a vital element in the rate structure affecting its adequacy and the stability of the insurer, and, if not uniform, open the door to rebating to, and unfair discrimination among, policy holders. This is a far cry from regulation of the minimum wages of employees in private business, to which none of such considerations apply, and wherein, in addition, the value of employees depends, among other things, on the character and quality of the services performed and not only on the aggregate amount of business done in standardized form.

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justify wage regulation under such decision, the Government must show not only (1) that the persons whose wages are regulated are engaged in interstate commerce; but (2) that the business in which they are engaged is one clothed with a public interest within the test laid down by this Court; and (3) that there exists a peculiar necessity, having a real and substantial relation to unobstructed interstate commerce in such business, for regulation of wages therein.[4a]

As stated by Chief Justice Taft, in *Wolff Co.* v. *Industrial Court, supra*, with respect to State regulation, which, of course, need not be predicated upon a showing of a real and substantial connection with interstate commerce, but only with the legitimate objectives of the police power:

> "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 * * *" (At p. 537).
>
> * * * * * *
>
> "To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system

[4a]Of course, if the Government had met all these requirements, the remaining question as to whether the particular wage scales prescribed were arbitrary or unreasonable would be one upon which the person attacking the same would have the burden of proof (*O'Gorman & Young, Inc.* v. *Hartford Fire Insurance Co., supra*). The rule of that case as to the burden of proof, obviously has no application in the determination of questions of the existence of legislative power over a particular subject.

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> may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. * * *" (at p. 539)

The same doctrine is reiterated in *Nebbia* v. *New York, supra,* where it is stated (at p. 525) that "a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts." Hence, in that case the first inquiry was "as to the occasion for the legislation and its history" (at p. 515). Since it appeared that the legislature, after a thorough and painstaking investigation, had found not only (1) that "the production and distribution of milk is a paramount industry of the state, and largely affects the health and prosperity of its people", (p. 517) but, also, (2) that the industry was ridden with evils endangering the adequacy of the milk supply, the public health and the public welfare, which, owing to peculiar and uncontrollable factors, could not be expected to right themselves through the forces of supply and demand, but only through price regulation, (p. 518), the regulation in question was sustained.

But it is plain, not only from the Court's affirmative reiteration of the applicable rule, but from its entire approach, that that case supports no blanket attempt, even by

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a State, possessed of broad police power, to regulate the wages of employees in all private business, without regard to the conditions in any particular business, without legislative investigation thereof, and without legislative determination, based on supporting findings of fact, of the necessity for the regulation of wages therein in the public interest. Much less does it support any such blanket attempt by the Federal Government.

The inevitable conclusion that the Federal Government possesses no such power was reached in *Adkins* v. *Children's Hospital, supra.* There attempt was made to interfere with liberty of contract by fixing minimum wages for women and children in all occupations in the District of Columbia, wherein the power of the Federal Government over commerce, production and all activities, is as broad, if not broader, than its power to regulate commerce among the several States, and such attempt was held by this Court to be arbitrary and capricious and to bear no reasonable or substantial relation to the objects embraced in the grant of power.

Far more arbitrary is the attempt in the instant case. Infinitely more remote and less substantial is the relation between the regulation attempted and the objects embraced in the grant of power relied upon. If fixation of minimum wages of those engaged in commerce in the District of Columbia is not a regulation of such commerce, infinitely less is a fixation of minimum wages of those engaged in private intrastate production a regulation of commerce among the several states.

If the Government's contention be sustained, it is a mockery to suggest that freedom of contract in private business is the rule, and limitation thereof the exception. The Government, in attempting to fix minimum wages of

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those engaged in private intrastate production is not only attempting regulation bearing no reasonable or substantial relation to the object embraced in the interstate commerce grant, for the reason that that which is regulated is not interstate commerce, or, indeed, commerce at all, but is attempting to treat *all* such intrastate businesses as super public utilities, subject to the most extreme regulation, without even a legislative or administrative determination that *any* of such businesses is affected with a public interest or requires *any* kind of regulation in the public interest, or that there is any peculiar necessity for fixation of minimum wages in any such business, by virtue of any substantial relationship between such wages and unobstructed interstate commerce in the products of such business or otherwise. In a single jump are taken the hurdles that the activities regulated are not in interstate commerce, that they are not commerce at all, that they are not affected with a public interest, and that there have been no legislative findings either of a substantial relationship between interstate commerce in the products of any of the industries sought to be regulated and the wages paid therein, or of a necessity for the regulation of such wages predicated upon such relationship. The Government's contention is in essence that it may regulate every aspect of *all* private business, howsoever, by whomsoever, and wheresoever conducted, because there is some relationship between all such business and interstate commerce in general.

The price paid for the services of wage earners engaged in production has no greater connection with interstate commerce than the price paid for materials or machinery or money used in production. If the government may usurp the power to regulate the price paid for labor, it may usurp

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the power to regulate the price paid for machinery, productive materials and money used in intrastate production. If the Government may regulate the wage level in intrastate production, on the ground that to do so increases national purchasing power and therefore increases consumption of goods shipped over state lines, so may it regulate prices to be paid for material and machinery and for money used in such production, since national purchasing power is likewise increased by payment of not less than fixed minimum prices therefor. If it is unfair competition, subject to Federal regulation, for one whose products eventually cross state borders, or who produces finished products from materials which have crossed state borders, or who produces articles similar to those of others which cross state borders, to pay for labor less than a specified amount, arbitrarily determined, so is it unfair competition for one to pay less than a specified amount for materials purchased, for machinery employed, and for money used in connection with such production. And this is only the beginning of the cycle, as is perfectly evident without elaboration. The end is price fixing of the articles produced (*Cf.* Live Poultry Code, Art. V, Sec. 9; *Darweger* v. *Staats,* New York Court of Appeals. April 26, 1935) and absurdly arbitrary and detailed regulation such as that embodied in the "straight killing" provisions of the Poultry Code.

The arguments advanced by the Government herein are not novel. As has already been demonstrated, some of them were rejected over fifty years ago in *Kidd* v. *Pearson, supra,* to refer back to only one instance. Others have been rejected and held invalid more recently. In attempting to support the minimum wage law for women and children in the District of Columbia which came before the Court in *Adkins*

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v. *Children's Hospital, supra,* it was argued (at p. 532) that such law was "a reasonable means of preventing cut-throat and unfair competition between manufacturers". That contention was rejected, although the employer in question was much more directly within the sphere of Federal regulation than the defendants herein. And in considering the Government's contention herein that the wage and hour provisions in question may be sustained on the ground that they are measures to increase purchasing power and to relieve unemployment generally, it is interesting to note that a much milder contention (namely, that the District of Columbia minimum wage law was justified because it constituted a measure to assure a decent, healthful standard of living to the particular individual employed) was rejected by the Court in the *Adkins* case, *supra,* in the following language (at pp. 557-558):

> "To the extent that the sum fixed exceeds the fair value of the services rendered, it [the minimum wage law] amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole."

So here, the attempt is to shift arbitrarily to the individual employer the burden of supporting indigent or partially indigent individuals, the burden of supporting whom, if it falls on anyone, falls on society as a whole. And here, as there, the feature of the legislation which "perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a

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purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do" (p. 558).

As the arguments advanced herein have been uniformly rejected in the past, so must they be rejected now. If they are not, the entire conception of this Government, the warp and woof of its fabric, are changed.

Thus far we have dealt with wages. But a word in addition is necessary with respect to hours. The Recovery Act does not involve an attempt to regulate the hours of individuals engaged in interstate shipment of poultry for the purpose of protecting their health. It involves an attempt to regulate the hours of virtually all individuals, in whatsoever industry employed, and wherever situated, and such attempt is predicated not on any desire to improve their health, as required by the decisions of this Court (*Lochner* v. *New York,* 198 U. S. 45[5]; *Adkins* v. *Children's Hospital, supra,* at p. 554), but apparently on the theory of "work sharing". Every regulation of hours, State or Federal, that has ever come before this Court and been sustained, has been sustained on the ground that such regulation was one bottomed on the power of the State to protect the health of its citizens engaged in intrastate activities[6], or of the Federal Government to promote the health and safety

[5]Although this case has been distinguished, "the principles therein stated have never been disapproved" (*Adkins* v. *Children's Hospital, supra,* p. 550).

[6]*Bunting* v. *Oregon,* 243 U. S. 426 (ten hour day for anyone employed in a mill, factory or manufacturing establishment sustained); *Holden* v. *Hardy,* 169 U. S. 366 (eight hour day for miners sustained). For cases involving regulation of hours of labor of women and related matters see *Muller* v. *Oregon,* 208 U. S. 412; *Riley* v. *Massachusetts,* 232 U. S. 671; *Hawley* v. *Walker,* 232 U. S. 718; *Miller* v. *Wilson,* 236 U. S. 373; *Bosley* v. *McLaughlin,* 236 U. S. 385, *Radice* v. *New York,* 264 U. S. 292.

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of employees and passengers on interstate carriers[7]. Here the regulation is an arbitrary attempt by the Federal Government to interfere with private intrastate business. It has no reasonable or substantial relation to the object embraced in the grant of regulating commerce among the several States, or the health or safety of the persons engaged therein, but is inextricably tied to a futile assertion of the power to regulate wages in all business for the purpose of carrying out the Administration's economic theories.

The issues in this case are, therefore, plain. They are: (1) May the Federal Government usurp the power of regulating purely intrastate production? (2) In attempting to do so, may it annihilate the principles of a free government, by wiping out in a single stroke the freedom of contract and enterprise of a free people and regimenting those participating in every private business by regulation more onerous, more complete, than that previously imposed even upon public utilities? (3) Is each private individual engaged in local business, henceforth to be a little "super utility", hedged in by regulation and government red tape and performing at the behest of a centralized, bureaucratic Federal administration occupied in the formulation of policies never passed on by the duly elected representatives of the people?

If this be the destiny of a free people, who created a Federal Government of limited powers for the purpose of carrying out specified objects, then it is a sad one, indeed. We shall then have witnessed a complete cycle, at the end of which is the subjugation of the individual, regulated and regimented by a bureaucracy made up of those not elected

[7]*Baltimore and Ohio Railroad Company* v. *Interstate Commerce Commission,* 221 U. S. 612.

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to handle local needs in the light of purely local conditions, but of an officialdom which acts upon a vague and sweeping delegation of authority from those elected to treat and deal only with specific national problems, including the commerce among the several States. We cannot believe that this end can be reached while our Constitution survives.

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III

THE "STRAIGHT KILLING" PROVISION IS VOID BECAUSE NEITHER A REGULATION OF INTERSTATE COMMERCE NOR A REGULATION SUSTAINABLE UNDER ANY DEFINITION OF FAIR COMPETITION AND BECAUSE VIOLATIVE OF THE FIFTH AMENDMENT.

Ten of the counts on which the defendants were convicted were for violation of the "straight killing" provision of the Code.

This (Sec. 14, R. 37) prohibits:

> "The use, in the wholesale slaughtering of poultry, of any method of slaughtering other than 'straight killing' or killing on the basis of official grade."

This provision, like that governing wages and hours, is, therefore, a provision regulating production, *i.e.,* the manner in which poultry shall be slaughtered. As such it is open to all of the constitutional objections urged against the wage and hour provision.

Its effect is to prevent "selective buying." It does not appear that the practice of selective buying obstructs interstate commerce, affects the volume of its movement—as it obviously would not—gives rise to any monopolistic tendencies, or has been practised with the intent and purpose of controlling or affecting interstate commerce in any way.

The "straight killing" provision is not even one affecting interstate commerce in such a way as to bring it within the commerce power by the most liberal interpretation. As appears from the indictment and from the Code provision itself as well as from the evidence, the purpose of the "straight killing" provision is to prevent a slaughterer

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from permitting his customers to select the fowls which he desires to buy and to compel him to buy in coops or in half coops and, in the latter event—in the order in which the chickens come out of the coop. It is the imposition of a rule, the purpose of which is to prevent the customer from getting what he wants. "Selective buying" was referred to in the Government's brief below as one of the "evils" corrected by the Code. The evidence relied on in support of this contention and also for the purpose of linking "straight killing" with interstate commerce, is that of Government's witness Tottis, himself a slaughterer. The nature of the "evil" was thus naively stated by this witness on his direct examination by the Government:

> "Q. Will you explain the practice of selective killing that existed prior to the time that the Code became effective? A. Well, at that time a buyer went in and handled each bird himself and picked out just what he wanted." [R. 294.]

His objection to the practice was expressed with equal frankness and naivete on his direct examination by the Government as follows:

> "Q. What happened to the rest of this poultry? A. It was sold at a cheaper price to whichever buyer they could get at a satisfactory price. It was a sacrifice price." [R. 294-295.]

In the opinion of this witness, concurred in by the Government, selective killing is an "evil" because it permits the customer to buy what he chooses, leaving in the possession of the slaughterer inferior poultry required to be sold at a lower price. So much for the "evil".

The supposed effect upon interstate commerce is that if the straight killing practice is enforced poultry will be

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graded before shipment. The only support for this is the opinion of the witness Tottis (R. 295) and of the witness Termohlen (R. 433). The Poultry Code has been in effect since the date of its approval by the President, April 13, 1934 (R. 5), or for a period of six months prior to the beginning of the trial on October 17, 1934 (R. 1), which continued to November 1, 1934. Unless it is to be presumed that all slaughterers have been guilty of Code violations—in which case it is for the Government to explain why only these defendants were indicted—it must be assumed that the "straight killing" practice has been observed generally by New York slaughterers in respect of the very large volume of poultry slaughtered in that city, which the Government emphasizes as indicating the importance of the Code. Yet no witness was called by the Government to testify that the "straight killing" practice had in fact resulted in grading poultry at points of shipment in support of the opinion of Mr. Tottis and Mr. Termohlen that it would or should have this effect.

We should suppose that a farmer shipping poultry would put into the same crate all the poultry he had, old and young, fat and thin, tough and tender, roosters, capons (if any) and hens, expecting to receive for the poultry shipped that which it was worth according to its quality, leaving the purchaser at the other end to grade and price it accordingly. Perhaps this is not so. And there may be large assembly points where grading would be possible. If grading is the purpose then it would appear that the appropriate and direct way in which to bring it about would be to impose a requirement of grading at the point of shipment. That the Code does not do, presumably because so to do would work an unjustifiable hardship upon producers. To undertake to relate "straight

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ing" to interstate commerce as a means of bringing about grading at point of shipment is far fetched.

Moreover whether this practice is one affecting interstate commerce under any definition of the commerce power, it cannot be defended as a provision designed to promote or insure fair competition or to prevent the pursuit of unfair methods of competition in interstate commerce. The purpose, as stated, is to prevent selective buying, *i.e.,* to prevent the buyer from selecting out of the poultry on hand in the possession of any slaughterer, whether in one coop or many, those birds which he desires to buy. That privilege these defendants have accorded their customers. To accord such privilege is neither contrary to good morals, fair business practice or any other business standard set up by the courts or by any administrative tribunal. *Federal Trade Commission* v. *Gratz,* 253 U. S. 421; *Federal Trade Commission* v. *Curtis Publishing Co.,* 260 U. S. 568; *Federal Trade Commission* v. *Sinclair Refining Co.,* 261 U. S. 463. On the contrary, the practice condemned by this rule is a proper practice. Any attempt upon the part of the Federal Government, under the guise of regulating interstate commerce, to prevent a buyer from buying what he wants and from paying therefor a price made by bargaining at arms length with the seller, and to require him to take that which he does not want, at some other price, is so arbitrary and unreasonable as to fall outside the realm of legitimate regulation of fair competition or competitive methods and to amount to a deprivation of property and of liberty of contract contrary to the Fifth Amendment.

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IV

THE CODE PROVISIONS FORBIDDING THE SALE OF UNFIT POULTRY, REQUIRING INSPECTION IN ACCORDANCE WITH LOCAL INSPECTION LAWS, AND FORBIDDING SALE TO ANY PERSONS OTHER THAN THOSE LICENSED UNDER LOCAL LICENSE LAWS, IF ANY, ARE NOT REGULATIONS OF INTERSTATE COMMERCE OR WITHIN THE PURVIEW OF THE COMMERCE CLAUSE.

Each of these code provisions is an attempted regulation of the conditions of local sale. Their operation does not have its inception until after interstate commerce has ceased and the articles transported therein have come to rest and have become commingled with the general mass of goods within the state. They are intended for the protection of buyers purchasing, for consumption within the state, articles which have in the past been moved in interstate commerce. But the provision of regulations and the enactment of prohibitory statutes or ordinances for the protection of such local buyers are matters committed and reserved to the states by the Tenth Amendment. The State of New York is competent to establish such regulations and prohibitions. If it has failed to do so the Federal Government may not correct its omission under the guise of regulating interstate commerce.

We do not question the power of the Federal Government to exclude noxious articles from interstate commerce or to require inspection of articles moving therein for the purpose of preventing the movement of noxious articles.

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These code provisions are of neither character, but operate on sales after receipt and delivery in interstate commerce. Moreover, they may not be brought within the doctrine of the *Stafford* and kindred cases upon the theory that the regulation is necessary on account of any subsequent movement in interstate commerce. This is so for the reasons that it not only appears that none of the poultry slaughtered and resold by the defendants was sold either in interstate commerce or for subsequent movement therein, but for the local market exclusively; but that there is no evidence that any of the other slaughterers within the metropolitan area to whom the code applies sold otherwise than for the local market. There is therefore wanting that stream of commerce flowing *through* New York that was present in those cases. The prohibition against sale except in accordance with the code provisions, claimed to have been violated, was an attempted regulation of local commerce and not of interstate commerce or of activities so affecting interstate commerce, either within the meaning of the Constitution or of the cases, as to bring them within the reach of Federal authority.

1. The prohibition against sale of unfit poultry.

As demonstrated, this is not a prohibition against the movement of unfit poultry in interstate commerce, but a general prohibition against the sale of unfit poultry within the City of New York and for local consumption. As we have stated, and as will hereinafter be pointed out, it is believed that the evidence was insufficient to sustain the charge that the defendants "knowingly" sold unfit poultry.

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The principle underlying the cases[1] which hold that the Congress has the power to prohibit the interstate transportation of certain articles may be summarized as follows:

The avenues of interstate commerce provide the facility for the dissemination across state lines of noxious articles. Congress has a complete power over such avenues and may therefore exclude therefrom such articles as are deemed generally harmful. In order to accomplish such exclusion it may be necessary to inspect the articles so carried from state to state, or it may, in order to enforce the rule of exclusion, be necessary to seize certain articles. It may well be that such inspection or seizure can take place only after the article to which the facilities of interstate commerce are forbidden has reached a certain point within the confines of a state. It has thus been held that a federal law may authorize the seizure of impure eggs which have been transported in interstate commerce after they have come to rest within a state and after they have been to a certain extent commingled with other goods therein (*Hipolite Egg Company* v. *United States,* 220 U. S. 45). In providing for such seizure the Food and Drug Act, as was said by Mr. Justice Holmes in *Weigle* v. *Curtice Brothers Co.,* 248 U. S. 285, "does not change or purport to change the moment at which an object ceases to move in interstate commerce." The violation of the code was the interstate transportation itself and, as Mr. Justice Holmes explained

[1]*Champion* v. *Ames,* 188 U. S. 321.
Hipolite Egg Company v. *United States,* 220 U. S. 45.
Hoke v. *United States,* 227 U. S. 308.
Seven Cases v. *United States,* 239 U. S. 510.
Caminetti v. *United States,* 242 U. S. 470.
Brooks v. *United States,* 268 U. S. 432.
Oregon-Washington Co. v. *Washington,* 270 U. S. 87.
Thornton v. *United States,* 271 U. S. 414.

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"* * * There is no reason why a lien *ex delicto* should be lost by the end of the journey in which the wrong was done. The two things have no relation to each other. * * * "

Such a provision does not set up a rule of conduct in intrastate transactions but merely in the actual interstate transportation.

In *Brooks* v. *United States,* 267 U. S. 432, the Court sustained Section 3 of the Automobile Theft Act which punishes the transportation of a stolen automobile in interstate commerce and Section 4 of that Act, which punishes the storage of such vehicle with knowledge of its having been stolen. The decision as to Section 4 was reached on the ground that such provision merely made more effective the provision prohibiting the actual interstate transportation of a stolen automobile. It clearly appears from the opinion in the *Brooks* case that the validity of Section 4 provision depended upon the existence of Section 3.

The Code does not prohibit or punish the interstate transportation of diseased poultry. Liability under the Code attaches only to acts done after interstate commerce has ceased. Congress has here not attempted to close the avenues of interstate commerce to diseased poultry.

Even were the Code to prohibit the interstate transportation of diseased poultry, it could not have predicated such prohibition on the intrinsically harmful character of such poultry since the National Industrial Recovery Act does not define any "policy" with regard to the preservation of public health. Under the "declaration of policy" in the Act such an exclusion could have been grounded only upon a purpose indirectly to regulate purely intrastate activities. Therefore, such a prohibition would be of the same nature as that which was condemned in *Hammer* v. *Dagenhart,*

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247 U. S. 251, and would not be analogous to the prohibition permitted in the *Lottery* case and kindred cases.

2. The provisions requiring inspection according to local laws or ordinances, if any.

This is again a regulation of the conditions of a local sale. The power of the Federal Government to require inspection of articles moving in interstate commerce for the purpose of preventing the movement of diseased animals is not disputed. Proceeding under an Act of Congress, the Department of Agriculture has provided such an inspection service. The defendants were not accused or convicted of a violation of the Federal inspection laws, but for violation of a code provision prohibiting the local sale of articles, which had ceased to be articles of interstate commerce, unless inspected in accordance with local inspection laws and ordinances, if any. Nor were the defendants accused or convicted of a violation of such local inspection laws or ordinances which carry with them their own penalties. The inspection provisions cannot be sustained upon any theory as a regulation of interstate commerce designed either to prohibit a movement of noxious articles in interstate commerce or their inspection under Federal authority. They constitute an attempt upon the part of the Federal Government to make it a misdemeanor under the Federal law for a person engaged in local commerce to sell poultry, unless the same has been inspected by state authorities in accordance with local inspection rules and laws, if any exist.

No analogy can be drawn between this provision of the Code and the statutes which were passed for the purpose of aiding the several states in enforcing their local laws

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relating to the regulation or prohibition of the sale or manufacture of liquor. Those statutes, in effect, by their very terms sought only to complement such state laws by regulating interstate transportation of liquor into such states for the very reason that such transportation was beyond the legislative jurisdiction of such states (*Clark Distilling Co.* v. *Western Maryland Railway Co.,* 242 U. S. 311; *In re Rahrer,* 140 U. S. 545). Those cases are wholly analogous to the *Lottery* and kindred cases. Moreover in *United States* v. *Hill,* 248 U. S. 420, the Reed Amendment was upheld despite the fact that, as applied to the situation there presented, it prohibited the importation into West Virginia of liquor in an instance where the West Virginia statute permitted such importation. Hence, it cannot be argued from those cases that the fact that Congress is seeking to further the legislative policy of the state can give to Congress powers which it would not have under the Commerce Clause. Clearly the provision of the Code requiring inspection according to local laws or ordinances is not a regulation of interstate commerce or of any matter affecting interstate commerce in such a way as to come within the Commerce Clause. In short, what the Code does in this respect is to borrow the State inspection law, except in its penal provisions, make it a Federal law, and then apply it not to inspection for the purposes of preventing movements in interstate commerce, but as a regulation of local sale.

3. Sales to dealers other than those licensed in accordance with local licensing provisions, if any.

The foregoing considerations apply here with the same force. Indeed, the relation between such sales and

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state commerce is even more remote than in respect of the other two regulations described above.

The only discernible effect of this provision is to aid in the enforcement of a state law requiring the licensing of retail dealers. In fact, it is not too much to say that there is no relation between a local sale to a dealer not licensed under local law and interstate commerce.

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V

THE CODE PROVISION REQUIRING FILING OF REPORTS IS NOT WITHIN THE COMMERCE CLAUSE.

The defendants were convicted upon two counts (counts 38 and 39), one of which charged the making of false reports for a period of about a month and the other of which charged the failure to make any reports whatsoever thereafter. These convictions rest upon a Code provision requiring the making of weekly reports showing the volume of sales and range of prices. They constitute the attempted exercise of visitorial powers over persons engaged in the live poultry industry in the City of New York, including these defendants. Unless the business in which these defendants were engaged was such as to be brought within the scope of Federal regulation, it would seem that Congress was without authority to exercise such visitorial powers. The defendants are not engaged in interstate commerce. Their sales were not made in interstate commerce, but locally.

The information required to be given obliged them to expose the secrets of their business, *i.e.,* their volume of sales and range of prices. Neither was within the power of Congress to regulate. The business of the persons from whom such reports were required was not within the power of Congress to regulate. The reports were not to be made directly to the Government but to the Code Authority purporting to represent the industry in which the defendants are engaged, and representing their competitors, as well as themselves. The requiring of such reports was not authorized by the Commerce Clause and constituted a denial of due process. See, *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298.

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VI

THE PENAL PROVISION OF THE RECOVERY ACT IS WHOLLY VAGUE AND INDEFINITE AND HENCE UNCONSTITUTIONAL AND VOID.

The only section of the Recovery Act which provides a fine for a violation of any provision of a code is Section 3 (f)[1], which provides:

> "When a code of fair competition has been approved or prescribed by the President under this title, any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500. for each offense, and each day such violation continues shall be deemed a separate offense."

Whether a person is to be deemed an offender and subjected to punishment under the terms of Section 3 (f) requires a determination, *inter alia,* of the question whether the transaction in which such person was engaged at the time of the alleged violation affected interstate or foreign commerce. Whereas it is a well established principle of law that "every man should be able to know with certainty when he is committing a crime" (*U. S.* v. *Reese,* 92 U. S. 214, 220), the standard of guilt set up by Section 3 (f) is so vague and so difficult to ascertain that no one can determine what course of conduct must be pursued in order to avoid punishment under that section. The limits of the

[1]The provisions of Section 10 (a) for fine and imprisonment have reference only to a violation of a rule or regulation prescribed by the President.

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significance of the word "affect" itself cannot be determined with any semblance of precision. The word, itself, has been defined to mean "to lay hold on; to act upon; to produce an effect upon; * * * to touch." (1 Webster's New International Dictionary 1925, p. 37.) That significance is rendered even more undeterminable, if possible, by the application which is made of the word "affect" in Section 3 (f) of the Recovery Act.

Whether a given transaction will "produce an effect upon" interstate commerce is a question which in a complex economic society involves factors so multitudinous and so interwoven with inoperative circumstances that even an exhaustive study will not provide an answer. The conflicting testimony in this case amply demonstrates that the question is practically impossible of solution.

Moreover, the Government in its brief has denied that it is contending that any form of activity which might have only a fanciful connection with interstate commerce is within the power of Congress to control. Thus, in order to avoid punishment a person is required by The Recovery Act not only to ascertain whether his conduct will have any effect whatever on interstate commerce but also whether such effect will be of a degree sufficient to bring his conduct within the control of the Federal Government under the power of that Government to "regulate commerce among the several states."

Having in Section 1 of The Recovery Act declared its "policy" to "remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof", Congress, according to the Government, sought to exercise the entire scope of its power under the Commerce Clause by the use of the words "in or affecting

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interstate or foreign commerce" in Section 3 (f). In order to determine whether his conduct falls within the inhibition of the Act a person is thus compelled to ascertain the ultimate limits of the Federal power under the Commerce Clause of the Constitution.

Moreover, according to the Government's contention, the question so to be answered depends upon the existence of facts which cannot be ascertained by a person seeking to adopt a rule of conduct in accordance with the terms of the Recovery Act, for guilt is made to depend not upon the effect of his *own* acts on interstate commerce but upon whether a practice in a trade is sufficiently general to affect interstate commerce more than "fancifully."

Finally, the practice must be one condemned by a code of "fair competition" containing provisions approved by the President. As previously pointed out, it is claimed by the Government that "fair competition", as employed in the Recovery Act, is broader in scope than the phrase "unfair methods of competition" employed in the Federal Trade Commission Act. Unless "fair competition" is infinitely broad and permits the President to approve any sort of code provision in his uncontrolled discretion (in which event the Recovery Act is clearly invalid as an improper delegation of legislative authority), such phrase must be subject to interpretation and construction by the courts, and the added burden is thus imposed upon the citizen of determining whether provisions contained in codes are provisions for "fair competition" within the meaning of the Act.

To put it mildly, Congress has departed no little from the well-known standard of legislative action that

> "If the Legislature undertakes to define by statute a new offense, and provides for its

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> ment, it should express its will in language that need not deceive the common mind." (*United States* v. *Reese, supra,* at p. 220.)

The Recovery Act by Section 3 (f) thus declares unlawful a class of acts which it defines, not by their intrinsic nature, but by their indirect, contingent and unascertainable results.

The principle that a penal statute may be unconstitutional for indefiniteness and vagueness is so firmly established that a voluminous citation of authorities would be supererogatory.[2]

The doctrine was stated by this Court in *Connally* v. *General Construction Co.,* 269 U. S. 385, in the following terms:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

In that case the statute required "that not less than the current rate of per diem wages in the locality where the work is performed" should be paid to all persons employed by Government contractors. The statute was held void.

In *United States* v. *Cohen Grocery Co.,* 255 U. S. 81,

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[2]*International Harvester Co.* v. *Kentucky,* 234 U. S. 216, 221; *Collins* v. *Kentucky,* 234 U. S. 634, 637; *American Seeding Machine Co.* v. *Kentucky,* 236 U. S. 660, 662; *U. S.* v. *Brewer,* 139 U. S. 278.

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this Court held unconstitutional Section 4 of the Lever Act (41 stat. 297) which made it unlawful for any person

> "willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person * * * to exact excessive prices for any necessaries * * *."

This Court said at page 89:

> "* * * to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

Can it be said that it is less difficult to determine whether an act is one contravening the nebulous "standard" of "fair competition" attempted to be erected by the Government, or is one "affecting" interstate commerce than it is to determine the current wage rate in a small community?

It would seem that even the determination of what is "an unjust and unreasonable rate or charge" would present, in a society where at least broad principles of justice and reason prevail with a certain degree of uniformity, a problem far more capable of solution than the intricate, confused and consequently disputed problem of the interaction of economic forces.

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PART II

QUESTIONS INVOLVED OTHER THAN CONSTITUTIONAL ONES

VII

SINCE SOME PROVISIONS OF THE CODE ARE CLEARLY UNCONSTITUTIONAL OR UNAUTHORIZED BY THE STATUTE OR BOTH, THE WHOLE CODE MUST FALL BECAUSE OF THE LACK OF A SEPARABILITY CLAUSE.

We have discussed *inter alia,* the "straight killing" requirement of the Live Poultry Code and the provisions for minimum wages and maximum hours of labor and have shown such provisions to be arbitrary and capricious regulations having no substantial relation to unfair competition or unfair methods of competition or to interstate commerce. We have not discussed in detail other provisions of the Live Poultry Code which are plainly obnoxious to due process of law, such as Section 9 of Article V, which requires that each slaughter house operator in order "to increase employment and to standardize the cost of marketing and selling" regularly employ not less than one employee if the volume of his weekly sales of live poultry averaged over a period of four weeks is less than 6,000 pounds but in excess of 8,000 pounds, not less than two employees if between 8,000 pounds and 11,000 pounds, etc., and the provisions of Section 7 of Article VII relative to selling or offering to sell a product below the current market price. Such provisions are not only plainly contrary to the Fifth

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and Tenth Amendments, but cannot possibly be said to have been authorized by the statute.

Section 3 of the Recovery Act only permits the President to approve a code of fair competition in its entirety. He is not authorized to approve individual provisions and has not done so. Thus if any provision of the Live Poultry Code is invalid because in contravention of due process of law or is not authorized by the statute, then the Code as a whole falls and none of its provisions are enforceable. Such is plainly the case here.

The leading case is *United States* v. *Reese,* 92 U. S. 214. There a statute punishing election officers for refusal to permit properly qualified voters to vote was held unconstitutional. This Court held that the provisions of the statute were not separable and that it was not applicable to a refusal to permit qualified negroes to vote, a question over which Congress clearly had power under the Thirteenth Amendment to the Constitution. The Court stated at page 221:

> "We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there by any such, from that which is not. * * * Each of the sections must stand as a whole, or fall altogether. * * *"

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Similarly, in *The Employers' Liability Cases,* 207 U. S. 463, 504, this Court, after holding that the legislation in question attempted to regulate certain matters in intrastate commerce, refused to separate the provisions of the Act and to hold it applicable to interstate commerce.[1]

[1]For other cases in which this Court has refused to separate the provisions of a statute and to give effect to the portion or portions which were constitutional, see the *Trade Mark* Cases, 100 U. S. 82, at page 89; *United States* v. *Harris,* 106 U. S. 629, at page 641; *Virginia Coupon* Cases, 114 U. S. 270, at page 305; *James* v. *Bowman,* 190 U. S. 127, at page 140; and *Butts* v. *Merchants Transportation Co.,* 230 U. S. 126, at page 133.

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VIII

THE DEFENDANTS' DEMURRER SHOULD HAVE BEEN SUSTAINED WITH RESPECT TO COUNTS 4, 5, 60 AND 38, WITHOUT REGARD TO THE CONSTITUTIONALITY OF THE RECOVERY ACT. THE COURT COULD NOT TAKE JUDICIAL NOTICE OF MUNICIPAL ORDINANCES, RULES AND REGULATIONS.

Counts 4 and 5 of the indictment charge the defendants with violating Article VII, Section 22 of the Live Poultry Code in a transaction affecting interstate commerce.

Section 22 of the Live Poultry Code prohibits the sale of live poultry which has not been inspected and approved in accordance with the rules, regulations and/or ordinances of the particular area (R. 39). (In this instance the City of New York.)

Count 60 charges three individual defendants who were operating as the A. L. A. Schechter Poultry Corporation, and said corporation with the sale of live poultry to the other corporate defendant and an individual defendant connected therewith, "persons not legally entitled to conduct the business of handling live poultry, *and not having a permit or licence to handle, sell, or slaughter live poultry as is required by the ordinances of the City of New York, and by the rules and regulations of the Board of Health of the City of New York,* * * *"[1]

[1]The quoted language is taken from the indictment (R. 117) and constitutes the charge.

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Neither the indictment nor the Live Poultry Code set forth the ordinances and regulations of the City of New York, with violation of which the defendants were charged in these three counts.

The law is well established that the courts take judicial notice of the laws and treaties of the United States; the date of the ratification of an amendment to the Constitution of the United States; and the laws of each of the States in the union (when the court is exercising original jurisdiction under the Constitution and laws of the United States).

The courts do not take judicial notice of municipal ordinances, or of foreign laws. Hughes, Federal Practice, Vol. 6, c. 83; *Robinson* v. *Denver City Tramway Co.,* (C. C. A. 8) 164 Fed. 174; *Choctow, O. & G. R. Co.* v. *Hamilton,* (C. C. E. D. Okla.) 182 Fed. 117; *Garlich* v. *Northern Pac. R. R.,* (C. C. A. 8) 131 Fed. 837); *King* v. *Augusta,* 277 U. S. 100, 126 (footnote[10]).

The trial court overruled the demurrer as to these counts, citing Section 1172 of the New York City Charter, which provides that all courts in the City of New York shall take judicial notice of city ordinances.

Referring to *Greenberg* v. *Schlanger,* 229 N. Y. 120, the trial court stated that "the state Courts have held, under this provision (Section 1172), that the New York Supreme Court, the highest Court of original jurisdiction in the State, sitting in New York City, will take judicial notice of city ordinances".

The State appellate courts take judicial notice of city ordinances on the theory that whatever the court of the first instance should take judicial notice of, the State appellate courts may notice. *Board of Health* v. *Farrell,* 178 App. Div. 714, 715.

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The charge is a Federal offense. The proceedings had herein were in a Federal court. The mere fact that the District Court building is located in the City of New York, does not make that Court a court of the City of New York, nor is it governed by the procedure followed in the State courts. The Conformity Act, which conforms the procedure to be followed in the Federal courts with that in the State courts, is inapplicable in a criminal prosecution. *Gay* v. *United States* (C. C. A. 5th), 12 F. (2d) 433.

It is further significant that the Section of the New York City Charter relied upon by the trial court is limited to ordinances and excludes rules and regulations. The 60th Count makes reference to an ordinance of the City of New York, which is not described, and to rules and regulations. Even the State courts cannot take judicial notice of rules and regulations.

The Circuit Court of Appeals sustained the ruling of the trial court, citing *Martin's Adm.* v. *B. & O. R. R.,* 151 U. S. 673; *Kaye* v. *May,* 296 Fed. 450; and *Pennington* v. *Gibson,* 57 U. S. 65.

In all of the above cases the rule enunciated was that a Federal court may take judicial notice of a State statute. None of such cases dealt with municipal ordinances or rules and regulations.

Count 38 charges the defendants with submitting reports which contained false and fictitious statements relating to range of prices and volume of sales, in violation of Article VIII, Section 3 of the Live Poultry Code (R. 91).

Article VI, Sections 1 and 2 provide generally for the administration of the Live Poultry Code (R. 25-34) but make no mention of making and filing reports; Article VIII, Section 3, states that "Every member of the industry

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shall submit a weekly report to the Code Supervisor. Such report shall show the range of daily prices and volume of sales.

The Live Poultry Code does not make it a crime to file false reports. The learned trial judge refused to sustain the demurrer on the ground "that the making of a false report is not a compliance with the requirement for the making of a report" (R. 161). In other words, the making of a false report is no report.

Penal provisions must be strictly construed. Statutes creating and defining crimes cannot be extended by intendment and no act however wrongful can be punished under such a statute unless clearly within its terms. There can be no constructive offense. Before a man can be punished his case must plainly and unmistakably be within the statutes under which he is prosecuted.

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IX

THERE WAS A FAILURE OF PROOF ON A NUMBER OF COUNTS.

1. There was failure of proof on the count charging sale of poultry unfit for use.

As appears from the statement, the defendants were indicted on two counts (Counts 2 and 3) for the alleged sale of unfit poultry; the second count, covering the sale of one alleged unfit chicken (R. 63) and the third count, covering the sale of two alleged unfit chickens (R. 65). The defendants were acquitted on the third count but convicted on the second.

The fact is that no case was made. As appears from the statement, the code provision charged to have been violated prohibits the sale "knowingly" of unfit poultry (R. 34). Any other provision would, of course, be so unreasonable as in itself to be beyond governmental power. No person may or should be convicted of an innocent sale. In any event the Live Poultry Code does not so provide. The evidence on the count on which the defendants were convicted of the sale of one unfit chicken and on which they were acquitted of selling two unfit chickens was given by the same witness and was substantially identical (with a single exception) in respect of both. That witness was an employee of the Code Authority, a young man fresh from an agricultural college (R. 737).

The witness referred to was sent to the defendants' place of business for the purpose of spying upon their operations (R. 726-730). He was sent there without doubt to "get" the defendants. While there he saw three chickens which previously had been inspected and

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found healthy (R. 705), but which aroused his suspicion. Making application of the wisdom acquired in the agricultural college he placed an identification mark upon the feet of each of the three (R. 708). Thereupon he watched for their sale and followed them into the possession of their purchaser (R. 709). There he met a Board of Health officer, sent at the request of the attorney for the Code Authority to make a special examination of these chickens (R. 708) and exhibited his quarry to the latter (R. 708). According to this witness's own testimony, the Board of Health officer found it necessary to perform a *post mortem* inspection upon the chickens. Upon its performance two of the suspected chickens were found to be suitable for human consumption and the third eggbound, whatever effect that may have upon rendering a chicken fit or unfit for human consumption (R. 710). Not until the performance of the *post mortem* examination did the alleged defective character of the one chicken referred to appear.

Government witness, Dr. Ives, testified that not even he was familiar with all poultry diseases (R. 219). That no one can tell what is wrong with a chicken unless the same is opened (R. 226). That the average market man although in the chicken business for a long time, and although he may purchase a great quantity of chickens, is not qualified and does not know when a chicken is fit or unfit (R. 233).

Upon this evidence the jury acquitted the defendants upon the charge relating to the two chickens whose autopsy developed that there was nothing wrong with them but convicted on the charge relating to the other. The young man who engineered and carried out, single-handed, this exploit in criminal detection, testified that he did not call the attention of the defendants to his suspicions regarding these

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