off the interstate commerce of one part of the industry and concentrating demand upon another part (R. 292–293), and (3) disparate wage costs causing diversion of interstate commerce from one field to another. The maximum price provisions of the Act are intended to prevent a run-away market in times of shortage. It was primarily such run-away prices that caused the huge increase of capacity from 1917 to 1923 (R. 301, 535.) If the Act succeeds in minimizing strikes and in adjusting wage differentials so as to maintain a reasonable equality of opportunity between producing areas in interstate commerce, the effects of the last two factors making for inflation will likewise be reduced.

COAL RESOURCES AND CONSERVATION

The facts cited by petitioner as to the life of coal resources (Br., p. 60) omit all reference to the evidence introduced as to the short life of some of our finest coals, the avoidable losses in mining under present practice, and the influence of unrestrained competition in causing such loss. Dr. George H. Ashley, the State Geologist of Pennsylvania, testified that the Connellsville coking coal would be exhausted in thirty years; and the Pittsburgh bed in the State of Pennsylvania, in one hundred years (R. 533). At 1929 rates of production, the beds of present minable thickness and quality in the Pocahontas and New River districts of West Virginia have a life of eighty-five years (Fg. 160, R.

204, 323, 531). The average loss in mining of all bituminous coal is thirty-five percent, of which twenty percent is classed as avoidable. In a year of normal production, the avoidable loss is 150,000,000 tons (Fg. 162, R. 205, 533).

Petitioner contends that the present Act has no relation to the conservation of resources other than the provision directing the Commission to make a study of the subject. (Br., p. 60.) He makes no reference to the findings of the Mineral Policy Committee of the National Resources Board. (Def. Ex. 43B; R. 1137–1149.) This Committee reports that "the causes of the excessive waste attending the mining of our coals are complex, but the great underlying cause is destructive competition." (R. 1142.) Prevention of the readily avoidable losses "depends on relieving the conditions of poverty which have surrounded the industry. The members of this Committee who have given most thought to the question are convinced that *the necessary first step in reducing the waste of coal in mining is to aid the industry in establishing itself on a stable and profitable basis.* * * * (Italics supplied.)

"In time, if the industry can be placed on a stable basis and competition between districts held within reasonable bounds, the legislatures of the coal-mining States may be expected to enact conservation laws to lessen the waste of their resources analogous to those already adopted in some juris-

dictions for oil and gas. Hitherto, State action has been impossible because of cut-throat competition. Progress in this direction can go no faster than development of a strong opinion within the principal coal States. Meantime, the first and indispensable step is so to organize the economic forces of the industry as to relieve the extreme pressure of competition" (R. 1143).[1] The members of the Mineral Policy Committee included a group of distinguished geologists, mining engineers, economists, and advocates of conservation.

Doctor Ashley testified (R. 536), "The State of Pennsylvania cannot take any measure to prevent this cut-throat competition. I believe * * * fixing a minimum price would help to prevent the waste of coal in mining."

SUMMARY OF ARGUMENT

In view of the detailed nature of the index of Argument at the beginning of this Brief it is believed that a Summary of Argument is not necessary.

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[1] The report of the Planning Committee on Mineral Policy, National Resources Board, *Report on National Planning and Public Works*, December 1, 1934, page 402. See Def. Ex. 43B, R. 1142, 1143.

ARGUMENT

Introduction

The Government contends that petitioner was correctly denied the relief which he sought below and supports this contention on the ground (1) that the various provisions of the Bituminous Coal Conservation Act severally constitute valid exercises by the Congress of the power to regulate interstate commerce duly conferred upon it by the Constitution and (2) that in so far as any particular provision or provisions might be found to transcend such power, the Act as a whole, since its provisions are expressly declared to be separable, is not thereby invalidated, and the petitioner may be constitutionally required to comply with the provisions established to be within Federal power.

The argument of the Government, therefore, requires an examination and analysis of the various provisions of the Act in their relation to the power conferred upon the Congress by the Constitution and in relation to the prohibitions or limitations imposed by the Constitution upon the exercise of that power.

Petitioner's counsel in their brief adopt a radically different approach. They attack the statute as a whole on the basis of its supposed ends and purposes before applying the test of constitutionality to particular provisions and they thereby seek to deduce the invalidity of those provisions mainly from such denunciation of the Act as a whole.

Accordingly their argument relies largely upon broad characterizations of the entire Act and upon suggestions and innuendoes designed to discredit the purposes and economic policies supposed to have actuated the legislative body in enacting it. Thus the object of the Act is said to be to subject an industry to Federal regulation (Br. p. 2), to regulate production (Br. p. 10), to effect "stabilization" (Br. p. 82), to set up a "planned economy" with economists doing the planning (Br. p. 59), to "unload the troubles of the coal industry on the Federal Government" (Br. p. 59), to establish Federal control of economic life (Br. p. 140), to promote the interests of coal operators and miners by increasing their share of the national income (Br. p. 96).

Such characterizations of supposed objects, purposes, and results are put forward as if they were in themselves the established criteria of constitutional power rather than mere argumentative assumptions as to ultimate legislative policy. It may well be that some or all of these supposed objectives, if accepted as constituting the legislative purpose of Congress, may be regarded as unwise in point of policy, or economically unsound. Many familiar types of existing legislation, however, may be branded by those not in sympathy with them with equally hostile descriptions of purpose. Thus a progressive income tax may be described as designed to effect a redistribution of wealth. A protective tariff act may be described as designed

to control economic life, divert the direction of economic enterprise, and promote the interests of manufacturers and employees engaged in certain lines of industry by increasing their income at the expense of the rest of the community. An act establishing for employees of interstate railroads the right of collective bargaining may be described as an act for the promotion of trade-unionism and the restriction of freedom of contract.

To urge uncomplimentary epithets as a test of constitutionality is to make legislative power dependent wholly on opinion as to the soundness or unsoundness of legislative policy. It is submitted that the question of the object or purpose of a legislative enactment of Congress becomes pertinent on the point of constitutionality only in connection with some specific question as to the extent and scope of a particular power granted to Congress on which a statutory provision depends for support, or in connection with the content and meaning of some specific limitation imposed by the Constitution on the exercise of such a power. Accordingly, supposedly distasteful objectives harbored by Congress should not, it is submitted, be exploited to create general impressions as to the unconstitutionality of a statute as a whole from which to deduce arguments as to the unconstitutionality of particular provisions.

There is a second preliminary matter to which attention should be called before proceeding to examine the constitutionality of the various provi-

sions of the statute. This is petitioner's misconception of the purpose for which evidence was introduced below concerning the facts and conditions of the bituminous coal industry and as to the bearing of this evidence upon the constitutional issues here involved. Petitioner apparently takes the position that the burden of establishing constitutionality rests upon the Government and states that the Government assumed this burden and introduced evidence of economic facts "for the avowed purpose of bringing the Act within the provisions of the Commerce Clause". (Br. p. 6.)

It is well established that the burden is upon one who asserts the unconstitutionality of a legislative enactment. This burden, of course, need not necessarily require the introduction of evidence, but may on occasion be satisfied by appeal to the doctrine of judicial notice. When petitioner claims, as he does, that the Bituminous Coal Conservation Act is invalid on its face (Br. p. 22), he obviously relies on judicial notice, for the meaning and effect of many of the provisions of the statute can obviously not be understood save by reference to the situation to which the statute applies. For example, the question of whether a transaction is or is not in interstate commerce or does or does not directly affect interstate commerce depends on facts *dehors* the statute. *A fortiori* is this true on the issue of whether or not restrictions on freedom of contract encounter the constitutional barrier of due process.

The determination of this issue turns on the reasonableness or appropriateness of the restriction, and questions of reasonableness require illumination from facts. The Government has introduced the volume of evidence regarding the facts and conditions of the bituminous coal industry, not for the purpose of sustaining the burden of establishing the constitutionality of the statute against an initial presumption of unconstitutionality, but for the purpose of making available to this Court the information which will enable it to pass upon the reasonableness and appropriateness of the exercises of Congressional power here involved.

In this connection, petitioner apparently seeks to suggest some possible vice in the facts which the Government has introduced into the record by calling them "economic" facts, placing the phrase in quotation marks (Br. pp. 22, 28) and elsewhere referring to them as "so-called 'economic facts' " (p. 86). The Government does not insist upon the adjective. It does not seek by means of a word to attach any greater significance to the facts than they otherwise would have. It does insist, however, that in a case presenting the constitutional issues here involved, the facts *are* important and that they are not rendered less important because they deal with matters of trade and commerce which inevitably lie within the realm of the "economic", however distasteful petitioner may find that word.

I. The Tax

THE TAX IMPOSED BY THE ACT IS CONSTITUTIONAL IF THE REGULATORY PROVISIONS OF THE ACT ARE CONSTITUTIONAL

The Government has not contended at any stage of this litigation that the validity of the tax imposed by Section 3 of the Bituminous Coal Conservation Act could be supported on any other basis than the power of Congress to regulate commerce among the several States. The Government concedes that if the regulatory provisions of the Act are not valid under the commerce clause, the fifteen percent tax imposed on producers who operate otherwise than under the code cannot stand separately under the taxing power. But if the regulatory provisions may be imposed under one of the granted powers, such as the commerce clause, Congress may enforce the regulation by means of a tax.[1] *Veazie Bank* v. *Fenno,* 8 Wall 533; *Head Money Cases,* 112 U. S. 580; *Board of Trustees of the University of Illinois* v. *United States,* 289 U. S. 48, 68. This principle was reaffirmed recently in *United States* v. *Butler* (decided January 6, 1936) where the Court stated, after holding that the tax levied under the Agricultural Adjustment Act was not a true tax:

> It does not follow that as the act is not an exertion of the taxing power and the exac-

[1] Petitioner has not denied that the tax is valid if the regulations come within the commerce power of Congress.

> tion not a true tax, the statute is void or the exaction uncollectible. For, to paraphrase what was said in *The Head Money Cases* (*supra*), p. 596, if this is an expedient regulation by Congress, of a subject within one of its granted powers, "and the end to be attained is one falling within that power, the act is not void, because, within a loose and more extended sense than was used in the Constitution" the exaction is called a tax.

No claim can be made in this case that Congress was not intending to exercise its commerce power when it enacted the Bituminous Coal Conservation Act. (Compare *Hill* v. *Wallace,* 259 U. S. 44.) Petitioner has not made any such contention, and the contrary appears from numerous sections of the Act itself. The Act is entitled "An Act to Stabilize the Bituminous Coal-Mining Industry and Promote its Interstate Commerce", etc. The second paragraph of Section 1 sets out with great particularity the belief of Congress that certain conditions and practices "bear upon", "directly affect", "disorganize" or "burden and obstruct" interstate commerce or are "detrimental to fair competition" in interstate marketing and that regulation of these conditions and practices is necessary "for the protection of", or "to promote", or to "remove burdens and obstructions" from interstate commerce. The second introductory para-

graph of Section 4, providing for the formulation of the Bituminous Coal Code, states:

> For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions, provisions, and obligations *which will tend to regulate interstate commerce in bituminous coal and transactions directly affecting interstate commerce in bituminous coal.*[1]

Subsection (i) of Part II of Section 4 defining certain practices as unfair methods of competition is essentially an elaboration of the substantive provisions of the Federal Trade Commission Act. Section 13, which declares certain marketing agencies to be in violation of the Sherman Act unless approved by the Bituminous Coal Commission, is supplementary to the Sherman Act. Section 18, which confers authority on the Bituminous Coal Commission to act in conjunction with the Interstate Commerce Commission, is supplemental to the Interstate Commerce Act. All these provisions indicate that Congress intended to act under the same power in pursuance of which previous statutes regulating commerce had been enacted.[2]

[1] In this brief all italics used in quotations are, unless otherwise indicated, supplied.

[2] A considerable portion of the report of the House Committee on Ways and Means is devoted to the argument that the Act is a valid regulation of interstate commerce (H. R. 1800, 74th Cong., 1st Sess., pp. 3–10, 12–13). The report states categorically that:

> This bill is founded on the principle that, for the protection of the public and to prevent restraint upon and to foster interstate commerce in bituminous coal,

The imposition of the penalty tax by way of denial of the drawback is designed solely to compel compliance by the producer with the regulations constitutionally within the power of Congress under the commerce clause; and, as will be shown later, full and complete opportunity is afforded to the producer to secure judicial protection against all attempts to impose the penalty with respect to transactions he can prove not to come within the commerce power.[1]

> Federal regulation is necessary. This industry is Nation-wide in its extent, carries on extensive operations in interstate commerce, directly affects the interstate commerce in other industries dependent on bituminous coal for fuel, and presents problems national in their scope.

The two minority reports oppose the bill because the signers do not believe the Act to come within the Federal commerce power. See H. R. 1800, *supra*, pp. 45–46, 49–51.

The Committee also asserted that the bill might be sustained under the taxing power, both separately and as an aid to the regulation contemplated under the commerce clause. In its discussion of the tax provisions the Committee said (*Ibid*, p. 10):

> Taken together with the exercise of the other powers in the bill it cannot be said that the tax is not a reasonable exercise of the power to aid in the enforcement of powers otherwise valid. No provision of the Constitution prevents the exercise simultaneously of two granted powers or prevents the exercise of one in aid of another.

The commerce clause was again and again referred to in the debates in Congress as the constitutional power under which the bill could be sustained. See Cong. Rec. Aug. 16 and 17, 1935, pp. 13822, 13828, 13829, 13833, 13835–8, 13844–6, 13858, 13864–6, 14007.

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[1] See pp. 146 to 149.

II. The Price Provisions

THE PROVISIONS OF THE ACT WITH RESPECT TO PRICE REGULATION ARE CONSTITUTIONAL

A. THE PROVISIONS OF THE ACT WITH RESPECT TO PRICE REGULATION ARE A VALID EXERCISE OF THE POWER OF CONGRESS TO REGULATE COMMERCE AMONG THE SEVERAL STATES

The first major question presented by this case is whether under the Constitution Congress has power to regulate prices for sales of bituminous coal in or directly affecting interstate commerce.

It is to be noted at the outset that there is no question here involved as to the power of Congress to prohibit interstate commerce in lawful articles, since the statute contains no prohibition and petitioner's contention (Br. p. 182) that Congress has no such power is therefore irrelevant.

The Government submits that the provisions of the Bituminous Coal Conservation Act with respect to price regulation are a valid exercise of the power of Congress to regulate commerce among the several States.

Petitioner denies such power broadly, quite apart from reliance on objections based upon specific detailed provisions of the Act.

Not merely does petitioner contend that the price-fixing provisions, like the other provisions of the Act, are invalid because, as he alleges, the purpose of Congress in enacting the Act as a whole was to accomplish another objective than the mere regulation of commerce; but he goes still further

and denies altogether that the commerce power of Congress can be employed to regulate prices of articles sold across State lines.

The Government's position is:

1. That the States have no power to regulate sales in interstate commerce for any purpose and therefore the price regulatory provisions of the present statute invade no reserved power of the States to regulate prices in such sales.

2. That the power of Congress to regulate prices in interstate commerce of commodities of such character that as to them price-fixing does not violate the due process clause of the Fifth Amendment is an incident of the Federal power to regulate sales in or directly affecting interstate commerce.

3. That the regulation of prices embodied in the Bituminous Coal Conservation Act is not for such a purpose as to place that regulation beyond the scope of the commerce power, but is on the contrary for a purpose for which the commerce power may constitutionally be exercised.

Petitioner's argument apparently goes on two grounds, first, the broad and all-embracing ground that the power over interstate commerce does not include the power to regulate prices in interstate commerce transactions at all, and, secondly, the somewhat narrower ground that the interstate commerce power may not be constitutionally employed if its exercise is intended to produce such results as economic stability, industrial rehabilita-

tion, etc., which he suggests are expected to flow from the legislation here in question.

Both these arguments, the broader and the narrower one, are rested by petitioner mainly on the contention that they embody propositions essential to the preservation of our Federal system of dual government by State and Nation. This contention is based in part upon argument from the cases, in part upon historical considerations and in part upon a philosophy of government advanced in petitioner's brief.

Upon these issues the Government contends in the first place that upon the precedents established by this Court Congress has power, under the commerce clause, to regulate the prices of sales of such a commodity as bituminous coal in or directly affecting interstate commerce for the purposes contemplated by the Bituminous Coal Conservation Act. Issues that may be raised under the Fifth Amendment as to the alleged unreasonable or arbitrary character of price regulation with respect to coal are reserved for later treatment.

1. *The States have no power to regulate sales in interstate commerce for any purpose, and therefore, the price regulatory provisions of the present statute invade no reserved power of the States to regulate prices in such sales*

It is clearly established that the power to regulate sales in interstate commerce, which is the power involved in the price-fixing provisions

of the Bituminous Coal Conservation Act, is constitutionally beyond the power of the several States. Price regulation is merely a regulation of one of the terms of a contract of sale. Power to regulate the sale carries with it the power to regulate the terms of the sale including the price, unless prohibited by the due process clause or some other express prohibition of the Constitution. Conversely, power to regulate the price does not exist where there is no power to regulate the terms of the sale.

State power over sales in interstate commerce.— The decisions of this Court have sharply limited the extent to which the regulatory powers of the States may be exerted over sales of commodities which are transported across State lines. Restrictions have been imposed, both with respect to regulation by the State of destination of the commodity and with respect to regulation by the State of origin. In *Leisy* v. *Hardin,* 135 U. S. 100, the States were held not to have the power to prohibit the sale in the original package of intoxicating liquor brought in from another State, and the contrary determination in the *License Cases,* 5 How. 504, in which such regulation had been upheld, was expressly overruled. Recently, in *Baldwin* v. *Seelig,* 294 U. S. 511, a provision in the New York Milk Control Act which forbade wholly all sales of milk bought in other States at a price less than that permissible in New York was held to be in-

valid even as to milk sold in other than the original containers.

Similar restrictions have been imposed on the regulatory power of the State of origin of a commodity. In *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, a sale of wheat in Kentucky for shipment to a mill in Tennessee was held to be a transaction in interstate commerce, from which it was held to follow that a Kentucky corporation statute which operated to prevent suit for breach of the contract could not constitutionally be applied. "Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation." (p. 290.) In *Flanagan* v. *Federal Coal Co.,* 267 U. S. 222, a Tennessee statute which operated to prevent suit for breach of a contract for the sale of coal f. o. b. mine was held not to be constitutionally applicable where it was understood between the parties that the dealings "were steps in sending coal from the mines to purchasers in other States." (p. 225.)

The facts in the *Dahnke-Walker* and the *Flanagan* cases closely approximate the facts in the case at bar.[1] *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50,

[1] Coal is ordinarily sold f. o. b. mine (*supra*, p. 27). Petitioner has conceded that such sales for destinations in States outside the State of production are sales in interstate commerce (R. 381). See *Flanagan* v. *Federal Coal Co., supra; Pennsylvania R. Co.* v. *Sonman Shaft Coal Co.,* 242 U. S. 120, 122; *Temple Anthracite Coal Co.* v. *Federal Trade Commission,* 51 F. (2d) 656, 659.

presents an even stronger illustration of the incompetence of the States. There the Court held that the commerce clause prevented the application of a North Dakota statute which regulated the business of purchasing grain within the State including a provision for the fixing of price by a State officer. The grain was sold to elevator operators who took delivery within the State and stored it there. Shipment to other States took place subsequently as the elevator operators desired. Nevertheless, the regulation was held to be a regulation of interstate commerce because it appeared that a very large proportion of the grain grown in North Dakota was habitually shipped outside the State after its purchase. See also *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189.

Federal power over sales in interstate commerce.—It is clear, therefore, that State regulation of the price of coal sold f. o. b. mine or destination for delivery outside the State of production would be a violation of the commerce clause. Where it appears that State regulation is precluded from application by reason of the commerce clause, it necessarily follows that the subject matter is within the scope of the Federal power over commerce. To hold otherwise would be to create a vacuum in the power to regulate commerce from which both State and Federal power would be excluded and to override the established doctrine that "the power to regulate commerce here meant to be granted was

that power to regulate commerce which previously existed in the states." Mr. Justice Johnson in *Gibbons* v. *Ogden,* 9 Wheat. 1, 227. See also *South Carolina* v. *Georgia,* 93 U. S. 4, 10. As James Madison wrote: "The powers [of the United States and the States] taken together, ought to be equal to all of the objects of government not specially excepted for special reasons, as in the case of duties on exports." *Letters and Other Writings of James Madison,* 250.

In the *Head Money Cases,* 112 U. S. 580, a decision that a Federal statute regulating immigration was a valid exercise of the commerce power was reached on the basis of prior decisions holding State regulation of the same subject matter unconstitutional, and it was declared (p. 593):

> It cannot be said that these cases do not govern the present, though there was not then before us any act of Congress whose validity was in question, for the decisions rest upon the ground that the State statutes were void only because Congress, and not the States, was authorized by the Constitution to pass them, and for the reason that Congress could enact such laws, and for that reason alone were the acts of the State held void. *It was, therefore, of the essence of the decision which held the State statutes invalid, that a similar statute by Congress would be valid.*

The existence of this power of the Federal government which follows from the constitutional in-

competence of the States has been recognized expressly by this Court. While the Federal government has not previously undertaken to exercise its power of price regulation except with respect to charges by commission men, etc., in stockyards, as in the Packers and Stockyards Act, and with respect to transportation, this Court has on several occasions clearly stated that such a power exists in the Federal government under the commerce clause.

In *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, the Court, while holding a State to be precluded by the commerce clause from giving to a State officer power to fix the price to be paid for grain grown and delivered within the State where such grain was habitually shipped out of the State after its purchase, expressly adverted to the fact that the Federal government may pass legislation of this character. It was said (pp. 60–61):

> It is alleged that such legislation is in the interest of the grain growers and essential to protect them from fraudulent purchases, and *to secure payment to them of fair prices* for the grain actually sold. This may be true, but *Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed.* The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce placed by the Constitution under federal control.

The decision thus recognizes, in the case of a commodity seeking an assured extra-state market, the intimate connection between the prices to be paid the producer and the ensuing interstate commerce in the commodity, and clearly implies that to the authority vested with power over the commerce must belong also the power to regulate the prices, when price regulation is under the due process clause a permissible exercise of governmental control.

In *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83, it was held that the rates of electricity produced within one State and sold within that State for transmission to another State are not subject to regulation by the State of production. Both the majority and minority opinions state clearly that the power to regulate the rate resides in the Federal Government. The Court said (p. 90):

> The rate is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests; but, *if such regulation is required it can only be attained by the exercise of the power vested in Congress.*

In the dissenting opinion it was said (p. 91):

> If the Commission lacks the power exercised, it is solely because the electricity is delivered for use in another State. That fact makes the transaction interstate commerce, *and Congress has power to legislate on the subject.*

Finally, in *Baldwin* v. *Seelig,* 294 U. S. 511, in which it was held that New York did not have the power to forbid sales of milk bought in other States at a price less than that permissible in New York, it was said (p. 522):

> If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals *that were meant to be averted by subjecting commerce between the States to the power of the Nation.*

Thus repeatedly it has been established that the absence of State power with respect to interstate prices is the resultant of the existence of Federal power to regulate them.

2. *The power of Congress to fix prices in interstate commerce of commodities of such character that as to them price fixing does not violate the due process clause of the Fifth Amendment is an incident of the Federal power to regulate sales in or directly affecting interstate commerce.*

The power of Congress to regulate contracts in or duly affecting interstate commerce has never been doubted and cannot at this late day be denied. Upon that power rest many of the most familiar Federal statutes—for example, the Sherman Anti-trust Act, many provisions of the Clayton Act, the Federal Trade Commission Act, the Grain Futures Act, the Packers and Stockyards Act, etc. Section

3 of the Clayton Act, prohibiting so-called "tying clauses" illustrates the exercise by Congress of its power to prohibit certain types of terms in contracts of sale. The power of the Federal Trade Commission to prohibit unfair forms of advertising can only be sustained because such advertising is incidental to interstate sales. If Congress can regulate a mere inducement to a contract of sale like advertising, it can obviously regulate, subject always to the due process clause, the terms of the sale itself, as it has done in Section 3 of the Clayton Act.

So far as relates to the commerce clause, price is a term like any other term in a contract, and the power to regulate contract terms carries with it the power to regulate price subject only to compliance with the requirements of due process. This power Congress has also exercised, as for example in Section 2 of the Clayton Act, which directly regulates the price term in interstate commerce by prohibiting directly or indirectly discriminations in prices to different purchasers. Again, in the Packers and Stockyards Act Congress has authorized the Secretary of Agriculture to regulate the service charges of market agencies buying or selling live stock on commission bases or furnishing stockyard services.

In the Grain Futures Act, upheld in *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, Congress made use of the commerce power to regulate trad-

ing practices on grain exchanges. The regulation was held to be valid because of the effect of these practices in depressing the price of commodities moving in interstate commerce, the Court saying (pp. 39–40):

> If a corner and the enhancement of prices produced by buying futures[1] directly burden interstate commerce in the article whose price is enhanced, it would seem to follow that manipulation of futures which unduly depress prices of grain in interstate commerce and directly influence consignment in that commerce are equally direct.

The situation of the bituminous coal industry may be significantly compared with the situation involved in the *Olsen* case. There the activity regulated by the statute was not the sale and delivery of actual grain, but contracts of sales of grain for future delivery, most of which, as the Court pointed out, do not result in actual delivery but are settled by offsetting them with other contracts of the same kind. Thus the transactions regulated were not in interstate commerce but were purely local, and most of them could not even lead to interstate activity. The primary effect of the practices there regulated was to cause undue fluctuation in the price of cash grain. Disturbance of the normal flow of commerce in grain was there secondary, the Court citing one instance in

[1] The reference is to *United States* v. *Patten*, 226 U. S. 525.

which the price of futures rose rapidly and had the effect of inducing large quantities of cash wheat to be taken out of the normal channels of distribution and brought to Chicago for delivery at the attractive price. (See 262 U. S. at 13, 38.)

In the case at bar, the activities under consideration are sales in interstate commerce, not local activity affecting interstate commerce. The record shows plainly the direct and historic consequence on interstate commerce of indulgence in the practices regulated by the Act. The Court below found that during the period following 1923, the competitive cutting of prices occasioned a large shift or diversion of shipments of coal from the fields north of the Ohio and Potomac rivers to the fields immediately south of the rivers. (Fg. 118, R. 179.) "The shift or diversion of shipments after 1923 from the northern to the southern group was primarily due to a reduction of f. o. b. mine prices in the South more rapidly than in the North, the spread between southern and northern f. o. b. mine prices being substantially increased after 1923." (Fg. 122, R. 181.) Obviously, such a situation is to be considered more significant from the standpoint of the applicability of the commerce power than was the occasional diversion of shipments of grain caused by the practices sought to be regulated under the Grain Futures Act. And, if the Federal power extends to the

regulation of local activity which affects interstate price and occasionally affects interstate shipment, it must *a fortiori* extend to the regulation of the interstate price itself, particularly where competitive price cutting has had so striking and controlling an effect on interstate shipment.

It is established that "the question of price dominates trade between the states" (*Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, 40). Can it be doubted then that the power to regulate interstate commerce includes the power to regulate price?

Petitioner puts forward the view that though the power to regulate prices in interstate commerce clearly is not possessed by the States, nevertheless it does not reside in the Federal government and that it must, therefore, be regarded as one of the powers reserved to the people under the Tenth Amendment.

There is clearly no basis in the language of the Constitution itself or in the construction which that language has hitherto received for singling out the price term from other terms in contracts in interstate commerce so far as relates to inclusion under the congressional power to regulate interstate commerce. Neither the commerce clause nor the Tenth Amendment requires or warrants such a distinction or supplies any standard whatever for applying it. The distinction being without foundation is purely an arbitrary invention.

Petitioner's argument is plainly inconsistent with the language and intent of the Tenth Amendment. The only reason why this Court has denied to the several States, whether of origin or destination, the power to regulate and control sales in interstate commerce is because it has held that the power to regulate such sales is vested in Congress by the commerce clause. *Dahnke-Walker Co.* v. *Bondurant, supra; Flanagan* v. *Federal Coal Co., supra.* In other words, the limitation on the State results precisely from the fact that the power to regulate has been granted to the Federal government. How can it be argued that a power of which one sovereignty was deprived only because it was transferred to another sovereignty resides in neither of them? A similar argument has been made to this Court before and the Court has refuted it on the ground that it amounts to saying "that the power perished as the result of the act by which it was conferred." *Intermountain Rate Cases,* 234 U. S. 493. Petitioner may answer that he means his argument to apply not to the power over contract terms in general, but only to the power over price. Such an answer puts him to the proof that the commerce clause distinguishes between the price term and other terms of contracts in interstate commerce and, as pointed out above, there is not a scintilla of proof for such a distinction.

3. *The Regulation of Prices Imposed in the Bituminous Coal Conservation Act is for a Purpose for Which the Commerce Power May Constitutionally be Exercised.*

Petitioner takes the position that the provisions of the Bituminous Coal Conservation Act with respect to price regulation do not constitute a valid exercise of the power of Congress to regulate interstate commerce because, he contends, they were enacted for purposes for which the commerce clause may not be employed. The major part of petitioner's brief is devoted to developing this argument in one form or another. Thus, petitioner variously urges that the commerce power may be used only "to keep commerce free" by removing burdens and obstructions therefrom; or to "promote" commerce; or for an end "having a real and substantial relation to the regulation of interstate commerce"; and that it may not be constitutionally employed if the intended purpose is to "stabilize" the coal industry, or to improve industrial conditions in that industry, or to accomplish some similar purpose which is not named in the constitutional grant of powers to the Federal Government. To this the Government answers:

(i) That while the power of Congress over commerce among the States extends to the removal of burdens and obstructions to the free flow of such commerce, it is not limited to that purpose; but in any event the purpose of the Bituminous Coal Con-

servation Act is to remove burdens and obstructions from interstate commerce in the sense in which those terms are used in the precedents.

(ii) That while the power of Congress over commerce among the States may be used for the purpose of promoting such commerce by increasing its volume or otherwise, it is not limited to that purpose; but in any event the provisions of the Bituminous Coal Conservation Act are designed to promote commerce among the States in the sense in which word "promote" is used in the precedents.

(iii) That the power of Congress to regulate commerce among the States may, so far as it extends, be employed to prevent or check any public evil or harm which occurs in or as a result of transactions in such commerce, and when so employed is employed for a proper "commerce" purpose; and the objective sought to be attained by the Bituminous Coal Conservation Act is the removal of evils which occur in or as a result of transactions in interstate commerce.

(i) *While the power of Congress over commerce among the States extends to the removal of burdens and obstructions to the free flow of such commerce, it is not limited to that purpose; but in any event the purpose of the Bituminous Coal Conservation Act is to remove burdens and obstructions from interstate commerce in the sense in which those terms are used in the precedents.*

Petitioner argues that the power of Congress under the commerce clause is limited to the removal

of obstructions and restraints on the free flow of that commerce, and apparently that the power of positive regulation for other purposes exists only with respect to transportation. There is nothing in the commerce clause or in the decisions from which any warrant may be derived for such a distinction between transportation and other forms of commerce and the distinction is purely arbitrary. Petitioner's conception of the commerce clause as limited to the removal of obstructions makes it not a positive grant of power to the Federal Government "to prescribe the rule by which commerce is to be governed" as Marshall said it was (*Gibbons* v. *Ogden,* 9 Wheat. 1), but a mere negative restriction on States and individuals which confers on the Federal Government nothing more than the limited power to see that this restriction is maintained.

This is not the conception of the Federal power over interstate commerce which this Court has laid down in its decisions. Thus, in *Gibbons* v. *Ogden,* 9 Wheat. 1, Mr. Chief Justice Marshall in speaking of the commerce power said that it is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution" * * * "It is vested in Congress as absolutely as it would be in a single Government having in its constitution the same restrictions on the exercise of the power as

are found in the Constitution of the United States.'" 9 Wheat., at 196–197.

In the same case Mr. Justice Johnson said in his concurring opinion (at 227):

> The power of a sovereign state over commerce therefore amounts to nothing more than a power to limit and restrain it at pleasure and since the power to prescribe the limits to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive.

Again in *In re Rahrer,* 140 U. S. 545, this Court was called upon to meet the argument that while the commerce clause is a restriction upon the power of the States to impose regulations on commerce, it confers no such restrictive power on the Federal Government. The Court said (at 561):

> Thus the grant to the general government of a power designed to prevent embarrassing restrictions upon interstate commerce by any state would be made to forbid any restraint whatever. We do not concur in this view. In surrendering their own power over external commerce the states did not secure absolute freedom in such commerce but only the protection from encroachment afforded by confiding its regulation exclusively to Congress.

Again in *United States* v. *E. C. Knight Co.,* 156 U. S. 1, at 11–12:

> The Constitution does not provide that interstate commerce shall be free, but by the

> grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints.

It is true that many of the cases under the commerce clause deal with obstructions and restraints. For this there are two explanations. The first arises from the fact that the majority of commerce clause cases have involved the validity or invalidity of State statutes. In these cases the question whether or not the commerce clause operates as a limitation upon any particular exercise of State power is one that depends for its answer upon whether or not the exercise of State power constitutes a restraint upon interstate commerce. The very reason, however, why a State-imposed restraint upon interstate commerce is unconstitutional is because under the commerce clause the Federal Government alone has power to impose such restraints and hence the State in imposing a restraint is invading a sphere of power exclusively reserved to the Federal Government.

The second reason why many of the commerce clause cases have dealt with burdens and restraints is because Congress in some of its most important statutes, notably the Antitrust Laws, has adopted a legislative policy of favoring free competition and in the execution of that policy has made certain kinds of burdens and restraints unlawful. In cases arising under such statutes the emphasis upon the burdens and restraints has been for the purpose of

delimiting the scope of the statute rather than of determining the limits of constitutional power.

This Court has repeatedly said that the power of Congress to regulate commerce among the several States includes not only the power to remove restraints and obstructions, but also "to foster, protect, control and *restrain*". *Second Employers' Liability Cases,* 223 U. S. 1, 47; *Dayton-Goose Creek Railway* v. *United States,* 263 U. S. 456, 478; *Texas and New Orleans R. R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 570.

In any event the terms "burden" and "obstruction" as used in the cases do not imply that Congress in regulating interstate commerce must refrain from restrictions upon the free choice and free action of business men and may not subject the terms of their contracts to regulation. The very Antitrust Laws whose object is to preserve competition, and in that sense to protect commerce from burdens and obstructions, recognize that to accomplish this result it is often necessary to regulate the terms of contracts and accordingly to impose such regulations or restraints upon some of the most important provisions of such contracts. Congress, however, is under no constitutional obligation to adopt a legislative policy of maintaining free competition. It may restrict and has restricted such competition when in its judgment the result of competitive methods or practices has been deleterious; and in the cases a deleterious result occurring in the course of commerce, or as a result of a

particular method of carrying on commerce, has frequently been referred to as a burden upon, or obstruction to, commerce. This appears from a comparison of the provisions of the statute involved in *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, with the language of the Court in that case, at 37:

> In the act we are considering, Congress has expressly declared that transactions and prices of grain in dealing in futures are susceptible to speculation, manipulation, and control, which are detrimental to the producer and the consumer and persons handling grain in interstate commerce and render regulation imperative for the protection of such commerce and the national public interest therein.
>
> It is clear from the citations, in the statement of the case, of evidence before committees of investigation as to manipulations of the futures market and their effect, that we would be unwarranted in rejecting the finding of Congress as unreasonable, and that in our inquiry as to the validity of this legislation we must accept the view that such manipulation does work to the detriment of producers, consumers, shippers and legitimate dealers in interstate commerce in grain and that it is a real abuse.

This Court then went on to say, speaking of the way in which this abuse operated (pp. 39–40):

> If a corner and the enhancement of prices produced by buying futures directly burden interstate commerce in the article

> whose price is enhanced, it would seem to follow that manipulations of futures which unduly depress prices of grain in interstate commerce and directly influence consignment in that commerce are equally direct.

Then this significant language is used (p. 40):

> The question of price dominates trade between the States. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it. By reason and authority, therefore, in determining the validity of this act, we are prevented from questioning the conclusion of Congress that manipulation of the market for futures on the Chicago Board of Trade may, and from time to time does, directly burden and obstruct commerce between the States in grain, and that it recurs and is a constantly possible danger.

It is clear from this language that something which works to the detriment of producers, consumers, shippers, and legitimate dealers in interstate commerce is what the Court means by a "burden" on interstate commerce, and a burden in such sense that Congressional legislation under the commerce power may properly be enacted to remove it.

As was pointed out by this Court in the *Olsen* case, the evils of competition, when competition reaches the point where it begins to produce effects that are thought to be undesirable, generally work themselves out through prices or through their effect upon prices. As the Court says, the question

of price dominates trade between the States, so that effective regulation to meet these evils must have something to do with price, either through regulating it directly or through regulating some of the terms and conditions which produce it. For this reason legislation which operates to remove a burden on interstate commerce may take the form of price regulation in some shape.

In enacting the Bituminous Coal Conservation Act, Congress found, on the basis of numerous investigations undertaken during the last twenty years, that conditions and practices existed which had burdened and obstructed interstate commerce in bituminous coal. The findings of the Court below fully substantiate the congressional findings. Destructive price cutting, carried on for many years "has directly burdened and restrained interstate commerce" in coal and "has caused substantial dislocation to and diversion of the normal flow of such commerce" (Fig. 180, R. 210). Unrestrained and destructive competitive conditions have occasioned many unfair competitive practices which have served to further demoralize the industry and to place added burdens and restraints upon interstate commerce (Fg. 181, R. 210). Unrestrained and destructive competition leading to the competitive cutting of wage rates has brought about many strikes which have closed down many mines, have caused violent and wide fluctuations in the price of coal to the consumer, have caused hardship and put burdens upon many consumers, have

threatened to and have "interrupted and obstructed interstate commerce" in coal, and "at times have even threatened to stop such interstate commerce for indefinite periods" (Fg. 184, R. 211). A statute designed to eliminate conditions and practices which have such effects upon interstate commerce fully meets any test of the scope of the commerce power, no matter how narrowly conceived.

(ii) *While the power of Congress over commerce among the States may be used for the purpose of promoting such commerce by increasing its volume or otherwise, it is not limited to that purpose; but in any event the provisions of the Bituminous Coal Conservation Act are designed to promote commerce among the States in the sense in which the word "promote" is used in the precedents.*

We have shown that when the object of an exercise of the commerce power is said to be the removal of "burdens" and "obstructions" from interstate commerce, it is broad enough to include more than merely the protection of businessmen and business dealings from restraints on their freedom of action. So when that object is said to be the "promotion" of interstate commerce, it is likewise broad enough to include more than merely increasing the physical volume of goods moving in such commerce or providing for its physical safety. The cases employ the word "promote" much as they employ the words "removal of burdens and obstructions" to signify whatever may render the commerce more convenient and advan-

tageous both to those who engage in it and to the general public.[1] To promote commerce is to remove obstructions from it and we have already seen that a removal of an obstruction from commerce may consist in eliminating from the conduct of commerce various practices and conditions which cause loss and injury to those who engage in it or to those who are served by it.

Much of the legislation sustained by this Court as an exercise of the commerce power has, so far from increasing the volume of commerce or providing for its safety, actually destroyed it by prohibition without in any way tending to increase the volume or promote the safety of commerce in other articles. Such was the purpose of the acts sustained in the *Lottery Case,* 188 U. S. 321 (lottery tickets); in *Hipolite Egg Co.* v. *United States,* 220 U. S. 45 (Pure Food and Drugs Act); in *Weber* v. *Freed,* 239 U. S. 325 (prize fight films); in *Hoke* v. *United States,* 227 U. S. 308 (White Slave Act); in *Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U. S. 311 (intoxicating liquors); and in *Brooks* v. *United States,* 267 U. S. 432 (stolen automobiles).

We have already shown the burdens and obstructions to which interstate commerce in bituminous coal has been subject for many years (*supra,* p. 125.) · The provisions of the present Act are de-

[1] *The Daniel Ball,* 10 Wall. 557, 565; *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 570; *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 478.

signed to remove these burdens and obstructions and the Act is therefore designed to "promote" commerce in bituminous coal among the states.

(iii) *The power of Congress to regulate commerce among the States may, so far as it extends, be employed to prevent or check any public evil or harm which occurs in, or as a result of transactions in, such commerce, and when so employed is employed for a proper "commerce" purpose; and the object sought to be attained by the Bituminous Coal Conservation Act is the removal of evils which occur in or as a result of transactions in interstate commerce.*

Petitioner contends that a statute otherwise valid as a regulation of interstate commerce is rendered invalid if the purpose of the statute does not "bear any reasonable relation to the regulation of interstate commerce" (Pet. Br. pp. 103 ff.). Apparently the phraseology in which this contention is couched was deliberately chosen to avoid the express assertion of an untenable proposition seemingly meant to be implied. Stated as it is, the contention is merely circular and meaningless. A regulation of an interstate commerce subject matter for whatever purpose bears a real and substantial relation to the regulation of interstate commerce since it is itself a regulation of interstate commerce. What petitioner apparently wishes to imply and yet not assert is that the power to regulate commerce may not be employed for *any* objective more ultimate than the immediate removal of burdens and restraints upon interstate commerce (Pet. Br. pp.

103 ff.). Petitioner contends apparently that any regulation of commerce which serves *any other or further* purpose, or has any other and further ultimate effect, is for that reason beyond the scope of the power to regulate commerce.

This contention seems to rest upon a complete confusion between a governmental *power* on the one hand and the *subject matter* upon which, and the *purpose* or *objective* for which, the power may be exercised, on the other. The Constitution delegates to the Federal Government certain express powers, of which the power to regulate interstate commerce is one. It does not specify the subject matters upon which this or any other granted power may be exercised. It does not set forth the particular purposes for which this or other granted powers may be used. It does not say that the power to tax may be exerted upon State chartered corporations or upon the right to inherit property or upon the manufacture or sale of commodities. It does not say that this power may be exerted for the purpose of accumulating funds to spend in building roads, or for the purpose of enhancing the price of foreign goods in order that American citizens may find it more advantageous, and therefore may be induced, to buy the products of home manufacture. The same thing is true of the power to regulate commerce. The Constitution does not set forth that the power to regulate commerce extends over navigation or railroads or sales of the

products of factories. It does not say that the power may be used to insure the safety of individuals traveling in railroad trains, or to protect the interest of shippers in not having to pay excessive freight rates, or to preserve the morals of the community by making it unlawful to transport women across a State line for immoral purposes, or to safeguard the health of the community by penalizing the shipment in interstate commerce of impure foods or adulterated drugs.

The fact that the wide varieties of subject matter upon which the granted powers of Congress may be exerted, and upon some of which they will have to be exerted if they are exerted at all, are not specifically enumerated in the Constitution, obviously does not mean that Congress may not exert its powers upon any such unenumerated subject matters. In the same way the fact that the various objectives which may be deemed desirable by Congress, and for which Congress may conceivably wish to assert one or more of its granted powers, are not expressly enumerated, does not mean that Congress must confine itself to objectives which *are* enumerated, for none are, save in the broad language of the preamble. The notion now embraced by the petitioner that the power to regulate commerce can be asserted only for the sake of commerce, or for "a purpose related to commerce" rests upon an assumption the acceptance of which elsewhere would make practically impossible either the con-

struction of the Constitution or the operation of Government under it.

The notion that a granted power may not be employed for any purpose not expressed in addition to the grant of the power is a fallacy which was early sought to be introduced into our constitutional thinking by opponents of a protective tariff, and was answered conclusively and exhaustively by Mr. Justice Story. Speaking of the taxing power, Mr. Justice Story says:

> The language of the Constitution is "Congress shall have power to lay and collect taxes, duties, imposts, and excises." If the clause had stopped here and remained in this absolute form, * * * there could not have been the slightest doubt on the subject. The absolute power to lay taxes includes the power in every form in which it may be used, and for every purpose to which the legislature may choose to apply it. This results from the very nature of such an unrestricted power. *A fortiori* it might be applied by Congress to purposes for which nations have been accustomed to apply it. Now, nothing is more clear, from the history of commercial nations, than the fact that the taxing power is often, very often, applied for other purposes than revenue. It is often applied as a regulation of commerce. It is often applied as a virtual prohibition upon the importation of particular articles for the encouragement and protection of domestic products and industry; for the support of

> agriculture, commerce, and manufactures; for retaliation upon foreign monopolies and injurious restrictions; for mere purposes of state policy and domestic economy; sometimes to banish a noxious article of consumption; sometimes as a bounty upon an infant manufacture or agricultural product; sometimes as a temporary restraint of trade; sometimes as a suppression of particular employments; sometimes as a prerogative power to destroy competition, and secure a monopoly to the government. (Story, *Commentaries on the Constitution,* Sec. 965.)

The Constitution does not explicitly say that the Federal Government has *power* to encourage and protect domestic production, to support agriculture, commerce, and manufactures, to set up a policy of domestic economy, to restrain trade, temporarily or otherwise, to suppress particular employments, or to secure a government monopoly. The Constitution does, however, explicitly say that the Federal Government has power to lay and collect taxes, duties, imposts, and excises, and since the taxing power is susceptible of being used to further the foregoing objectives, the Federal Government, as Mr. Justice Story points out, has power to further them through use of the taxing power. The fact that they are not set out as express powers in the Constitution does not cut down the plenary grant of the taxing power to the point where it may not be exerted to effectuate them.

Mr. Justice Story develops the same argument in connection with the commerce power. (*Commentaries on the Constitution,* Secs. 1079–1089.) He states the position which he is refuting, and which represents precisely the position now taken by the petitioner, as follows:

> But the question is a very different one, whether, under pretense of an exercise of the power to regulate commerce, Congress may in fact impose duties for objects wholly distinct from commerce. The question comes to this, whether a power exclusively for the regulation of commerce is a power for the regulation of manufactures? (Sec. 1079.)

In answering the question he begins by pointing out that those who claim that the commerce power should be used only for the sake of commerce and the taxing power only for the sake of revenue "* * * admit that the power may be applied so as incidentally to give protection to manufactures when revenue is the principal design; and that it may also be applied to countervail the injurious regulations of foreign powers when there is no design of revenue" (Sec. 1081). He then continues:

> These concessions admit, then, that the regulations of commerce are not wholly for purposes of revenue, or wholly confined to the purposes of commerce, considered *per se.* If this be true, then other objects may enter

into commercial regulations; and, if so, what restraint is there as to the nature or extent of the objects to which they may reach, which does not resolve itself into a question of expediency and policy? It may be admitted that a power given for one purpose cannot be perverted to *purposes wholly opposite,* or beside its legitimate scope. But what perversion is there in applying a power to the very purposes to which it has been usually applied? (Sec. 1081.)

Now it is well-known that, in commercial and manufacturing nations, the power to regulate commerce has embraced practically the encouragement of manufactures * * * When the Constitution was framed, no one ever imagined that the power of protection of manufactures was to be taken away from the States, and yet not delegated to the Union. The manufacturing States would never have acceded to it upon any such terms * * * The same reasoning would apply to the agricultural States; for the regulation of commerce, with a view to encourage domestic agriculture, is just as important and just as vital to the interests of the Nation, and just as much an application of the power, as the protection or encouragement of manufactures. It would have been strange indeed if the people of the United States had been solicitous solely to advance and encourage commerce, with a total disregard of the interests of agriculture and manufactures * * *. (Sec. 1082.)

> Now the motive of the grant of the power [to regulate commerce] is not even alluded to in the Constitution. It is not even stated that Congress shall have power to promote and encourage domestic navigation and trade. A power to regulate commerce is not necessarily a power to advance its interests. It may in given cases suspend its operations and restrict its advancement and scope. Yet no man ever yet doubted the right of Congress to lay duties, to promote and encourage domestic navigation * * *. The motive to the exercise of a power can never form a constitutional objection to the exercise of the power. (Sec. 1089.)

Petitioner's argument amounts to contending that in addition to enumerating the powers conferred on the Federal Government, the Constitution should have enumerated the infinite variety of objectives for which those powers may be exercised. The framers of the Constitution, designedly according to Marshall, couched even their grants of power in broad general terms, leaving much to implication. What Marshall has said in a famous passage in regard to this economy of expression relating to powers, amply explains and justifies the decision of the framers not to enumerate objectives. Marshall says (*McCulloch v. Maryland,* 4 Wheat. 316, 407):

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by

> which they may be carried into execution, would partake of the prolixity of a legal code and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.

This Court has in repeated instances sustained exercises of the Federal power over interstate commerce to accomplish objectives, the promotion of which is not only not conferred by the Constitution in express terms on Congress but which, within the geographical limits of each separate State, could have been promoted by the exercise of the State police power. Thus Congress has no general power to protect the morals of the people of the United States and, more specifically, no power to give such protection by the suppression of lotteries. On the other hand, each State, within its own limits, may employ its police power to suppress lotteries. Nevertheless, this Court has held that the commerce power may be used with the objective of suppressing lotteries so far as that objective may be obtained by regulations of commerce, and the regulations are not invalid because the suppression of lotteries is their objective.

It could have been urged against the Pure Food and Drug Act that its objective was to promote

health and that the Constitution nowhere confers upon the Federal Government any power to promote health; it could have been urged against the Mann White Slave Act that its objective was to promote morality and that the Constitution nowhere confers upon the Federal Government the power to promote morality; it could have been urged against the automobile theft act that its objective was to prevent theft and that the Constitution nowhere confers upon the Federal Government the power to prevent breaches of State law. In all these cases, however, the Acts were sustained because, irrespective of their objective, they were obviously regulations of commerce; and the fact that their objective was, in one way or another, to promote the general welfare did not invalidate them as regulations of commerce, but served rather to explain and justify the regulation.

So in the present case the fact that the objective of the Bituminous Coal Conservation Act and the legislative policy which led to its enactment may have been the improvement of competitive conditions in the interstate marketing of bituminous coal, whether we speak of that improvement as "stabilization" or otherwise, does not and cannot prevent the statute from being an exercise of the power of Congress over interstate commerce.

It may well be that an improvement of competitive conditions in the interstate marketing of bituminous coal will, as one of its ultimate results, increase the incomes of the producers and employees in the bituminous coal industry and that the probability or possibility of that result was one of the thoughts in the mind of the Congress in enacting the legislation. It seems to be accepted as a fact that protective tariff legislation of the kind discussed by Mr. Justice Story (see *supra,* p. 133), while having for its objective the promotion of manufacturing and agriculture, is similarly expected to increase the income of factory owners, employees and farmers. Indeed, it could just as plausibly be stated that the ultimate purpose of a tariff act is to effect a redistribution of the national income through increasing the income of these classes of persons,[1] as it can be stated by the petitioner that the purpose of the Act now before the Court is to redistribute that income by allocating a larger share to mine owners and miners. In the case of the protective tariff, this possible ultimate effect and the fact that it may have been a motive in the minds of legislators have never been regarded as invalidating the tariff as an exercise of the commerce power. The tariff, irrespective of

[1] The Tariff Act of 1930, 46 Stat. 590, is entitled: "An Act To provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, to protect American labor, and for other purposes."

its ultimate purpose of increasing the income of particular classes of persons, has been construed to be a regulation of commerce having for its objective the promotion of manufacturing and agriculture. Whatever the ultimate result of the Bituminous Coal Conservation Act in improving or not improving the economic position of the persons subject to its provisions may be, its objective, namely, the improvement of competitive conditions in the interstate marketing of coal, is one even more intimately related to and connected with commerce than is the promotion of manufacturing or agriculture.

So far as relates to the specific measures which Congress selected for the accomplishment of this objective, they consist of the regulation of competitive methods and practices—a matter of commerce, if ever there was. The regulation of competitive practices in interstate transactions has been the staple of Congressional regulation of commerce since the Sherman Act. To be sure, the regulations embodied in the Sherman Act were dictated by legislative preference for a policy of free competition. This Court, however, has said in *Northern Securities Co.* v. *United States,* 193 U. S. 197, 337, and, more recently, in *Nebbia* v. *New York,* 291 U. S. 502, 537, that the legislative body is constitutionally at liberty to choose between different economic theories. If it does so, as in the Bituminous Coal Conservation Act, and undertakes to restrict at

certain points the liberty of competition, it is nonetheless, still pursuing a "commerce" objective—the regulation of competition. Such a regulation is, contrary to the assertions of petitioner, directed toward commerce at a vital and significant point—the practices through which competition in commerce is carried on. If the purpose of a statute is to regulate this important aspect of commerce, and if the statute does so by applying its regulations, as in the case of the Bituminous Coal Conservation Act, to interstate transactions beyond the reach of State power, then the regulation is not invalidated by the fact that it may have been enacted with the ultimate objective of improving conditions in one of the great basic industries of the nation.

It is of course fully recognized that there may be instances in which it will appear by objective evidence on the face of a statute that what is in form and appearance the exercise of a granted power is in substance the exercise of a power not granted. In these instances the vice of the statute lies not in the purpose or objective for which a granted power is exercised, but in the fact that what appears to be an exercise of one power is in fact the exercise of another. This was the situation presented in *Hammer* v. *Dagenhart,* 247 U. S. 251. There the statute bore the superficial aspect of a regulation of commerce, but upon examination the real and substantial regulations which it contained bore directly

upon, and were direct regulations of, a social and local matter, child labor, which, in so far as it was an evil, was not an evil occurring in or arising out of transactions in interstate commerce. The detailed regulatory provisions and the whole scheme of the statute operated in effect directly to regulate not commerce or commercial transactions, but conduct not in itself directly affecting commerce among the States. The prohibition of transportation in interstate commerce was not in itself a substantive regulation but a mere extraneous lever to compel compliance with a regulation of matters not directly affecting commerce.

Of the Act now under consideration it is impossible to say that it is not a substantive regulation of commerce, since it is a direct regulation of sales and prices in interstate commerce with the objective of regulating competition in interstate commerce, which is clearly a commercial matter. From the standpoint of the commerce clause the Bituminous Coal Conservation Act is a statute of the same general character as the Sherman Anti-Trust Act, operating upon competition in interstate commerce and differing from the Sherman Act mainly in the legislative policy with respect to the commerce involved. Unlike the Child Labor Act, the regulations here imposed on prices in interstate transactions are completely beyond the power of any State to impose.

On the present issue *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, is not in point, since the Act there involved did not regulate transactions in commerce at all, but operated upon conduct outside of commerce on the theory that it affected commerce, but which was found by this Court not to be directly related thereto. The Court there held that the asserted relation between a pension scheme and the efficiency and safety of interstate transportation did not exist, and the Act fell of necessity, no other source of Congressional power being urged. Here, the regulation of price is a direct and immediate regulation of an interstate commerce transaction in a manner similar to the regulation of railroad rates.

It was not the various beneficial social objectives which Congress envisaged in the Railroad Retirement Act that caused that statute to be invalid. They were irrelevant to the issue of constitutionality since the Act itself did not regulate commerce and therefore was not an exercise of the commerce power. The *Railroad Retirement* case would furnish support for petitioner's contention only if the Court had held that a pension system which did in fact promote efficiency and safety of transportation and which therefore regulated matters directly affecting commerce, was made invalid by the fact that Congress also attempted to achieve social objectives thereby. But this, of course, the Court did not suggest by remotest implication. On the

contrary, in its discussion of the validity of a Federal workmen's compensation law, the Court said (p. 371):

> The collateral fact that such a law may produce contentment among employees,—an object which as a separate and independent matter is wholly beyond the power of Congress,—would not, of course, render the legislation unconstitutional.

The Government has not emphasized or insisted upon the authority of cases like *The Lottery Case,* 188 U. S. 321, *Hoke* v. *United States,* 227 U. S. 108, and *Brooks* v. *United States* 267 U. S. 432, because they go beyond what in this case the Government is required to sustain. Here the object of the regulations contained in the Bituminous Coal Conservation Act is, as has been pointed out, a commerce object—the regulation and improvement of competitive conditions in the bituminous coal industry, thereby removing obstructions to and interference with interstate commerce in bituminous coal. The cases just cited establish the proposition that where there is a true regulation of commerce and not as in *Hammer* v. *Dagenhart, supra,* a merely specious one, the objective of the regulation may be something that reaches beyond a mere commerce objective and may be to accomplish some desirable result for the people of the United States. Mr. Justice Harlan, writing for this Court in *The Lottery Case,* said that the Act there upheld was "for the purpose of guarding the people of the United States against the wide-

spread pestilence of lotteries". (188 U. S. 321, at 357.) Mr. Chief Justice Taft, writing for a unanimous Court in *Brooks* v. *United States, supra,* said that "Congress can certainly regulate interstate commerce to the extent of punishing the use of such commerce as an agency to promote * * * the spreading of any evil or harm to the people of other States from the State of origin", and he added that "in doing this it is merely exercising the police power for the benefit of the public within the field of interstate commerce". This Court in *Nebbia* v. *New York,* 291 U. S. 502, has again reaffirmed the proposition that the Federal Government may use its granted powers to promote the general welfare just as the States may use their reserved powers for that purpose. The Court said (p. 524):

> Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution, the United States possesses the power as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government.

This power to promote the general welfare by appropriate legislation is usually referred to in the case of the States as their police power, and Mr. Chief Justice Taft, in the passage above quoted from the *Brooks* case, applied the same term to an

exercise by Congress of one of its granted powers for the purpose of preventing the spread of any evil or harm where he spoke of a Congressional exercise of the power to regulate commerce as an exercise of "the police power for the benefit of the public within the field of interstate commerce". It is well established in the decisions of this Court that the police power is not, as sometimes claimed, limited to the making of regulations for the promotion merely of such matters as health, morals and safety. As this Court has many times said, it "embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety." *C. B. & Q. R. Co.* v. *Drainage Commissioners,* 200 U. S. 561, at 592; *Eubank* v. *Richmond,* 226 U. S. 137, at 142; *Sligh* v. *Kirkwood,* 237 U. S. 52, at 59.

If, therefore, in the language of Mr. Chief Justice Taft, Congress by a regulation of interstate commerce may "exercise the police power for the benefit of the public within the field of interstate commerce" and if the police power extends to the promotion of the public convenience or the general prosperity, it would seem clear that an exercise of the commerce power is not made invalid by the fact that one of its objectives may be to improve conditions in one of the great basic industries of the nation and thereby enhance the ability of that industry to render its indispensable service to the community.

This Court elsewhere in speaking of "the police power of the National Government" has held that there is a "public national interest", and that "a business affected with a public national interest * * * is subject to national regulation as such". (*Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, at 41.) Of course, that regulation must take place through one of the constitutionally granted powers, *e. g.* the power to regulate interstate commerce. Certainly, however, it is new constitutional doctrine to urge, as petitioner does, that an exercise of the granted power to regulate commerce is made invalid if its effect is, as petitioner contends, to subject to national regulation an industry like the bituminous coal industry, which on a national scale presents all the characteristics held in *Nebbia* v. *New York, supra,* to constitute affectation with a public interest. See *infra,* pp. 162 to 164.

B. THE PRICE REGULATION PROVISIONS OF THE ACT ARE LIMITED TO SALES IN OR DIRECTLY AFFECTING INTERSTATE COMMERCE, AND ARE THEREFORE WITHIN THE POWER OF CONGRESS

The provisions of the Bituminous Coal Conservation Act relating to price regulation are to be found in Part II of Section 4 of the Act, the section which embodies the Bituminous Coal Code.

The code is introduced by a paragraph which reads as follows:

> For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions, provisions and

> obligations which will tend to regulate interstate commerce in bituminous coal and transactions directly affecting interstate commerce in bituminous coal.

The provisions of the code, those relating to price regulation as well as those relating to other matters, must be read in the light of this introductory paragraph prefixed to them. The words of the paragraph describe the provisions and obligations of the code as those which will tend to regulate interstate commerce and transactions directly affecting interstate commerce. In the light of this language the sales to which the price regulatory provisions of the Act found in the code are meant to apply must be construed to be sales in interstate commerce and sales directly affecting that commerce.

That the Act is to be construed as thus limited in application to transactions which can be reached by federal power follows not merely from the plain import of the language just quoted, but from general canons of statutory construction. Should any doubt as to meaning of the language be raised because of the use of the phrase "which will tend to regulate" instead of "for the regulation of", the construction above indicated is compelled by the long established rule that if a statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional or of doubtful constitutionality and by the other valid, the Court

will adopt that construction which will save the statute from constitutional infirmity. *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 407; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339; *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658; *United States* v. *Shreveport Grain & Elevator Co.,* 287 U. S. 77.

Furthermore, the Act provides in Section 3:

> No producer shall by reason of his acceptance of the code provided for in section 4 or of the drawback of taxes provided in section 3 of this Act be held to be precluded or estopped from contesting the constitutionality of any provision of said code, or its validity as applicable to such producer.

This provision clearly contemplates that should an effort ever be made to apply the provisions of the Act to a situation over which congressional power may not be validly exerted, the individual affected shall have opportunity to contest the constitutionality of such attempted application, as, *e. g.,* to a transaction not directly affecting interstate commerce. Under this provision, a producer who makes a sale which is not in interstate commerce or which does not directly affect interstate commerce is enabled to establish judicially that the regulation can not be validly applied to such a sale. Opportunity to assert such a contention is given in the proceedings for judicial review of the orders of the Commission in Section 6 of the Act.

In the light of the fact that the operation of the Act is expressly directed to transactions in or directly affecting interstate commerce, and that a way is provided for producers to remove themselves from the operation of the Act by establishing in a proper case that it is constitutionally inapplicable to the transactions to which in their case it is sought to be applied, neither the *Trademark Cases,* 100 U. S. 82, nor the *Employers' Liability Cases,* 207 U. S. 463, cited by petitioner (Br. p. 89) is in point. The statutes involved in those cases purported to draw no distinction whatever between transactions in interstate and in intrastate commerce.

In the present case the statute is expressly directed to transactions in or directly affecting interstate commerce. There is no doubt that Congress intended to apply the regulations of the Act up to the limits of its constitutional power and no farther. For this reason, it included not merely interstate commerce but also transactions directly affecting interstate commerce. The Act will, of course, thus require judicial examination and interpretation in particular cases to determine the constitutional applicability of its provisions to those cases; but so do the Sherman Act, the Federal Trade Commission Act, the Second Employers' Liability Act, and many other congressional regulations enacted under the commerce power.

Congressional power under the commerce clause may validly regulate not merely transactions *in*

interstate commerce, but also transactions in intrastate commerce to the extent that these *directly affect* interstate commerce. *United States* v. *Ferger,* 250 U. S. 199; *Board of Trade* v. *Olsen,* 262 U. S. 1. There can be no doubt, therefore, that the price-fixing provisions of the Bituminous Coal Conservation Act may be constitutionally applied not merely to interstate sales of bituminous coal, including sales f. o. b. mine for interstate shipment, but also to intrastate sales which directly affect interstate sales.

It appears from the record that at least in all the important producing areas, because of the way in which bituminous coal is marketed, the prices made in the bulk of the intrastate sales have a direct and immediate effect upon the price in interstate sales. Furthermore, such is the relationship in the large majority of transactions between the two sets of prices, that a regulation of interstate prices can be defeated by the prices made in the intrastate transactions. Thus the court below found:

> The distribution and marketing of bituminous coal within the United States is predominantly interstate in character, and the interstate distribution and sale of such coal are so intimately and inextricably connected, related and interwoven that the regulation of interstate transactions of distribution and sale cannot be accomplished effectively without discrimination against interstate

> commerce unless transactions of intrastate distribution and sale be regulated. (Fg. 175, R. 209.)

The court below also found that:

> If coal produced and sold for use in the state of production were sold at lower mine prices resulting in delivered prices lower than comparable coal produced outside the state shipments of such coal into the state would be diminished and intrastate shipments of coal within the state would be increased. (Fg. 52, R. 134.)

The petitioner stipulated that the government witnesses would testify that, as to all areas of substantial production:

> The competitive situation is such that the effect upon intrastate sales resulting from a minimum-price regulation for interstate sales, if such regulation were not applied to intrastate sales, would be to give such a competitive advantage to the intrastate seller that the interstate seller could not fairly compete with him, so that there would result a discrimination against the interstate seller. (R. 376.)[1]

[1] The second paragraph of this stipulation reads:

"That the other Government producer witnesses would each make the same answer in respect of the producing and marketing territories as to which they testified and as to the other areas of substantial production throughout the country to which they testified."

It is obvious that the words "to which they testified" at the end of this paragraph have no meaning as they stand,

Petitioner made no attempt to introduce any evidence to controvert this statement.[1]

Thus the Record bears out the finding in the Report of the Committee on Ways and Means of the House of Representatives that:

> No effort at regulating interstate commerce in bituminous coal or stabilizing its interstate markets can ignore the factor of domestic production and distribution. Some of the coal producing states have no domestic markets. Some of the States with the largest consumption also produce coal. The effect of this domestic production on the interstate marketing of coal, and therefore, on its interstate commerce is direct and, to a large extent, controlling. (H. R. 1800, 74 Cong., 1st Sess., p. 2.)

Under these circumstances it is submitted that if Congress may regulate the price of coal sold in interstate commerce, it may also, in order to pro-

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and that the only reasonable interpretation of the paragraph is that Government witnesses would make such an answer as to all areas of substantial production.

[1] Petitioner now attempts to supply the defect in his case by pointing out that in some states only a small proportion of the coal produced or of the coal consumed moves in interstate commerce. (Petitioner's Brief, pp. 42–45.) But this in no way affects the conclusion, amply established in the Record, that if the price of interstate sales were regulated and the price of intrastate sales not regulated, the result would be injury to the interstate sales. The contention of petitioner means merely that a smaller volume of interstate commerce would be injured in such cases than in the usual case of most coal-producing States.

tect interstate commerce in coal from injury by way of adverse discrimination, regulate intrastate sales of coal subject to the right of any affected producer to show as a matter of constitutional right in any questioned transaction that the price which is charged in that transaction did not directly affect interstate commerce. The congressional power to regulate prices in intrastate sales in order to protect the prices fixed in interstate sales is precisely the same power as the power to regulate rates in intrastate transportation in order to protect the rates fixed in interstate transportation. In other words where the relationship between the price of coal sold locally and the price of that sold in interstate commerce is such that the effect of the local on the interstate is direct, settled principles establish that this relationship is subject to the control of the Federal Government. *Houston, East & West Texas R. Co.* v. *United States* (Shreveport Case), 234 U. S. 342; *Wisconsin Railroad Comm.* v. *Chicago, B. & Q. R. R. Co.,* 257 U. S. 563; *Colorado* v. *United States,* 271 U. S. 153.

The discrimination against the interstate seller from lower delivered prices on intrastate coal resulting from lower mine prices for such coal would have precisely the same effect upon interstate commerce as that resulting from lower intrastate freight rates described by this Court in *Ohio* v. *United States,* 292 U. S. 498. There, that half of the intrastate delivered price of coal which was al-

locable to freight was lowered by State authority and it was found that interstate commerce was prejudiced thereby. If the other half of the same price—that allocable to the mine price—were lowered, the effect upon the delivered price and upon interstate commerce would be exactly the same. Since it appears that practically all intrastate sales of coal are directly competitive with interstate sales, it follows that all sales of coal come potentially within the Federal regulatory power, subject to the right to show in any particular instance that the intrastate price does not directly affect the interstate price.

This can be none other than the meaning of Congress with respect to sales in its declaration in Section 1 of the Bituminous Coal Conservation Act that "all * * * distribution by the producers [of bituminous coal] bear[s] upon and directly affect[s] its interstate commerce and render[s] regulation * * * imperative for the protection of such commerce." These words, appearing in a section of the Act which is in the nature of a preamble, are an expression of what was deemed by Congress to be a factual relationship, and indicate the legislative conclusion that potentially all sales of coal come within the regulations of the statute. However, by the provision already quoted from Section 4, Congress plainly expressed its intention that where in a particular case the factual relationship might be

proved not to exist, the affected producer, through asserting and establishing his constitutional right, may remove himself from the operation of the regulation.[1]

[1] Petitioner contends that the inclusion of "captive coal" in the Act indicates an intention that the regulatory features of the Act should apply to all coal produced. Captive coal is coal produced from mines owned or controlled by companies which themselves consume a substantial part of the output of these mines. The reason for the inclusion of captive coal is obvious. Petitioner himself has forcefully stated the necessity therefor. At the trial in the court below he testified:

"It has been the experience of the coal industry that large consumers will buy and operate their own mines when the price of coal becomes so high that it is more profitable to them to produce at controlled mines the tonnages required by them. This is a substantial element in competition with coal producers such as Carter Coal Company because the users of coal who do operate captive mines and who, upon a rise in the coal market, would acquire and operate them are the largest customers of the commercial producers. As their business is lost, further pressure is exerted on an already declining market for coal." (R. 264–265.)

Petitioner states in his brief (p. 12) that producers of captive coal are not engaged in commerce in coal in any sense. This is true only in those cases where a mine is owned by the consuming company and the coal produced in that mine is consumed in the State of production. In such cases the producer could successfully claim exemption from the regulatory provisions of the Act under Sections 3 and 6. Where, however, the mine is owned by a subsidiary company of the consuming company, or the coal is consumed in a State other than the State of production, the Act would apply to the extent that the transactions in question directly affect the interstate commerce of competing commercial companies.

If it should be urged that regulation of prices in interstate commerce by the Federal Government cannot be constitutional because it would logically require, as above indicated, the regulation of many intrastate prices and thus would subject a large part of the economic life of the State to Federal control, there are two answers:

In the first place, it is to be noted that the scope of Federal power thus established over prices in intrastate sales under the commerce power is restricted to the very limited category of commodities over which governmental price regulation may be exercised consistently with the due process clause of the Fifth Amendment.

In the second place, the Federal power thus established reaches no farther than transactions which directly affect interstate commerce, which transactions have repeatedly been declared to be subject to Federal control. Any contention that would deny this established power because its exercise may extend to matters otherwise within State supervision is one that is directly opposed to the principles of constitutional construction declared and applied in such cases as *Ruppert* v. *Caffey,* 251 U. S. 264, and *Everard's Breweries* v. *Day,* 265 U. S. 545. These cases afford full recognition to the principle that whenever it is necessary, in order

effectually to implement an exercise of power granted to the Federal Government—of which the power to regulate sales in interstate commerce is surely one—Federal power may be exerted to reach all transactions whose regulation is reasonably deemed by Congress appropriate to the effective exercise of the granted power. In *Everard's Breweries* v. *Day, supra,* this Court said (pp. 558–560):

> If the Act is within the authority delegated to Congress by the Eighteenth Amendment, its validity is not impaired by reason of any power reserved to the States . . . And if the Act is within the power confided to Congress, the Tenth Amendment, by its very terms has no application, since it only reserves to the states powers not delegated to the United States by the Constitution. . . . The Constitution confers upon Congress the power to make all laws necessary and proper for carrying into execution all powers that are vested in it. In the exercise of such non-enumerated or implied powers it has long been settled that Congress is not limited to such measures as are indispensably necessary to give effect to its express powers. It is likewise well settled that where the means adopted by Congress are not prohibited and are calculated to effect the object entrusted to it, this Court may not

> inquire into the degree of their necessity. . . . Congress under its express power to enforce by appropriate legislation the prohibition of traffic in intoxicating liquors for beverage purposes may adopt any eligible and appropriate means to make that prohibition effective. The possible abuse of a power is not an argument against its existence. It has been held that the power to prohibit traffic in intoxicating liquors includes as an appropriate means of making that prohibition effective the power to prohibit traffic in similar liquors, although non-intoxicating. . . . *Ruppert* v. *Caffey,* 251 U. S. 264.

It must be re-emphasized that the power exerted in the Bituminous Coal Conservation Act stops at transactions directly affecting interstate commerce. If it be argued that this power, restricted as it is to transactions directly affecting interstate commerce and to the limited class of commodities over which governmental price control may be exercised, nevertheless exceeds the constitutional grant, this position can only be founded on reasoning directly opposed to the reasoning of the Court in the passage just quoted and amounts to an assertion that expressly granted powers are to be restricted because they may be exercised in important and far-reaching ways. Surely, to hold that the existence of a constitutional power is to be denied because the power is such that its exercise may be important and far-reaching is to establish a new canon of constitutional construction.

C. THE PROVISIONS OF THE ACT RESPECTING REGULATION OF PRICES ARE REASONABLE REGULATIONS AND INVOLVE NO INFRINGEMENT OF THE RIGHTS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

The fact that Congress has power under the commerce clause to regulate prices in interstate transactions and transactions directly affecting interstate commerce does not mean that Congress, in the exercise of such power, may regulate the price of shoes, candy, clothing, tobacco, toys, and all commodities generally, for there are always the limitations of due process upon governmental price regulation to be considered.

It is settled law that price regulation by governmental power is restricted by the constitutional requirement that property shall not be taken without due process of law. The Fifth Amendment imposes the requirement of due process upon exercises of Federal power in precisely the same way that the Fourteenth Amendment imposes it upon exercises of State power. It is well-established that under the Fourteenth Amendment the governmental power of the States does not extend to the regulation of all prices generally, for this would involve an unwarranted interference with the constitutional guaranty of freedom of contract, but only to such price regulation as constitutes a reasonable and appropriate means of protecting and promoting the public interest.

Just as price regulation by the States is limited to this scope by the due process clause of the Four-

teenth Amendment, so price fixing by the Federal Government under the commerce power is likewise limited by the due process clause of the Fifth Amendment. The parallelism between the relation of the Fourteenth Amendment to State power and of the Fifth Amendment to Federal power has recently been stated by this Court in *Nebbia* v. *New York,* 291 U. S. 502, a case which concerned price fixing by a State. The language of the Court is as follows (pp. 524–525):

> Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution, the United States possesses the power, as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government, as shown by the quotations above given. These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.

> The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

The Court further stated with respect to the power of government to fix prices:

> There can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells. * * * Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty. (*Ibid,* pp. 537, 539.)

The picture of the bituminous coal industry presented in the Record in this case and summarized at the beginning of this Brief, indicates the great importance of the industry in the economic life of the Nation, and demonstrates that the remedy

adopted by Congress to deal with the evils which admittedly afflict the industry is one which, in the language of this Court just quoted, "is not unreasonable, arbitrary or capricious" but has "a real and substantial relation to the object sought to be attained." The Record also demonstrates a truly remarkable parallelism between the material conditions found by the court below to exist in the bituminous coal industry and those facts of the milk industry which were specifically singled out and adverted to by this Court in the *Nebbia* case as constituting the considerations which made price fixing for that industry a reasonable and hence legitimate exercise of governmental power and consistent with due process. The following comparison in parallel columns amplifies that made by the court below in its oral opinion (R. 1193–1195).

Milk Industry	*Coal Industry*
1. "During 1932 the prices received by farmers for milk were much below the cost of production." (291 U. S. 515.)	1. Coal prices have been below the cost of production for years (Fg. 179, R. 210).
2. "The decline in prices during 1931 and 1932 was much greater than that of prices generally." (291 U. S. 515.)	2. The decline of coal prices at the mine since 1923 has been much greater than that of commodities prices generally (Fg. 100, R. 163–164).
3. "The situation of the families of dairy producers had become desperate and called for state aid similar to that afforded the unemployed, if conditions should not improve." (291 U. S. 515.)	3. The condition of coal miners and their families has long been desperate (Fg. 142, R. 193).

Milk Industry	*Coal Industry*
4. "Milk is an essential item of diet." (291 U. S. 516.)	4. "Coal is certainly essential for the carrying-on of our commerce and the industrial activities of the country, as well as for domestic heating." (R. 1194; Fgs. 42–43, R. 129–130.)
5. "Failure of [milk] producers to receive a reasonable return for their labor and investment over an extended period threaten a relaxation of vigilance against contamination." (291 U. S. 517.)	5. This, of course, is not true of coal. But to counterbalance this is the great waste of coal in mining operations which results from the failure of coal producers to receive a reasonable return (R. 162–164, R. 204–205).
6. "The production and distribution of milk is a paramount industry of the state, and largely affects the health and prosperity of its people. * * * Curtailment or destruction of the dairy industry would cause a serious economic loss to the people of the state." (291 U. S. 517.)	6. The trial court found that "the destruction of the [coal] industry * * * would cause serious economic loss to the entire country and * * * a very serious interference with all commerce."
7. Among the causes for low prices for milk are: "a periodic increase in the number of cows and in milk production; * * *." (291 U. S. 517.)	7. This court is familiar with the chronic condition of overcapacity in the coal industry which forces prices down (Fgs. 57–58, R. 137–138) (*Appalachian Coals, Inc.*, v. *United States*, 288 U. S. 344, 361).
8. "the prevalence of unfair and destructive trade practices in the distribution of milk, leading to a demoralization of prices in the metropolitan area and other markets; * * *." (291 U. S. 517.)	8. The existence of trade practices demoralizing the coal industry was discussed in the *Appalachian* case, *supra*, at 362–363. See Fgs. 50, 166, 181, R. 133–134, 207–210.
9. "and the failure of transportation and distribution charges to be reduced in proportion to the reduction in retail prices for milk and cream." (291 U. S. 517.)	9. This is even more important for coal than for milk, since over 50% of the delivered price of coal consists of transportation charges which have not been reduced (Fg. 67, R. 142).
10. The need for a surplus milk supply to meet day to day and seasonal demands, combined with the	10. The seasonal demand for coal, plus inability to store coal, keeps sufficient mines in operation

Milk Industry	*Coal Industry*
inability to store milk, causes price cutting. (291 U. S. 517–518.)	to satisfy the winter peak demand, and this is in part responsible for the tremendous overcapacity which depresses prices (Fgs. 49, 57, R. 132–133, 137).[1]
11. "unrestricted competition aggravated existing evils, * * *." (291 U. S. 530.)	11. The trial court found: "Said competitive conditions have caused the insolvency of very many coal producers, the abandonment of a great many mining properties before they were completely worked out with a consequent waste of coal resources, repeated and substantial reductions in wage rates, and, unless corrected, threaten to destroy the solvency of a great many of the existing operators and the premature abandonment of many of the existing mines." (Fg. 185, R. 212.)
12. "the normal law of supply and demand was insufficient to correct maladjustments detrimental to the community." (291 U. S. 530.)	12. The maladjustment in the coal industry was not corrected during 12 years of unregulated competition. The court below found expressly that "It is probable that the operation of the law of supply and demand will not serve to eliminate the destructive competitive conditions." (Fg. 185, R. 212.)

Petitioner attempted, in the court below, to limit the effect of the *Nebbia* case in determining the considerations which serve to make price-fixing conform to due process by urging that that case rests solely on the power of the States to protect

[1] The trial court found: "Surplus capacity is partly due to the necessity of maintaining capacity sufficient to meet the seasonal peak of demand in winter and partly to over-development above and beyond the requirements of the seasonal peak. * * * The surplus capacity which must be maintained to meet the seasonal peak is one of the causes of the intense competition in the industry, as the operator is under pressure because of continuing fixed charges to try to sell during off-season. * * *" (Fg. 57, R. 137.)

the public health. Although health was one of the factors involved, it was but one of many and was clearly not the sole or major basis of the decision. In any event, and altogether apart from the special and parallel economic conditions in the two industries, coal resembles milk in being one of the basic necessities of life, essential to health and work, and the power of governmental authority to deal with coal as such a basic necessity and therefore vital to the public interest was recognized by this Court long before the *Nebbia* case. *Jones* v. *City of Portland,* 245 U. S. 217.

Petitioner further contended that the *Nebbia* case is inapplicable because it affirmed an exercise of State and not of Federal power. The Government does not rely upon the case to establish the basis for the power of the Federal Government to regulate prices. That basis exists in the commerce clause. The *Nebbia* case was concerned, not with the basis of State power, which is not a Federal question, but with the issue whether or not the particular exercise of State power transgressed a limitation imposed by the Federal Constitution, namely, the due process clause of the Fourteenth Amendment. It is accordingly authority for the extent to which the due process clause sanctions or limits governmental power to regulate prices. Clearly, the due process clause of the Fifth Amendment imposes no greater restriction upon Federal power than the due process clause of the Fourteenth Amendment imposes upon State power.

The *Nebbia* case has ruled that those limitations do not operate to invalidate governmental price fixing when applied to such facts and conditions as are characteristic of the milk industry and the coal industry.

In his brief for this Court petitioner does not contend that price-fixing is *per se* a violation of the due process clause. Instead he argues that the fixing of minimum prices is confiscatory because such prices tend to become the maxima (Br. p. 258); that arbitrary power is given to his competitors (*i. e.* the district board) to fix prices (Br. p. 260); and that the price-fixing provisions are invalid because the prices of competing fuels such as oil and gas are not also regulated (Br. pp. 261 ff.). The argument that the fixing of minimum prices constitutes confiscation was rejected by this Court in *Hegeman Farms Corporation* v. *Baldwin,* 293 U. S. 163. The contention that the statute gives power to the competitors of petitioner arbitrarily to fix prices is based on a plain misconstruction of the statute as will be shown elsewhere. The price-fixing authority is the Commission, a governmental body (see *infra,* pp. 170 to 171). No serious weight could be given to the argument that the statute is invalid because Congress has not attempted to fix the prices of competing fuels. Such a contention would have made federal regulation of the railroads unconstitutional because water transportation and motor trucks and motor busses were not regulated.

Petitioner is thus reduced to contending that the entire statute is made unconstitutional under the due process clause because it combines a number of restrictions on the freedom of contract. (Br. pp. 244 ff.) In other words, even if each of these restrictions is reasonable, the sum of them becomes *ipso facto* unreasonable because these restrictions are combined in one statute. It is hard to see why the combination of valid provisions should become invalid merely by reason of the combination. If this contention were true the Interstate Commerce Act and the related acts regulating the railroads would be unconstitutional merely because they contain manifold restrictions on the liberty of the carriers.

D. THE MECHANISM FOR THE DETERMINATION OF PRICES IS REASONABLE AND DOES NOT INVOLVE AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER

The procedure provided in the Act for determining minimum prices is detailed, because of the nature of the subject matter and the obvious desire of Congress that these minimum prices should be fixed on as complete a factual basis as it is possible to obtain and that they should not involve hardship on any producer or district. The primary standard to which the prices must conform is that taken in the aggregate they shall yield an average return per ton for each district as nearly equal as may be to the weighted average cost per ton of the

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production of the minimum price area in which the district is located. Specific prices must conform to the following standards: they must be just and equitable, must reflect as nearly as possible the relative market value of the various kinds, qualities and sizes of coals, must not be unduly prejudicial or preferential as between districts, and must afford to the producers in the several districts substantially the same opportunity to dispose of their coals on a competitive basis as has heretofore existed. The procedure for arriving at prices based upon these standards is briefly as follows: Each district board first determines the weighted average cost of the coal produced within the district in 1934, and adjusts this figure to give effect to subsequent changes in factors substantially affecting costs. The district boards then transmit to the Commission the cost figures so ascertained and the computation on which they are based. The Commission thereupon computes the weighted average cost for each minimum price area, which it in turn transmits to the district boards. Upon the basis of the cost figure of the minimum price area in which the particular district is located the district boards draw up a schedule of minimum prices applicable to the various kinds, quality and sizes of coal produced in the district. These schedules are to be submitted to the Commission which may approve, disapprove or modify them.

The various district boards must then coordinate the prices, subject to rules and regulations prescribed by the Commission; that is to say, these prices are to be so adjusted that the coal producers in the different districts will be afforded substantially the same opportunity to dispose of their coal upon a competitive basis as has heretofore existed. These coordinated prices, together with the data upon which they are predicated, are then to be submitted to the Commission which may approve, disapprove or modify them.

Few statutes involving delegated power have circumscribed administrative discretion within the limits of such detailed instructions. This Court has frequently upheld statutes which contain far less definite standards. See *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 24 (in the public interest); *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.,* 289 U. S. 266, 285 (public convenience, interest or necessity); *Avent* v. *United States,* 266 U. S. 127, and *United States* v. *Chemical Foundation,* 272 U. S. 1 (in the public interest); *Colorado* v. *United States,* 271 U. S. 153, 168, and *Chesapeake and Ohio Railway* v. *United States,* 283 U. S. 35, 42 (certificates of public convenience and necessity); *Tagg Bros. and Moorhead* v. *United States,* 280 U. S. 420 (just and reasonable commissions); *Wayman* v. *Southard,* 10 Wheat. 1 (in their discretion deem expedient); *Buttfield* v. *Stranahan,* 192 U. S. 470 (purity,

quality, and fitness for consumption); *Union Bridge Co.* v. *United States,* 204 U. S. 364 (unreasonable obstruction to navigation); *Mahler* v. *Eby,* 264 U. S. 32 (undesirable resident).

In view of these decisions, we can see no basis for petitioner's contention that the detailed and comprehensive provisions for price regulation here involved delegate legislative authority "without a standard" (Pet. Br. p. 236).

Petitioner contends that the minimum price provisions of the statute are invalid as delegating power to fix prices, not to a public body, the Bituminous Coal Commission, but to private persons, namely, district boards which are composed of coal producers elected by code members with an additional labor representative chosen by employees, within the district. This contention rests on a plain misunderstanding of the statute. It is clear on the face of the statute that the minimum prices have binding legal effect only by virtue of action by the Commission; that while the district boards "may advise and recommend, they are powerless to coerce" (*Doty* v. *Love,* 295 U. S. 64, 70).

Under subsection (a) of Part II, Section 4, the schedules of minimum prices established by any district board, together with the data upon which they are computed, must be submitted to the Commission, "which may approve, disapprove, or modify the same to conform to the requirements of this subsection, *and such approval, disapproval, or mod-*

ification shall be binding upon all code members within the district," subject to such changes as result from the coordination provided for in subsection (b). Subsection (b) directs the district boards to coordinate in common consuming markets prices so established under subsection (a) and to submit these coordinated prices to the Commission, "which may approve, disapprove or modify the same * * * *and such approval, disapproval,* or modification shall be binding upon all code members within the *affected districts."* Subject to certain exceptions, subsection (e) makes it a violation of the code to sell or deliver coal, or to contract to sell or deliver coal, at a price below the minimum *"approved or established by the Commission."*

The task of regulating the minimum prices of bituminous coal in sales in or affecting interstate commerce is obviously one of extreme complexity. So, however, is the task of regulating all the railroad freight rates in or affecting interstate commerce. Petitioner refers to the fact that in the area corresponding to Minimum Price Area No. 1, established by the present statute, 27,000 sizes, varieties, and prices of coal were found to exist in a recent period. The number of individual freight rates subject to determination by the Interstate Commerce Commission runs to many times that figure and yet that Commission has not found its task an impossible one, and the courts have not held

that the complexity of the task affords reason for regarding the Interstate Commerce Act as unconstitutional. Indeed, the very complexity of the task has been recognized as ground for committing its performance to an administrative agency with broad discretionary powers. See *Hampton & Company* v. *United States,* 276 U. S. 394, 407.

Petitioner's major attack upon the provisions of the Act which establish the mechanism for price regulations is that those provisions will, in effect, operate to "freeze" the distribution, as between States, of the production and sale of bituminous coal in the proportions which now obtain and that to that extent the Act amounts to a Congressional control of production. The argument that such is the purpose and effect of the statute rests on a misreading of its terms. It is put by petitioner on those provisions which deal with the coordination of minimum prices as between different producing areas and, more specifically, upon the provision of subdivision (b), Part II of Section 4, to the effect that coordination shall take account of certain factors "to the end of affording the producers in the several districts substantially the same opportunity to dispose of their coals upon a competitive basis as has heretofore existed." (Pet. Br. p. 91.)

Obviously the plain import of this language is not to guarantee to the producers of each district the proportion of business elsewhere which they now

have, but merely to keep open to them their opportunity to continue to compete upon the same basis as hitherto. In view of the fact that there is already the widest possible distribution of coal by the different producing States to other States (see map, Def. Ex. 10, R. 1015), this mandate to the price-fixing authority is a guarantee of a full measure of reasonable competition between districts rather than in any way a restriction thereon. It is to be noted that the language above quoted does not provide, as petitioner seems to assume, that prices are to be so coordinated that the producers of a given area shall not be able to sell in other markets more than the quantities that they have hitherto sold, but, on the contrary, expressly preserves to them the opportunity to compete as they now are doing. Attention should also be called to the fact that if any producer or district board is dissatisfied with the coordination of prices, complaint may be made to the Commission for revision thereof and the Commision, after notice and hearing, shall make a new order to remove any prejudice to which any district may be subjected with respect to the fair opportunity to market its coal.[1]

[1] "On the petition of any district board or other party in interest or on its own motion, after notice to the district boards, the Commission may at any time conduct hearings to determine whether the foregoing method of fixing minimum prices under subsection (a) is prejudicial to any district with respect to the fair opportunity of such district to mar-

The contentions advanced by petitioner with regard to the operation of the price-fixing provisions of the Act are at the present time and in this proceeding purely speculative. Ample opportunity exists under the terms of the statute to question them or their applicability to a particular controversy when such controversy shall actually arise. The provisions are complicated, largely as a result of the obvious legislative intent to leave less to the discretion of the Bituminous Coal Commission than

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ket its coal. Should the Commission so find, and further find that the prejudice cannot be removed through the coordination of minimum prices as provided for in this subsection (b), then the Commission may establish a different basis for determining minimum prices in such district, to the end that fair and competitive prices shall prevail in the marketing of the coal produced in such district: *Provided*, That the minimum prices so established as to any such district shall yield a return, per net ton, not less than the weighted average of the total costs, per net ton, of the tonnage of such district." (Section 4, Part II, subdivision (b).)

"If any code member or district board, or any State or political subdivision of a State, shall be dissatisfied with such coordination of prices or rules or regulations, or by a failure to establish such coordination of prices or rules or regulations, or by the maximum prices established for him or it pursuant to subsection (c) of this section, he or it shall have the right by petition, to make complaint to the Commission, and the Commission shall, under rules and regulations established by it, and after notice and hearing, make such order as may be required to effectuate the purpose of subsections (b) and (c) of this Section * * *." (Section 4, Part II, subdivision (d).) It is to be noted that under the provisions of Section 6 of the Act all orders of the Commission are subject to review at the suit of any party or interest in the Circuit Court of Appeals of the United States or in the United States Court of Appeals for the District of Columbia.

is left, for example, to the Interstate Commerce Commission by the provisions of the Interstate Commerce Act. The Interstate Commerce Commission has the broadest possible power to fix particular rates with no other guide than a general requirement of reasonableness. In the exercise of this almost untrammeled discretion, the Commission has made orders which have vitally affected the economic well-being of whole communities and have operated from time to time to cause the transfer of business from one place to another or else have prevented transfers which would otherwise have occurred. In connection with petitioner's contention that the provisions of the present statute are invalid because they may operate to maintain distribution in existing channels, it is interesting to note that one of the familiar policies applied by the Interstate Commerce Commission in the fixing of rates is to preserve existing equality of opportunity. *Anaconda Copper Mining Co.* v. *Director General,* 78 I. C. C. 549, 552; *Morrell & Co.* v. *N. Y. Central R. Co.,* 104 I. C. C. 104, 124; *City Council of Atchison* v. *Missouri Pacific Ry. Co.,* 12 I. C. C. 111, 114. The power of the Interstate Commerce Commission thus to affect the course of economic development is apparently not questioned by petitioner. Indeed, the suggestion has been made that supposed objectives of the present Act could be validly attained through the use of the powers of the Interstate

Commerce Commission. If the use of the commerce power is competent to attain those objectives through the regulation of transportation, there is no constitutional basis for arguing that the same objectives cannot be attained through the action of a commission like the Bituminous Coal Commission, to which is committed the regulation of the other great branch of commerce—viz, sales and distribution.

E. PETITIONER'S ARGUMENTS BASED (1) UPON THE SUPPOSED DANGERS AND DIFFICULTIES INCIDENT TO THE EXISTENCE OF A CONGRESSIONAL POWER TO REGULATE THE PRICES OF BITUMINOUS COAL IN TRANSACTIONS IN OR DIRECTLY AFFECTING INTERSTATE COMMERCE, AND BASED (2) UPON THE HISTORICAL CONTENTION THAT SUCH A POWER WAS NOT INTENDED TO BE GRANTED TO CONGRESS AT THE TIME THE CONSTITUTION WAS ADOPTED, ARE NOT WELL FOUNDED

1. *The Practical Argument as to Dangers and Difficulties is not well-founded.*

Throughout his brief, petitioner is continually suggesting the difficulties and dangers which he contends would be incident to congressional price regulation. Sometimes these suggestions seem directed towards specific provisions of the statute now before the Court, sometimes towards congressional price regulation in general. Insofar as they relate to specific provisions, some of them have already been answered in the preceding section of this brief dealing with the mechanism for price

determination set up by the Act. No statute can be so complete or specific as to exclude from the outset all doubt and uncertainty regarding the way in which its provisions will be applied in particular cases, or regarding the effect which such application may have upon particular interests.

When power to regulate railroad rates was conferred upon the Interstate Commerce Commission, subject to no other statutory direction than that the rates should be reasonable, it would have been possible to draw an even more terrifying picture of the complexity of the task and of the way in which the power might be abused by the Commission than petitioner now draws in his account of the difficulties presented by the Bituminous Coal Conservation Act (Br. pp. 237–243). The only difference is that the Coal Act undertakes to spell out some of the complex steps in the process of price determination which the Interstate Commerce Commission has been left free to work out for itself without having attention called to them through their explicit inclusion in the statute. It may well be that some of the provisions of the Coal Act will prove difficult to administer in practice. Difficulty of administration is, however, not a constitutional vice, but a matter for legislative correction. It may even be that some of the provisions will work hardship upon individuals or localities. If that should prove to be the case, and if the hardship should be sufficient in

degree to amount to an invasion of constitutional right, the affected individual has full opportunity to make his claim in court and ultimately to bring it to this Court under Section 6 of the Act. Such questions are not, it is submitted, properly before the Court at this time. They remain in the the realm of speculation and anticipation. Where, in a proceeding like the present, the validity of an entire statute is questioned, before its operative effect upon any individual in any concrete case can be tested, care should be exercised to distinguish between those issues which go to the constitutionality of the Act as a whole and those which can only be properly determined in connection with the attempted application of some particular provision to a particular situation.

In certain respects, however, petitioner claims that the powers exercised by Congress in the Coal Act are in themselves, and without reference to the specific provisions of the statute, so dangerous as not to lie within the scope of the constitutional grant. His principal argument to this effect consists of an elaboration and extension of his contention, already answered in the immediately preceding section of this brief, that the purpose of the Act is to "freeze" production and distribution in their existing pattern (Pet. Br. 91–96). Having assumed that this is the purpose of the Act and having argued that because of that purpose, the

Act is unconstitutional, he returns to the same point at a later part of his brief (pp. 143–149) and argues that the Congressional power to regulate the prices of bituminous coal in transactions in or affecting interstate commerce necessarily carries with it such a power to allocate and "freeze" production and distribution and is, therefore, unconstitutional; and in support of this contention he propounds a number of hypothetical examples of exercise of such power, as, for instance:

> Possessing the power now claimed by the Government, Massachusetts, and its neighbors, securing a majority of the Congress to aid them, could have prevented the well known "shift" of cotton mills from the North to the South which was undertaken in recent decades on a large scale in order to take advantage of the lower labor costs obtaining in Georgia and the Carolinas consequent upon the lower cost of living in those states.
>
> Similarly, the growth of the automobile industry could have been halted in its tracks by prohibitory price control of interstate shipments of automobiles, upon the ground that interstate commerce in automobiles would "divert" or "dislocate" interstate commerce in horse drawn vehicles and in horses and mules, with consequent injury to the production of wagons, buggies, horses and mules,—a result which the Congress of that day might "reasonably" have regarded

> as opposed to the then general interests of the Nation at large.
>
> Upon like grounds, price regulations could be made today to ameliorate or altogether to destroy the competition of oil with coal, or vice versa. Nor need the use of price regulation of commodities moving in interstate commerce be limited to redistribution of the localities of production. Upon the same basic theory advanced to support the statute now at bar, price discriminations might also be made as between the interstate movement of various kinds of foodstuffs, upon the ground that it is for the Congress to say what it is for the general welfare of the Nation that the people should eat. Under this disguise, sumptuary laws (with which we have had recent unfortunate experience) could again be thrust upon us,—this time without constitutional amendment. (Pet. Br. 147–148.)

The suggestion that the power of Congress to enact the price regulations contained in the Coal Act would necessarily carry with it a power to enact such legislation as petitioner conjures up, and the argument that if Congress is without power to enact legislation of the latter kind, it is without power to regulate the price of bituminous coal in transactions in or directly affecting interstate commerce, are obviously without foundation. It is like suggesting that Congress cannot have power to exclude impure food and drugs from the channels

of interstate commerce, without having the further power to exclude allopathic drugs in favor of homeopathic, and that because it has not the latter power, it must be denied the former. All exercises of congressional power, including exercises of the commerce power, are obviously subject to the due process clause of the Fifth Amendment, as from time to time that clause is interpreted and applied by this Court, and exercises of power which are manifestly arbitrary, capricious and unreasonable will be held to transgress the limitation of due process. Just as it has been said that the power to tax is not the power to destroy while this Court sits, so it may be truly said that while this Court sits, the power to regulate is not the power to regulate arbitrarily, capriciously and for no reasonable end or purpose.

The validity of the price regulations contained in the Act now before the Court depends not merely upon whether they are an exercise of the commerce power, but also upon whether they are such a reasonable exercise of Governmental power as to satisfy the requirements of due process. That they are reasonable regulations in the light of the facts and conditions of the bituminous coal industry, of the problems to which they are addressed and of the evils for which they are put forward as attempted solutions, the Government has attempted to show in a previous section of this brief. On the other hand, hypothetical and imaginary statutes

are not directed toward meeting the fully proved and well understood distress of one of the limited number of essential basic industries of the nation, are not reasonably adapted towards any such end, and being therefore capricious and arbitrary, would clearly violate the Fifth Amendment. Such a conclusion is wholly irrelevant to the question whether the price regulations of the Act before the Court fall properly within the constitutional grant of the commerce power to Congress.

2. *The Historical Argument is not well-founded or sufficient.*

One of the longest of all the sections of petitioner's brief is addressed to supporting the proposition that "the history of the formation, adoption, and ratification of the Constitution and contemporary expositions thereof establish that the power now asserted" (viz. the power of Congress to fix prices in transactions in or directly affecting interstate commerce) "was not granted" (Br. pp. 152–182). Petitioner admits that "it is not a sound ground for denying the asserted scope of a power granted to say that it was not in the minds of the framers or ratifiers of the Constitution when it was framed and ratified" (Br. p. 152). This admission is obviously necessary in view of the recent statement of this Court that:

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. *If* by the statement that what the Constitution meant at the time of its adoption it means to-day, *it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.* It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a *constitution* we are expounding" (*McCulloch* v. *Maryland,* 4 Wheat. 316, 407)—"a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." *Id.,* p. 415. When we are dealing with the words of the Constitution, said this Court in *Missouri* v. *Holland,* 252 U. S. 416, 433, "we must realize that *they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.* * * * The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." (*Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, at 442–443.)

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With this passage, there must also be read the following from the opinion in *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, at 228:

> *The reasons which may have caused the framers of the Constitution to repose the power to regulate interstate commerce in Congress do not, however, affect or limit the extent of the power itself.*

In view of this language petitioner cannot hope to argue that the commerce power does not include the power to regulate sales of bituminous coal in or directly affecting interstate commerce merely because the framers of the Constitution may not have felt the need for regulating such sales or may not have contemplated that the commerce clause might be interpreted to include the power to make such regulations. Accordingly, petitioner is driven back on language used by Chief Justice Marshall in *Dartmouth College* v. *Woodward,* 4 Wheaton 518 at 644, from which counsel quote as follows (Br. p. 152):

> It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception.

In view of petitioner's contention, it seems advisable to quote the entire passage of which the sentence just given forms a part. Speaking of the clause of the Constitution which forbids the States

to impair the obligation of contract, Chief Justice Marshall said:

> It is more than possible that the preservation of rights of this description [i. e. rights granted to corporations by their charters] was not particularly in the view of the framers of the constitution, when the clause under consideration was introduced into that instrument * * *. It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. *The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.*

The passage thus quoted obviously produces on the mind a different impression from that left by the particular sentence extracted from its context and transferred to petitioner's brief. The test of whether, had the particular case been suggested, the language would have been so varied by the founders as to exclude it, turns out to be whether or not there is something in the literal construction of the commerce clause so obviously absurd or mis-

chievous or repugnant to the general spirit of the instrument as to justify making a special exception of the power in question—viz, the power to regulate sales of bituminous coal in interstate commerce,—and to exclude the power to regulate such sales from the plain meaning of the words of the commerce clause.

The test laid down by Marshall is thus not a historical one at all, but rather one which calls for the construction of the Constitution in the light of current conditions, and of what today, in the eyes of those who expound the Constitution, must be regarded as so absurd or mischievous or repugnant as to justify a construction contrary to the plain meaning of the language of the Constitution. If, as this Court has repeatedly held, differences of opinion as to the wisdom or unwisdom of policy must be laid aside as lying within the field of legislative discretion, and if accordingly attention is focused upon that which is absurd or repugnant or mischievous upon *any* conception of legislative policy, whether it be a policy of *laissez faire* on the one hand or of controlled competition on the other, then clearly it seems impossible to say in the light of the record before the Court in this case, and in the light of the application of the due process clause considered above, that the regulation of the price of bituminous coal in sales in or directly affecting interstate commerce is so obviously absurd or mischievous or repugnant to the general spirit of the

instrument as to justify making it an exception from the plain words of the Constitution.

Accordingly, petitioner falls back on the purely historical argument and asserts that had the particular exercise of the commerce power here involved been suggested when the article was framed and adopted, it would not have been adopted, and the language would have been varied as to exclude it. Apparently convinced, however, of the impossibility of proving a negative proposition of this character, he accepts the burden of proving the broader affirmative that the power to regulate interstate commerce was conferred upon Congress for the sole purpose of preventing the states from imposing restraints against each other in respect of such commerce, and from this proposition is drawn the conclusion that, under the commerce clause, the power of Congress is limited to the prevention of such restraints.

The proposition itself is without foundation and even if well-founded, the conclusion would not follow.

Referring to the latter point first, even if it were well established that the only reason which induced the Federal Convention of 1787 to confer, and the people to ratify, the power of Congress over interstate commerce was to prevent the States from imposing restraints thereon, it is well settled by the decisions of this Court, as indicated in the passage above quoted from the *Addyston Pipe* case,

that "the reasons which may have caused the framers of the Constitution to repose the power to regulate interstate commerce in Congress do not affect or limit the extent of the power itself."

Petitioner, however, has not, it is submitted, been successful in showing that the only reason which led to the grant of the interstate commerce power to Congress, and the only purpose of the grant, was to prevent restraints upon such commerce by the states. All that he shows, and all that is capable of being shown, is that this was *a* reason, or *one* of the reasons, for the grant (Br., pp. 154–155, referring to 2 Farrand, Records of the Federal Convention, 308, and Federalist No. XLII), which no one denies. If, however, this had been the only purpose, it is impossible to understand why it was not expressed in the Constitution in the form of a specific limitation on the power of the States, such as the Constitution imposes in other instances, as, for example, in the clause forbidding the States to impair the obligation of contracts, and why, instead, a grant of affirmative power was conferred on Congress. Furthermore, even were it capable of proof that it was the only reason, still, under the language quoted from the *Addyston Pipe* case, it would not serve to limit the express affirmative language of the grant.

Petitioner adduces two additional arguments in support of his contention that the affirmative power granted to Congress to regulate commerce among

the States must be construed as limited to a negative power to restrain interference with such commerce by the States. The first of these is that the Convention considered, and either rejected, or failed to adopt, proposals to confer on the central government certain powers of control over the States (Br., pp. 156, 162). Thus, he points out that the Convention refused to give to the Federal Government a power to negative laws of the States which, in the opinion of the national legislature, violated the Federal Constitution. Clearly, this evidence is inconclusive one way or the other as to the affirmative or negative character of the commerce clause. It may just as well be argued that the Convention declined to give this additional power to the Federal Government because it wished to confer wide powers under the commerce clause, and did not desire to extend those powers still further, as that its failure to confer the additional power must be attributed to a jealousy of the Federal Government which in turn requires the inference that it meant the commerce power to be a purely negative one.

The same ambiguity attaches to the history and fate of the proposal to confer on the Federal Government power "to legislate in all cases to which the separate States are incompetent or in which the harmony of the United States may be interrupted by the exercise of individual legislation." This proposal was actually adopted by the Conven-