tion by vote of 8 States to 2 (2 Farrand's Records, p. 21, South Carolina and Georgia alone voting in the negative), which argues anything but jealousy of Federal power. It was never "rejected", as petitioner states (Br., p. 158), but was dropped out by the Committee of Detail in drafting the text of the Constitution. In view of this history, it is quite as reasonable, indeed more reasonable, to suppose that the omission was due to the understanding by the Committee and the Convention that the granted powers were to be construed as extending to all matters wherein the States were incompetent, as to conclude, as petitioner does, that the disappearance of the resolution in committee must be construed as requiring those powers to be construed so as to narrow and limit their scope.

In final support of his contention that the framers of the Constitution intended by the commerce clause to confer on the Federal Government a purely negative, rather than an affirmative power, petitioner argues that the Convention imposed an important restraint upon the congressional power to regulate foreign commerce, viz, the prohibition against export taxes. He then proceeds to argue that congressional power to regulate foreign commerce is a broader and more extensive power than the power to regulate interstate commerce, and from these two propositions draws the conclusion that since the power to regulate foreign commerce was restricted by the express prohibition of the

export tax, the Convention must have intended to impose even greater restrictions, although unexpressed, on the power to regulate commerce among the States. No one disputes that the power to regulate foreign commerce is limited by the prohibition of an export tax; nor, for the purpose of the present argument, would it seem to make any difference whether or not the power to regulate foreign commerce is to be construed as broader than the power to regulate interstate commerce. What does seem pertinent, is that in one case the Convention saw fit to impose a restriction expressly and in the other did not. Surely it is a strange conclusion that because a restriction was expressly imposed on one power, it must be regarded as implying a will to impose some other unexpressed limitation on a power on which it was not imposed.

It must also be remembered that so far as relates to the power to regulate foreign commerce the express prohibition of the export tax proved to be not inconsistent with the subsequent laying of a total embargo. We are not here concerned with the power of Congress under the commerce clause to embargo commerce between the States. No embargo or prohibition is laid by the Act now before the Court. The question is simply as to the scope of the commerce power and even should it be conceded that the power to regulate commerce among the States may be in some respects or for certain purposes narrower than the power to regulate for-

eign commerce, this does not prove that the power to regulate interstate commerce is a purely negative power or tell us what its limits are. On these latter points the evidence adduced by petitioner is insufficient to support his contentions.

This inconclusiveness applies to the voluminous quotations by petitioner from speeches in the Federal Convention and letters of constitutional Fathers. It needs no proof that some members of the Convention wished the Federal Government to have comparatively broad, and others wished it to have comparatively narrow, powers. Some wished it to have broad powers with respect to certain subjects and narrow powers with respect to others. Certainly no general agreement can be shown that its powers with respect to commerce should be purely negative. On the contrary, some leaders of the time regarded the power of the Federal Government to regulate commerce in a different light. Monroe, writing to Jefferson before the Convention in support of a proposal to vest in Congress "the sole and exclusive power of regulating the trade of the states as well with foreign nations as with each other" stated it as his opinion that

> the effect of this would be to put the commercial economy of every state entirely under the hands of the union. (Writings of James Monroe, ed. Hamilton, Vol. I, p. 85).

Madison himself in the Convention said:

> The states are only great corporations having the power of making by-laws and these

> are effectual only if they are not contradictory to the general confederation. The states ought to be placed under the control of the general government. (I Farrand, Records, 471.)

A member of the Convention, writing after its conclusion in support of the adoption of the Constitution by the people stated, with reference to the scope of Federal power that

> the authority of the whole must be co-extensive with its interests . . . or else the whole would have interests without authority to manage them, a position which prejudice itself cannot digest. . . . As to the idea that the superintending sovereign must of consequence destroy the subordinate sovereignties of the several states, it is begging the question by inferring that a manifest and great usefulness must necessarily end in abuse. (John Dickinson, *Letters of Fabius,* First Series, in Political Writings, Volume II, p. 97.)

These quotations, while not conclusive upon the exact scope of the commerce clause, at least indicate that at the time of the adoption of the Constitution the Fathers were not so fearful of Federal power or so anxious to reduce it to a mere negation as they are sometimes represented today.

It is true that Madison in explaining and defending the Constitution referred to the need for restraining interferences by the States with interstate commerce (Madison in 3 Elliott's Debates,

259–260, referred to in petitioner's brief, pp. 179–180) but, as already indicated, such a statement of one of the purposes of the clause cannot serve as a limitation upon the express language of the grant. It is also true that Madison in his extreme old age, after nearly half a century of bitter political combat against the policies of Hamilton and his successors, expressed it as his opinion that the clause was "intended as a negative and preventive provision" (Letter to Cabell, February 13, 1829, 3 Farrand's Records, 478, quoted in petitioner's brief, p. 177), but such an expression made under such circumstances is not sufficient basis on any sound principles of construction to convert what is expressly an affirmative grant of power into a negative one.

To ask this Court, as the petitioner does, to hold at the present time that the power of Congress to regulate traffic among the several states is limited to a power to prevent interference with such traffic, is not merely not justified by historical considerations but flies in the face of the judicial construction of the clause which has prevailed for more than a hundred years—in order to convert what is expressed as an affirmative power to regulate into a negative power not to regulate, but merely to protect from regulation.

It is true that the exercise of any affirmative power by the Federal Government, whether it be the power of tax or the power to maintain armies and navies or the power to regulate commerce,

will to some extent, and perhaps vitally, affect the economic life of some or many of the States. There are States from which the removal of an army post would seriously dislocate the local economy. There are States which an alteration in the form of Federal taxation would relieve from heavy burdens, while it would increase the burdens upon others. The exercise of the commerce power in the form of the regulation of railroads operates very definitely to build up and maintain distributing centers and to dictate the location of manufacturing plants. Because these results follow, no one argues that the existence of Federal power should be denied or that the Constitution would not have been adopted if the men of 1789 could have known that they would follow. The men of 1789 were impressed above all things with the importance of a Federal Government strong enough to give effective aid in the solution of the economic difficulties of the time. They expressly granted certain powers to the Federal Government and it is to be presumed that they intended those powers to be exercised whatever consequences might follow for the States. Under the Constitution, the powers of the States are reserved powers, residuary powers. It is not understood among lawyers that the residuary clause in a will operates to cut down the specific legacies. What is true of the construction of a private instrument is *a fortiori* true of the construction of a

constitution. The question presented on many fronts today is whether we shall stand upon the Constitution or by construction reduce it to what the anti-Federalists of 1789 would have liked to see it.

III. The Unfair Trade Practice Provisions

THE PROVISIONS OF THE ACT AND CODE PROHIBITING SPECIFIC UNFAIR COMPETITIVE PRACTICES ARE CONSTITUTIONAL

There can no longer be any question that Congress may regulate competition in interstate commerce by prohibiting unfair practices. The jurisdiction and authority of the Federal Trade Commission rests upon this power. Subsection (i) of Part II of Section 4 of the Act lists a number of specific practices which are prohibited as unfair. Petitioner concedes that some, at least, of these practices may be constitutionally prohibited by Congress under the commerce power (Pet. Br. p. 223). Yet, the basis for such an exercise of the commerce power is precisely the same as the basis for the regulation of prices in sales in or directly affecting interstate commerce, *viz.* competition in the sale of coal across state lines. We do not perceive why the commerce power should extend to one aspect of competition and not to another.

Petitioner apparently conceives of the prohibition of these practices as being limited in purpose to the maintenance of price fixing (Pet. Br., p. 19).

It is enough to note that two of the practices prohibited—consignment of unordered coal and intentional misrepresentation of sizes—were referred to by this Court in *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 362–363, as having aggravated the unfavorable condition of the industry. The prohibition of these and others of the practices mentioned in the Act (e. g. commercial bribery, unauthorized use of trade names, etc.) cannot be considered as merely in aid of price regulation; the practices constitute economic evils in and of themselves.

IV. The Labor Provisions

THE LABOR PROVISIONS OF THE ACT ARE CONSTITUTIONAL

INTRODUCTION

Petitioner makes a general attack upon the labor provisions of the statute on the ground that they are a "regulation of production" (Br., p. 116, 219), and this general objection requires some answer before the specific provisions are taken up for consideration. While it is true that in one aspect labor relations in the coal industry are related to and concerned with the productive stage of the industry, it does not follow that regulation of them is beyond the power of Congress simply because Congress has no power to regulate production. The record makes it plain that labor relations in the coal industry are also intimately connected with the sale of coal, with distribution and competition,

and that their relationship to this aspect of the industry is much more important and significant than their connection with production in the sense of the removal of the coal from the ground.

The fact that a federal regulation may affect a productive activity does not invalidate it if the activity is directly connected with interstate commerce and if the regulation is concerned with its relationship to commerce. Thus, although Congress could not regulate a combination of manufacturers as such (*United States* v. *E. C. Knight Co.,* 156 U. S. 1), it could prohibit such a combination when proved to have the effect of monopolizing interstate commerce (*Standard Oil Co.* v. *United States,* 221 U. S. 1). See also *Standard Oil Co.* v. *United States,* 283 U. S. 163, *infra,* pp. 229–230. It is clear from these decisions that if a transaction may be subsumed under two categories, the test of whether it may be regulated by Congress is not whether it can be subsumed under a category which the federal government cannot regulate, but whether it *can* be subsumed under one within the federal powers. Although Congress may not regulate production or manufacture as such, if a subject of regulation is related to a granted power, such as the maintenance of the Army, it is immaterial that it may also be regarded as an aspect of production. See *Hamilton* v. *Kentucky Distilleries,* 251 U. S. 146, in which federal regulation of the local sale of intoxicating liquor was sustained under the war power.

Such cases as *Kidd* v. *Pearson,* 128 U. S. 1, *Heisler* v. *Thomas Colliery Company,* 260 U. S. 245, and *Oliver Iron Mining Company* v. *Lord,* 262 U. S. 172, relied upon by petitioner, which hold that manufacture and production may be subject to state regulation or taxation, do not mean that certain aspects of production may not be regulated by Congress when they directly affect interstate commerce. It is well established that the powers of state and nation may overlap to some extent. "The rule which marks the point at which state taxation or regulation becomes permissible" does not necessarily prevent "interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the states." *Swift & Co.* v. *United States,* 196 U. S. 375, 400; *Stafford* v. *Wallace,* 258 U. S. 495, 525. See also *Minnesota* v. *Blasius,* 290 U. S. 1; *Dickson* v. *Uhlmann Grain Company,* 288 U. S. 188. The dicta in *Kidd* v. *Pearson* and the other cases cited to the effect that Congress may not regulate production as such is well-established law and not challenged by the Government here.

The Bituminous Coal Conservation Act regulates labor regulations only because and in so far as they constitute an integral and essential element in the competitive process. Producers deny to their employees the right of collective bargaining and cut wage rates not because of anything having to do with the *mining* of coal, in the sense of the

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physical removal of the coal from the ground, but in order to gain an advantage over others in the *sale* of coal in commerce. The Act regulates such conduct by producers in order to prevent them from gaining such an advantage *in selling coal.*

It is therefore not sufficient for petitioner to say that the regulation of labor relations is a "regulation of production". For a regulation of certain aspects of productive activity may be at the same time a regulation of interstate commerce through regulation of competition in such commerce, and the absence of power over production cannot limit the commerce power when commerce and production thus overlap.

A. THE PROVISIONS OF THE ACT WITH RESPECT TO MINIMUM WAGES AND MAXIMUM HOURS OF WORK, AND ITS PROVISIONS PROTECTING THE RIGHT OF EMPLOYEES TO ORGANIZE AND BARGAIN COLLECTIVELY, ARE A VALID EXERCISE OF THE COMMERCE POWER OF CONGRESS

1. *The extent to which, in the bituminous coal industry, the labor practices regulated by the Act directly affect interstate commerce*

The Act requires that the code shall provide that hours of labor agreed upon in collective bargaining between producers representing more than two-thirds of the national tonnage and representatives of a majority of the mine workers shall be accepted by all code members, and that wages agreed upon by the same proportions of producers and of mine workers in any district or group of districts shall be

accepted by the code members operating in such districts or group of districts. (Sec. 4, Part III (g).) The code must also provide that employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from interference, restraint or coercion of employers in such matters, and that no employee shall be required as a condition of employment to join any company union. (Sec. 4, Part III (a).)

The validity *under the commerce power* [1] of these provisions depends upon whether they are reasonably adapted to removing or mitigating practices which directly affect interstate commerce. Since the precise line between intrastate conduct directly affecting interstate commerce, subject to federal control, and that affecting such commerce only indirectly and therefore lying beyond federal power "can be drawn only as individual cases arise" (*Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 546, *supra*), it is necessary to explore fully the conditions existing in the industry in so far as they relate to the effect of the labor provisions of the Act upon interstate commerce.

(i) *Conditions peculiar to the industry with reference to the effect of wages and hours upon interstate commerce*

The statement of facts at the beginning of this brief disclosed that there is unremitting pressure

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[1] Their validity under the due process clause and in respect of delegation of power are considered later, *infra*, pp. 253–275.

on operators to maintain production even when output can be marketed only by selling at or below cost, that the wage scale is both the primary determinant of cost and the only substantial cost item at all subject to the producer's control, that labor costs are a much higher percentage of total cost of production than in any other industry except anthracite coal, that wage cutting is, in the bituminous coal industry, practically indispensable to price cutting, and that wage cutting has for many years constituted the outstanding competitive device in the industry. (*Supra,* pp. 37–41, 47–54, 60–64.) Since small variations in the mine price as between mines in different areas and states may cause large variations in interstate shipments of coals (Fg. 176, R. 209), variations in the wages paid those engaged in production affect immediately the course and movement of interstate commerce to an extent probably not paralleled in any other industry. The trial court found (Fg. 182, R. 211):

> In the bituminous coal industry cutting of wage rates is the predominant and most effective method of gaining competitive advantages and under the conditions which have existed in the industry has proven to be a destructive method of competition and has tended to create a great disparity in wage rates between producers operating in different states and producers operating in the same states. Such disparities in wage rates have permitted disparities in price which

> have in turn directly shifted, diverted and dislocated the normal flow of bituminous coal in interstate commerce * * *.

The trial court also found (Fg. 183, R. 211):

> The wages of persons engaged in the production of bituminous coal have a very substantial effect upon interstate commerce in the coal so produced.

(ii) Conditions peculiar to the industry with reference to the effect of freedom of collective bargaining upon interstate commerce

Before dealing with the question of wages and hours as such, the Government wishes to call attention to conditions existing in this industry which make the issue whether or not employees shall be guaranteed by law the freedom to bargain collectively of paramount importance to the normal and uninterrupted flow of interstate commerce. Because of the advantage in interstate commerce which, apart from such a guaranty, results to operators who deny to their employees freedom in collective bargaining, as against operators who accord such freedom, collective bargaining has always been organized on an interstate scale, with direct reference to competition in interstate commerce. Since the refusal to recognize collective bargaining in certain areas is a continuous threat to its continuance in other areas, this leads to conflicts and strikes for the direct purpose of preventing the sale in interstate commerce of low-priced coal origi-

nating in areas where collective bargaining is not permitted. It also leads, in areas where collective bargaining prevails, to difficulties in reaching new collective agreements upon expiration of old ones, since the employers who have been parties to such agreements must meet the competition of producers in areas where collective bargaining does not prevail, and as a result are reluctant to agree to terms which they know will be undercut by the producers in these latter areas. (*Infra,* pp. 209–212.) Accordingly, the renewal of a collective agreement in this industry has always proved to be a painful process, attended not infrequently by suspensions of operations until the terms could be worked out in the teeth of the difficulty of meeting competition from the areas where no such bargaining prevailed.

The strength of the collective bargaining movement on the part of workers in this industry, which dates back many years, grows out of certain conditions of their employment. The workers usually live in isolated communities where the mine offers the only means of livelihood. (R. 432, 481.) They are tied to the mine not only by their isolation but by their lack of training for any other occupation, and the expression "once a miner, always a miner" is more than an empty phrase.[1] Fur-

[1] Morris, *The Plight of the Bituminous Coal Miner* (Univ. of Pa. Press, 1934) p. 68:

"The relation of the miner to his job is not so much that 'mining gets into his blood' as that nothing else gets there. It is a blind-alley occupation which does not lead to other industrial contacts. The miner not only works in an isolated

thermore, operators have deliberately adopted employment policies designed to prevent self-organization and to increase the employee's dependence upon his employer. (R. 431, 496–497, 499.) The exaction of contracts not to join a union while continuing in employment, the so-called "yellow dog" contract, has enabled employers to prevent self-organization, since third persons could be enjoined from inducing breach of these contracts.[1] (Fg. 107, R. 167; R. 431; *Hitchman Coal & Coke Co.* v. *United States,* 245 U. S. 229.) Employees have also been required as a condition of employment to live in company houses under leases permitting immediate eviction upon violation of the stipulations of the "yellow dog" contract. (R. 445, 457–458; Pl. Ex. 64, R. 927.) The complicated system of piece rates by which most of the workers are paid leads

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room, but the whole camp in which he lives is isolated from the industrial world. The miner is in an occupational rut from which he can extricate himself, even in normal times, only with the greatest difficulty. His mining experience is no asset to him as an industrial worker. In fact, his work habits in the mine tend to be a definite handicap. He does not fit easily into this rigorous, lockstep, boss-controlled factory organization. The expression, 'Once a miner, always a miner', does not signify so much the passionate devotion a miner feels towards his job, as it expresses the limited occupational opportunities open to a man once he has become a miner."

[1] Section 3 of the Act of March 23, 1932, c. 90, 47 Stat. 70 (U. S. C., Title 29, Sec. 103), declares such contracts to be "contrary to the public policy of the United States" and provides that they shall not be enforceable in, or "afford any basis for the granting of any legal or equitable relief by", any court of the United States.

to misunderstanding and abuse, especially when the miners are not permitted to have their own checkweighman to guard against shortweighting by their employers. (Fg. 143, R. 194; R. 444, 481, 498.) In practically no non-union mines in the east did the miners have checkweighmen in 1933 prior to the N. R. A. code. (R. 444.)

While these and other conditions furnished a powerful stimulus to self-organization,[1] at the same time other circumstances dictated organization on an interstate and practically a national basis. By reason of the effect of varying wages on interstate competition, no organization could survive on any other basis.[2] (R. 429.) When wage rates in a given area, State or group of States, are fixed by collective bargaining, producers in unorganized areas and States are given the opportunity to cut their wages and their prices just sufficiently to take business from mines maintaining the scale of pay and hours as a result of such bargaining. (R. 411.) The collective bargaining agreements act as a kind of umbrella—for those who are not parties to them. The absence of collective bargaining agreements gives the operator a direct advantage in interstate commerce and, to the same degree, imposes upon

[1] The miners were among the first workers to organize unions in this country. Suffern, *The Coal Miners' Struggle for Industrial Status* (Institute of Economics, 1926), p. 19.

[2] Tryon, *The Effect of Competitive Conditions on Labor Relations in Coal Mining*, Annals American Academy of Political and Social Science (Vol. CXI, Jan. 1934), p. 94.

operators bound by such agreement a serious handicap in competing in such commerce.[1]

Merely reducing the wage does not end the unequal competition between the man with the fixed cost and the man with the flexible cost.[2] (R. 411.) The operator not bound by the collective agreement is still free again to cut the rate. (*Ib.*) Experience demonstrates that this is precisely what happens.[3] (Compare the average daily wage in Illinois and in West Virginia in 1922, 1924 and 1929, Fg. 113, R. 174.)

(iii) *Illustrations drawn from the history of the industry showing how directly the wage rate and denial of freedom to bargain collectively have affected interstate commerce*

Collective bargaining in this industry has always been conducted on an interstate basis and with direct reference to the effect of the wage rate upon interstate commerce. During the entire period from 1898 to the war, representatives of the producers and of the United Mine Workers negotiated

[1] Suffern, *The Coal Miners' Struggle for Industrial Status* (Institute of Economics, 1926), pp. 433–434.

[2] Suffern, *ib.* at p. 431: "The maintenance of individual bargaining enables the non-union operators to under-cut the wage scale fixed by the union fields no matter what the scale is."

[3] It was the view of Secretary of Commerce Hoover, testifying before the House Committee on Interstate and Foreign Commerce in 1926, that the non-union mines would have cut under any scale agreed upon by the union mines at Jacksonville in 1924. (Hearings on Coal Legislation, 69th Cong., 1st Sess., p. 529.)

collective agreements covering the central competitive field—Illinois, Indiana, Ohio and western Pennsylvania. (Fg. 128, R. 186.) These agreements were predicated upon the understanding that the wages and hours agreed upon for the central competitive field would be applied to all other unionized districts, through the medium of collective bargaining agreements covering these other districts "coordinated to the basic agreement arrived at in the central competitive field." (R. 429; 340.) The procedure adopted gave practical recognition to the fact that the "effect of a variation in wage standards * * * creates chaos in marketing." (R. 429.) The problem dealt with was similar to that which arises when the fixing of minimum prices is undertaken, namely, coordination of the practice controlled—in the one case wages and hours and in the other minimum prices—in relation to the effect of the practice upon interstate competition.[1]

The controlling effect in this industry of labor costs upon price and of price upon interstate competition and interstate commerce (Fg. 182, R. 211) was the reason for the development of this system of collective interstate agreements correlating wages on an interstate basis with reference to

[1] The Bituminous Coal Conservation Act provides that minimum prices f. o. b. the mines shall be established and that these prices shall then be coordinated in common consuming markets upon a fair competitive basis. (*Supra*, pp. 167–169.)

interstate competition. It is significant that, with few and unimportant exceptions, similar collective interstate agreements are not found in other manufacturing or productive industries in this country.

In the pre-war period, although about 60% of the output of the country was from districts where collective bargaining prevailed (R. 340), the competition of non-union districts made it difficult, when the various agreements expired, to negotiate new ones. (Fgs. 80, 132, R. 149, 189; R. 296.) On such occasions there was commonly a suspension of work until new terms could be agreed upon. (R. 297.) The two largest, those occurring in 1906 and 1910, each involved approximately 211,000 men in ten States. (Fg. 80, R. 149.)

The serious adverse effects upon interstate competition of varying wage rates led the operators in the organized fields to urge upon the union the necessity of organizing competitive fields in the south. In *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, 403–404, where the question at issue was union responsibility under the Sherman Act for damages caused by a strike occurring in 1914, the Court said, with reference to the annual conferences between operators in the central competitive field and the union miners:

> In these conferences the operators frequently complained that the competition of many non-union mines in Western Pennsylvania and the whole of West Virginia was ruinous to their business because of the

> low cost of production of coal in such mines due to the lower wages and less expensive conditions of working than in union mines, and urged that something must be done to stop this, or that the union scale of wages be reduced. * * *
>
> From this time on [1898] in every annual conference until after the controversy in the case before us in 1914, the subject recurred.

Strikes in the pre-war period in attempts to gain recognition of the union and to secure collective bargaining agreements in non-union fields occurred in West Virginia in 1902, 1912, and 1913; in Alabama in 1902, 1903 and 1904; and in Colorado in 1903, 1904, 1913 and 1914. (Fg. 81, R. 150.) The 1913–1914 strike in Colorado resulted in calling out the militia, the so-called Ludlow massacre, intervention of federal troops and a congressional investigation. (Fg. 82, R. 150–151.) The 1912–1913 strike in the Paint Creek and Cabin Creek Districts of West Virginia was accompanied by bloodshed, declaration of martial law and led to an investigation by the Senate. (*Ib.*) See S. Rep. No. 321, 63rd Cong. 2nd Sess.

The facts concerning the industry previously outlined (*supra,* pp. 47–64) have shown the intimate relation of wages to prices and hence to interstate competition in the years following 1920. It is clear from the record that the competitive struggle which, even during years of great general prosperity, brought the bituminous coal industry to its low estate was essentially a struggle between wage-

cutting producers and producers seeking to maintain wage rates established by collective bargaining. It was a struggle between areas where collective bargaining prevailed and areas where it did not prevail. This was apparent to the operators and the miners alike. When negotiations were begun in the central competitive field for a new agreement to replace the one expiring on March 31, 1922, the operators demanded that it "provide for a continuous competitive wage scale with states south of the Ohio River" (R. 434),—i. e., the states not practicing collective bargaining. Similarly, when the operators and the men met early in 1927 for the purpose of negotiating a new agreement to replace the one expiring in that year, the operators again advanced the proposal that "the wage scale for the Central Competitive Field commencing April 1, 1927, must be continuing and at all times a competitive scale with the wages and conditions prevailing in West Virginia and Kentucky." (Pl. Ex. 62, R. 924).

It is significant that the operators did not demand a wage reduction as such. Their proposals contemplated subsequent upward as well as downward revisions of the wage scale. What they asked was that recognition be given to the fact that the wages paid in areas without collective bargaining directly affected their own ability to compete and the flow and movement of coal from their own mines in interstate and intrastate commerce.

The operators' proposals to which we have referred, made in 1922 and again in 1927, were rejected by the miners upon the ground that, if they had been accepted, operators in areas where there was no collective bargaining would, in effect, have been given the power to dictate the rate of pay in areas where there was collective bargaining. (R. 437.) But the real source of difficulty in reaching new agreements, the disparate scales of pay in different areas, was not easily bridged over, and, because of this difficulty, there was on each occasion a prolonged strike disrupting and disturbing interstate commerce. The resulting strike in 1922 involved 460,000 men and at one time 73% of total productive capacity and produced a coal shortage. (Fg. 85, R. 154.) The strike in 1927 closed down mines in a number of States from five to seven months, caused production in Illinois to drop from 10,000,000 tons a month to practically nothing, diverted about 15,000,000 tons of business from northern to southern states, and caused the trade to accumulate, in anticipation of a strike, large excess stocks of coal, at an additional cost of about $20,000,000. (Fgs. 108, 110, 111, R. 169–171.)

The course of events during the period of the Jacksonville agreement running for three years from April 1, 1924, illustrates the manner in which the pressure of wage and price competition, which go hand in hand, exert a widening and cumulative effect. Up to the time of the agreement the producers in the Kanawha Valley of southern West

Virginia had signed collective bargaining agreements but, being nearest to areas where such agreements did not prevail, they were most exposed to competition in interstate markets of the low-priced coal of unorganized areas. (Fg. 108, R. 168.) Finding themselves unable to meet this competition, they refused to renew or enter into any wage agreement. (*Ib.*) The movement to abrogate wage contracts spread from the Kanawha Valley northward and westward and continued throughout the period of the Jacksonville agreement, to the accompaniment of strikes, many of them prolonged, which closed down mines in northern West Virginia, Ohio and Pennsylvania and substantially affected interstate commerce in coal. (*Ib.*)

During the life of the Jacksonville agreement there was an abnormal and decided shift in commerce in coal from northern to southern states. Comparing 1923, the year preceding the agreement, with 1926,[1] the last full year of the agreement, there was a decline in shipments from northern states of about 34,000,000 tons and an expansion in shipments from the three leading southern states of about 58,000,000 tons. (Def. Ex. 28a, R. 1070.) That this change was primarily due to the wage factor is indicated by the fact that there was very little change in the relative production of the two

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[1] If 1923 were compared with 1927 a still larger shift in business would be shown but the protracted strikes curtailing production in northern states in 1927 made this basis of comparison misleading.

regions after 1928 when, following the 1927 strike, most of the operators in important areas in the north discontinued collective bargaining and the southern wage differential contracted. (Fgs. 109, 119, 124, R. 170, 180, 183.)

After 1927, as the area within which collective agreements were maintained narrowed, the price cutting associated with wage cutting did not disappear, but the price cutting was that of individual operator against individual operator, both within and without the same area. The measure of stabilization achieved by collective bargaining, which had always been only partial, did disappear and the result, as one experienced operator described it, was "confusion and chaos". (R. 347.)

Up to this point we have dealt with the effect upon interstate commerce of differing wage scales and of denial of collective bargaining chiefly from the standpoint of the operator. These practices were naturally of just as great concern to the miners and frequently provoked action on their part directly affecting interstate commerce. In a number of instances the strikes which resulted were of the precise character held in *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295, 310, to be within the scope of the Sherman Act, and consequently within the federal commerce power, because of an intent to "control the supply entering and moving in interstate commerce, or the price of it in interstate markets."

Hitchman Coal & Coke Co. v. *Mitchell,* 245 U. S. 229, 243, refers to the policy adopted by the miners in the middle 1900's "to relieve the union miners of Ohio, Indiana, and Illinois from the competition of the cheaper product of the non-union mines of West Virginia," which policy was to be carried out by strikes local to West Virginia. *International Organization* v. *Red Jacket C. C. & C. Co.,* 18 F. (2d) 839, certiorari denied, 275 U. S. 536, grew out of strikes in West Virginia in 1920 and 1922 for a similar purpose. The court (p. 844) said that "*the effect of the standard of wages on competition between employers applies in the coal industry, not to a restricted neighborhood, but to the industry as a whole*; for in that industry the rate of wages is one of the largest factors in the cost of production, and affects not only competition in the immediate neighborhood but that with producers throughout the same trade territory." Upon the question whether defendants' combination restrained interstate commerce within the meaning of the second *Coronado* case, *supra,* the Court said (p. 845):

> Moreover, it is perfectly clear that the purpose of defendants in interfering with production was to stop the shipments in interstate commerce. *It was only as the coal entered into interstate commerce that it became a factor in the price and affected defendants in their wage negotiations with the union operators.*

The oppressive tactics and practices to which operators have resorted in order to prevent collective bargaining have likewise been the cause of many disorders seriously disrupting interstate commerce. When such tactics are employed, force is met with force and conflicts of extraordinary bitterness result. Miss Roche, formerly president of the second largest coal company in Colorado, testified that in the fall of 1927 practically 80% of the mine workers of the state, entirely unorganized, went out on a spontaneous strike which lasted until early in 1928. (R. 499.) It was a revolt against intolerable working conditions. The workers were required to live in company houses and to trade at company stores; they were shortweighted, and checkweighmen were denied them; the operators used industrial spies. (R. 498.) The same witness testified that during the 1913–1914 strike in Colorado the records of her company showed that it had paid nearly $500,000 into a joint fund for importing detectives, strike breakers and gunmen, and for arming guards, electrifying barbed wire, building an armored car, etc. (R. 497–498.)

A condition of guerrilla warfare likewise prevailed in parts of Pennsylvania during the time when various operators were abrogating the Jacksonville agreement (R. 435–436.) Coal companies in the state employed during this period 5,200 private policemen. (R. 435.) In the course of the strikes referred to in the *Red Jacket* case, *supra*, sniping between Baldwin-Felts guards and mine

workers continued over a three-months period and, after the guards had killed two men, serious loss of life was probably only averted by the despatch of 5,000 federal troops to the zone of conflict. (R. 447–448.)

The United States Coal Commission reported in 1923 (Vol. III, p. 1331):

> In their endeavor to keep the union out, non-union operators have used widely differing methods. A few of them have attempted to compete with the union for the loyalty of their employees, but most of them have resorted to methods of force.

The Investigation Commission appointed by the Governor of Kentucky in 1935 stated in its report [1] upon Harlan County (one of the few important areas in which, since 1933, the operators have refused to enter into collective wage and hour agreements):

> Free speech and the right to peaceable assemblage is scarcely tolerated. Those who attend meetings or voice any sentiment favorable to organized labor are promptly discharged and evicted from their homes. Many are beaten and mistreated in most injurious and un-American methods by some operators using certain so-called "peace officers" to carry out their desires.

[1] The report was made a part of the record in the hearings which led to the enactment of the Bituminous Coal Conservation Act. (Hearings before House Ways and Means Committee on H. R. 8479, 74th Cong., 1st Sess., pp. 636, 637.)

Such conditions of intimidation and violence have been found to exist in different areas and at different times when the right to collective bargaining has been denied. The Congressional investigation of 1921[1] brought to light conditions of violence and oppression by operators in the West Virginia fields. The former Attorney General of West Virginia testified that the mine guard system maintained by the operators to prevent organization of the men was one of the greatest sources of trouble.[2] When during the period of the Jacksonville agreement pressure from the southern fields caused operators in Pennsylvania, Ohio and Northern West Virginia to abrogate their collective bargaining agreements, like conditions prevailed. The Congressional investigation of 1928[3] disclosed that many of the coal fields were camps, armed with machine guns, rifles, tear bombs and pistols, with the mines barricaded and the evicted families of former employees living in tents or crowded wooden barracks. There were said to be in the Pennsylvania coal fields at that time not less than 4,000 so-called coal-and-iron police, commissioned as state officers but privately paid by the

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[1] Hearings pursuant to S. Res. 80, 67th Cong., 1st Sess., on Conditions in West Virginia Coal Fields before Senate Committee on Education and Labor.

[2] *Ib.*, p. 720.

[3] Hearings pursuant to S. Res. 105, 30th Cong., 1st Sess., on Conditions in the Coal Fields of Pennsylvania, West Virginia, and Ohio before the Senate Committee on Interstate Commerce.

operators. The hearings are replete with accounts of clashes, assaults, armed violence and blanket injunctions.

(*iv*) *Conclusion*

We have set forth the interstate character of collective bargaining in this industry and its relation to interstate competition; the shifting movements of interstate commerce caused by disparate wage scales in different areas, accentuated by collective bargaining in certain areas and not in others; the difficulties in arriving at collective agreements when the commerce of operators parties to such agreements were threatened by the wage-cutting and price-cutting of competitors who refused to bargain collectively; and the bitterness with which the issue of collective bargaining was often fought out, engendering labor disturbances which seriously obstructed interstate commerce and which in many instances had this very objective.

The Government does not contend or suggest that these and other difficulties of the industry, however great or however insoluble except through federal regulation, justify extending the commerce power beyond its proper limits. Our sole purpose has been to show the *directness,* in this industry, of the impact of the wage scale and of the prevalence or absence of collective bargaining, upon interstate commerce. It is believed that this is a matter of general common knowledge. As our review of the facts discloses, those in the industry, both

operators and employees, have shown by their actions that they have at all times recognized, and have repeatedly bowed to, its force. It therefore seems proper to conclude that in this industry the scale of pay and the hours of work, and refusal to recognize the right of collective bargaining, have a direct, immediate and substantial effect upon interstate commerce to a degree not found in industry generally, or perhaps in any other industry.

2. Under applicable legal principles and decisions, the provisions of the Act regulating wages and hours of work are within the commerce power of Congress

Subsection (g) of Part III of Section 4 of the Act provides that when producers of more than two-thirds of the national tonnage and a majority of the workers have entered into a collective bargaining agreement respecting maximum hours of labor, all code members shall observe such maximum hours. The subsection further provides that when a wage agreement has been made by like proportions of the producers and employees within a district or group of districts, the minimum wages so agreed upon shall be accepted by other producers in the same districts.

Before discussing any question of delegation of legislative power which the form of this regulatioı may raise, a matter which is dealt with later (*infra*, pp. 263–275), it is first necessary to consider the

constitutional basis of the power of Congress to act in the matter of wage and hour regulation in this industry at all.

It has been conclusively demonstrated, and the trial court found, that in the bituminous coal industry the wage scale substantially affects the price of coal sold in interstate commerce and the course and movement of coal in such commerce. (Fg. 183, R. 211.) But petitioner contends and the trial court held that, however direct, as well as substantial, this effect might seem to be upon the basis of the facts disclosed as to this industry, nevertheless *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, requires a contrary conclusion. (R. 1180–1181.) The contention is that the *Schechter* case holds that wages and hours of employees engaged in production are, as a matter of law, always indirect in their effect upon interstate commerce.

It is submitted that neither the decision in the *Schechter* case in the light of the issues there presented, nor the language and reasoning of the opinion read in the light of those issues, establishes a rule of constitutional law that the terms of the labor contract are always and necessarily indirect in their effect upon interstate commerce. The Government submits that, on the contrary, upon reason and authority, and with full recognition of the principles governing constitutional interpretation where the borderline between federal and state power is in issue, the question of what acts have

and what have not a direct effect on interstate commerce is always a question of fact, and, that on the basis of the facts of the bituminous coal industry as presented by this record, the wages and hours of employees in that industry *directly* affect interstate commerce and are, therefore, subject to federal control.

The *Schechter* case, so far from laying down any general rule that wages and hours as a matter of law always affect interstate commerce indirectly, on the contrary, expressly states that while the distinction between that which directly affects interstate commerce and that which indirectly affects it is clear in principle, application of the principle to particular situations can be determined only as those situations arise. The Court said (p. 546):

> In determining how far the federal government may go in controlling intrastate transactions upon the ground that they "affect" interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, * * *.

This language seems to preclude the view that a general rule was meant to be laid down to the effect that wages and hours in all cases affect commerce indirectly as a matter of law.

The opinion in the *Schechter* case was at pains to point out the specific nature of the employment in which the workers in that case were engaged,

under conditions such that it was held that their wages and hours did not directly affect interstate commerce. The Court stated (p. 548), for example, that the issue related to employees in an essentially local business. Details as to this business are set forth in the opinion and attention is called to the fact that the employment was in a slaughterhouse where the poultry was held for local sale to retail dealers after interstate commerce had come to an end. (See pp. 520–521, 543.) It is interesting to note that when the Court, after having described the local nature of the business, discusses the question of whether or not interstate commerce was directly affected by the wage and hour regulation involved in that case, it does not undertake to discuss the effect on interstate commerce of wages and hours in general, but the effect of the wages and hours of defendants' employees. The Court said (p. 548):

> The question of chief importance relates to the provisions of the Code as to the *hours and wages of those employed in defendants' slaughterhouse markets.* It is plain that these requirements are imposed in order to govern the details of defendants' management of their *local* business. The persons employed in slaughtering and selling in *local* trade are not employed in interstate commerce. *Their* hours and wages have no direct relation to interstate commerce. The question of how many hours *these employees* should work and what *they* should be paid

> differs in no respect from similar questions *in other local businesses which handle commodities brought into a State and there dealt in as a part of its internal commerce.*

Words could not have been more fitly chosen to indicate that what the Court was passing upon was the situation of the employees in a business of the type involved in the *Schechter* case, and not upon the general question of whether wages and hours can never directly affect interstate commerce. The essential difference between the effect upon interstate commerce of the employment involved in the *Schechter* case and that involved in the case at bar is clearly brought out by the nature of the argument which the Government made, and was required to make, in that case in order to support the contention that interstate commerce was there affected.

In the *Schechter* case, the slaughterhouse operators sold slaughtered poultry only in intrastate commerce to the local trade. However, the live poultry which they bought moved to New York City in interstate commerce. When a slaughterhouse operator reduced the wages of his employees who slaughtered the poultry which he then sold in intrastate commerce, he took advantage of this saving in his labor cost to reduce the price of his poultry in such sales. The Government contended that in order to meet such price reductions in local sales, other competing slaughterhouse operators

sought to pay lower prices for the live poultry which they purchased and which was shipped to New York in interstate commerce, and that the result was to create a weakness in the price of poultry moving to New York in interstate commerce. The Government also contended that the lower prices at which a wage-cutting slaughterhouse operator sold in the local intrastate trade led competitors in this trade to demand cheap grades of poultry which would reduce their costs, and that these conditions stimulated the flow of low-grade poultry in interstate commerce.

The speculative and tenuous character of the connection thus sought to be established between wage cutting in the local slaughterhouse trade on the one hand and interstate commerce on the other is obvious. It is not at all certain that the necessity of meeting the low local prices of a wage-cutting slaughterhouse operator would cause competing operators to pay a lower price for poultry shipped in interstate commerce than they would otherwise pay. Presumably wholly apart from any such inducement, each operator would seek to pay as low a price for his live poultry supply as possible. That he would be able to secure live poultry shipped from other States at a lower price than otherwise because some of his competitors were price cutting in Brooklyn and he had to meet their prices, seems by no means certain. There is thus no clear causal relationship between the effect of

the local wages and resulting local prices on the one hand and either the price in interstate commerce or the movement in interstate commerce on the other hand. The effect is hypothetical. This is also true of the argument that a desire to meet the low prices of competitors in local commerce would result in the movement of low-grade as distinguished from high-grade poultry in interstate commerce, even if that were significant.

In the bituminous coal industry, on the other hand, when a producer who sells his goods in interstate commerce reduces his labor costs, and in consequence reduces the prices at which he can offer his goods in interstate commerce, he immediately and as a matter of statistical demonstration takes business away from producers selling at higher prices, and his lower prices in these interstate commerce transactions compel such competitors either to meet these prices in other interstate commerce transactions or to lose orders in interstate commerce. The wage cutting operates in a demonstrably direct and unbroken straight-line sequence on the interstate transactions in, and the interstate movement of, coal. In the situation involved in the *Schechter* case, the wage cutting, if it operated on interstate commerce at all, operated first on the intrastate price and thereafter the connection had to be traced backward through the uncertain and speculative effect of an intrastate price on the interstate prices in transactions lying farther back

along the line toward the ultimate producer. In the bituminous coal industry, wage cutting operates immediately on a directly subsequent sale in interstate commerce.

Although, therefore, neither the decision nor anything in the opinion in the *Schechter* case appears to be in any way controlling as to the validity of the wage and hour regulation in the Bituminous Coal Conservation Act, there remains the question of the validity of that regulation upon reason and authority, giving due consideration to the appropriate spheres of authority of the federal government, on the one hand, and the states, on the other, under our constitutional system. When Congress undertakes to regulate intrastate conduct because of its effect upon interstate commerce, the courts are presented with the difficult and delicate problem of holding the scales even between the power over commerce among the States conferred upon Congress, supplemented by the power to use all means necessary and proper to make such regulation effective, and the preservation of the constitutional freedom of the States.

While the Government is confident that this Court in the *Schechter* case did not intend to announce any sweeping general rule that *no* practice or conduct related to production can directly affect interstate commerce, it equally disavows any contention or suggestion that *all* practices materially entering into the cost of production of those selling in interstate com-

merce directly affect such commerce. No merely mechanical rule of causation for the determination of what is a direct and what is an indirect effect seems satisfactory. The test, as in so many branches of the law, would seem to be one of degree. "The law is not indifferent to considerations of degree." *Schechter Poultry Corp.* v. *United States, supra,* p. 554.

The Government submits that it would be erroneous to assume that all intrastate conduct of a certain kind would have the same effect, either direct or indirect, upon interstate commerce, regardless of the circumstances which condition its operation. The fact that wages and hours are an incident to all production is delusive; the universality of these practices does not justify applying an equally universal rule—that wages and hours in productive enterprise are either always direct or always indirect in their effect on interstate commerce. Obviously any such conclusion would not accord with reality.[1] Adoption of such a general rule could be supported, if at all, only upon the ground of convenience, that it would avoid the problem of determining, as individual cases may arise involving regulation of wages and hours in different trades or industries, whether under the facts as to the particular trade or industry, the effect of these practices on interstate commerce

[1] In *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 360, this Court said, with reference to determining the reasonableness or unreasonableness of agreements partially restraining trade, "Realities must dominate the judgment".

is direct or indirect. The *Schechter* case indicated (p. 546) that there is no short-cut solution to the problem, that the "precise line" between intrastate transactions affecting interstate commerce directly and those affecting it indirectly "can be drawn only as individual cases arise."

This Court has said that a combination which brings under control "a decisive factor in the cost of production" so that such control is "tantamount to the power to fix prices" may be within the Sherman Act. *Standard Oil Co.* v. *United States,* 283 U. S. 163, 174. These views were expressed with reference to a combination to interchange patent licenses for the production of gasoline by a certain process. If, therefore, the Constitution gives Congress the power to regulate intrastate conduct respecting a decisive factor in the cost of production when such conduct serves to *enhance* the price in interstate commerce of the commodity produced, Congress likewise has the power to regulate intrastate practices respecting a decisive factor in the cost of production when such practices serve unduly to *depress* the price in interstate commerce of the commodity produced [1]—subject, undoubtedly, in each instance to the limitation that the practices may be reasonably regarded as likely to enhance or depress price materially. As to the wisdom of

[1] The practice reached by regulation in *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, had as one of its effects the *depression* of price.

the determination by Congress that low prices are injurious to interstate commerce, this presents an economic question with which "the courts are both incompetent and unauthorized to deal." See *Nebbia* v. *New York,* 291 U. S. 502, 537. In *Northern Securities Co.* v. *United States,* 193 U. S. 197, 337, this Court said:

> Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this Court need not consider or determine.

Standard Oil Co. v. *United States,* 283 U. S. 163, *supra,* also shows that practices with reference to production do not, as such, lie beyond the scope of the federal commerce power, that they are not so insulated from commerce that whatever concerns them necessarily affects interstate commerce only indirectly. The Court in that case said (p. 169):

> Moreover, while manufacture is not interstate commerce, agreements concerning it which tend to limit the supply or to fix the price of goods entering into interstate commerce, *or* which have been executed for that purpose, are within the prohibitions of the Act.

The question whether the wage and hour provisions of the Bituminous Coal Conservation Act regulates practices which affect interstate commerce so directly as to be subject to federal control is similar to the problems upon which this Court

has passed in litigation arising out of federal regulation of the relations between interstate carriers and their employees. Congress may make it unlawful for interstate carriers to interfere with, restrain, or coerce employees in the designation of representatives for collective bargaining or in self-organization, because such prohibited activity constitutes a threat to the amicable adjustment of disputes between employers and employees which, if not amicably adjusted, may lead to interruptions of interstate commerce. *Texas & New Orleans R. R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548. The intrastate conduct regulated, that is, carrier interference with the free exercise by their employees of the processes incident to collective bargaining, was regarded as affecting interstate commerce sufficiently directly to be within federal power. On the other hand, promoting the morale or contentment of mind of employees of interstate carriers by requiring such carriers to pension employees retired for age was held to be too remote in its effects in improving the efficiency or safety of interstate transportation to come within federal power. *Railroad Retirement Board* v. *Alton Railroad Co.,* 295 U. S. 330.

Cases arising under the Sherman Act show that an intent to restrain interstate commerce may bring within federal power intrastate conduct which, but for such intent, would affect interstate commerce only indirectly. Compare *Coronado*

Coal Co. v. *United Mine Workers of America,* 268 U. S. 295, 310, with *United Mine Workers of America* v. *Coronado Coal Co.,* 259 U. S. 344, 410, 411; *United Leather Workers* v. *Herkert & Meisel Trunk Co.,* 265 U. S. 457, 464–467; and *Industrial Association* v. *United States,* 268 U. S. 64, 82. But cases arising under that Act also show that intrastate conduct may directly affect interstate commerce even though such intent is absent. *United States* v. *Patten,* 226 U. S. 525, 543. That case came before this Court on appeal from a demurrer to an indictment under the Sherman Act charging a conspiracy to purchase on an exchange contracts for the future delivery of cotton in excess of the amount available for delivery on the due dates. This Court said (p. 543) that "by its necessary operation it [the conspiracy] would directly and materially impede and burden the due course of trade and commerce among the States" and that it was therefore immaterial that there was "no allegation of a specific intent to restrain such trade or commerce." In *Industrial Association* v. *United States,* 268 U. S. 64, 81, the Court said that the facts in *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, *supra,* did not show a conspiracy to restrain interstate commerce in view of "the absence of proof of an intention to restrain it or proof of such *a direct and substantial effect upon it,* that such intention reasonably must be inferred."

In *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, which sustained federal regulation of grain ex-

changes, the Court considered the validity of the statute as applied to cash grain, sales to arrive, and grain actually delivered in fulfillment of future contracts, separately from the validity of the statute as applied to future contracts which do not result in actual delivery (because of the later purchase of offsetting contracts). As to the former group, the Court held (p. 34) that the case could not be distinguished from the stockyards regulation sustained in *Stafford* v. *Wallace,* 258 U. S. 495, upon the ground that the transactions regulated were in a stream of interstate commerce flowing into a state, resting there temporarily, and then going forward. As to future sales which do not result in actual delivery, the ground of decision was that manipulation of grain futures may produce abnormal price fluctuations which, in turn, "disturb the normal flow of actual consignments" (p. 39) and "directly influence consignment in" interstate commerce (p. 40). The commerce power was therefore held (p. 40) to include control over intrastate transactions where they "affect the country-wide price" of an article and thus affect interstate commerce therein.

Cases upholding federal control of intrastate acts because of their effect upon competition in interstate commerce furnish a close analogy to the regulation under consideration. Section 7 of the Clayton Act makes it unlawful for any corporation engaged in interstate commerce to acquire the stock of another corporation so engaged "where the effect of such acquisition may be to substan-

tially lessen competition" between the corporations. In none of the various cases in which this action has been enforced or interpreted did it appear that the stock acquisition was itself an interstate transaction. *Federal Trade Commission* v. *Western Meat Co.,* 272 U. S. 554; *International Shoe Co.* v. *Federal Trade Commission,* 280 U. S. 291; *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission,* 291 U. S. 587. See *Northern Securities Co.* v. *United States,* 193 U. S. 197, *supra.*

Section 8 of the Clayton Act further illustrates this type of regulation. The section provides that no person shall be a director in two or more corporations engaged in interstate commerce (if the capital of one of them exceeds $1,000,000) if the competition between the corporations is such that its elimination by agreement would constitute a violation of any provision of the antitrust laws.

Most of the cases arising under Section 5 of the Federal Trade Commission Act which prohibits "unfair methods of competition in [interstate] commerce" have involved practices such as false advertising or unfair use of a trade name which usually have an interstate circulation. Little, if any, attention has been given to this aspect in the cases under this section which have come before this Court, but it would appear that the statute would apply to an unfair method, used wholly intrastate, of competing in interstate commerce. See *Federal Trade Commission* v. *Eastman Kodak*

Company, 7 F. (2d) 994 (C. C. A. 2nd), affirmed on another issue, 274 U. S. 619); *Chamber of Commerce* v. *Federal Trade Commission,* 13 F. (2d) 673 (C. C. A. 8th).

It may, accordingly, be confidently asserted that federal power to regulate practices employed to gain a competitive advantage in interstate commerce is not confined to methods and practices which themselves consist of acts in interstate commerce. But the Government does not contend that, because federal power may embrace such practices, it therefore extends to all. Only those practices which by their necessary effect materially influence competition in interstate commerce or the movement of goods in such commerce may be regulated.

It is for this reason that the Government has summarized at length in this brief the facts and figures regarding the bituminous coal industry which indicate the connection and the nature of the effect which wages and working conditions generally in that industry have upon the interstate commerce in bituminous coal. It is upon these facts that the Government rests its contention that in this industry wages and hours have such a *direct and substantial* effect upon interstate commerce as to bring their regulation within the scope of federal power.

Without attempting at this point to summarize the facts, attention may nevertheless be called

again to special conditions in the industry accentuating the competitive effect of varying wage scales. First, is the fact that labor costs are from 60% to 65% of total cost of production. Second, is the fact that the wage scale of certain operators has been fixed over definite periods of time by collective bargaining agreements while other operators were free to fix their wages, and therefore their prices, at levels which would enable them to undersell the former group of operators.[1] In short, it may truly be said that in this industry wage cutting and price cutting go hand in hand. Producers may cut their wages in order to win particular contracts (R. 348) or they may enter into contracts at prices based upon a future cut in wages, which is then carried out by giving employees the choice between working at a lower wage or not working at all (R. 411).

In discussing the effect of varying wage scales on interstate competition, interstate prices and interstate commerce, the Government has frequently shown these effects by the use of statistics and testimony relating to states or areas. This has been done for two reasons. In the first place, since collective bargaining has, for the most part, been the recognized means of determining the wage scale in certain states and areas and not in others,

[1] In determining the directness of the effect of wage rates upon interstate commerce, the effects attributable to these agreements must be accorded as much weight as any other factor.

the effect on interstate commerce of differing wage scales is most clearly and graphically shown by a comparison on a state basis or an area basis. In the second place, statistical information as to wages, prices, and shipments is available only with respect to states and areas and not for individual producers.

Petitioner (see Br., pp. 37–40, 91–96) erroneously deduces from the Government's use of such data that it rests its support of the regulatory provisions of the Act upon the ground that the federal government may exercise its commerce power to allocate the production of coal among the several states. On the contrary, what the Government is contending is that, in the case of both price cutting and wage cutting causing price cutting, the important consideration is, not the protection of the interstate commerce of Illinois operators as against the interstate commerce of West Virginia operators—to take these states as illustrative of petitioner's point—but the protection of the interstate shipper, wherever located, against the unfair competition in interstate commerce of his wage-cutting competitors, wherever located, whether they are his immediate neighbors or operators in a distant state. Indeed, when the area covered by collective agreements narrowed, the wage-cutting and price-cutting competition which was most severe was that of producers in the same district or area competing with each other in common consuming extrastate

markets. A prominent operator of mines in Ohio, Pennsylvania and West Virginia, testified as follows as to conditions during the period between the termination of the Jacksonville Agreement on April 1, 1927, and the adoption of the N. R. A. code in 1933 (R. 384):

> Instead of having only the competition of the open-shop mines in other districts, the mines were then competing with each other in the same district, *and it got to the point that there was really nothing but chaos in all these fields.* It was in many instances impossible to know what your neighbor was paying in the way of wages, and when you would go out to bid on a piece of business it would be impossible to know whether you would have to bid within 5¢ or 50¢ a ton of the price at which the business would be awarded. There was no stability whatever in the industry all during the period between April 1, 1927 until the fall of 1933.

3. *Under applicable legal principles and decisions, the collective bargaining provisions of the Act are a valid exercise of the commerce power of Congress*

Subsection (a) of Part III of Section 4 requires the insertion in the code of the following condition:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from interference, restraint, or coercion of employers, or their agents, in the designa-

> tion of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; and no employee and no one seeking employment shall be required as a condition of employment to join any company union.

Petitioner devotes only a single page (p. 132) of his brief to the question of the validity under the commerce power of the above provision.[1] He apparently regards this question as on all fours with the validity under the commerce power of the wage and hour provisions of the Act. Petitioner thus ignores or overlooks the fact that the collective bargaining provisions, in addition to their appropriateness as a means of preventing price-cutting competition in interstate commerce, also constitute a means peculiarly adapted to preventing the disturbance and injury to interstate commerce caused by the numerous and wide-spread strikes which have frequently recurred in the bituminous coal industry.

In supporting the collective bargaining provisions upon the latter ground, questions which may require consideration are whether collective bargaining may reasonably be regarded by Congress as a proper and necessary means to prevent labor disturbances in this industry, and whether the labor disturbances which have characterized the industry

[1] Petitioners in *R. C. Tway Co.* v. *Glenn*, No. 649, entirely ignore this question in their brief.

in the past are of such a character that federal power may be exerted to prevent their occurrence.

Upon the first question *Texas & N. O. R. R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, would seem to be an authority of great weight. In that case this Court upheld the validity under the commerce power of a section of the Railway Labor Act of 1926, the provisions of which are substantially the same as those of Part III (a) of Section 4 of the Bituminous Coal Conservation Act. The Court there recognized that protecting employees against interference by their employers with self-organization or the processes of collective bargaining was an appropriate means of preventing labor disputes and strikes incident thereto.[1]

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[1] The Railway Labor Act has been remarkably successful in preventing strikes. The *First Annual Report* of the National Mediation Board, established pursuant to the Act of June 21, 1934, c. 691, 48 Stat. 1193, states (p. 8):

> Since the enactment of the Railway Labor Act in 1926 there has been an almost unbroken record of peaceful settlement of labor disputes on the railroads. * * *
>
> That the railroad industry could maintain such a peaceful record, especially since 1932 when strikes and industrial unrest have been prevalent in other industries throughout the country, is testimony to the soundness and effectiveness of the labor policies formulated by Congress in the Railway Labor Act.
>
> *   *   *   *   *
>
> But there has been no lack of labor disputes in the railroad industry. It differs from other industries only in that its disputes are amicably adjusted with the aid of the agencies set up by the act.

The Court said (p. 570):

> Exercising this [commerce] authority, Congress may facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation. In shaping its legislation to this end, Congress was entitled to take cognizance of actual conditions and to address itself to practicable measures. * * * It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184, 209. Congress was not required to ignore this right of the employees but could safeguard it and *seek to make their appropriate collective action an instrument of peace rather than of strife.*

But wholly aside from the authority of this case, the facts of record conclusively establish that interference by operators with the right to organize and to bargain collectively has been the primary cause of the many strikes in the bituminous coal industry. In areas where operators have denied these rights, there have been repeated and violent labor disturbances occasioned by such denial. (*Supra, pp.* 214–219.) Likewise, in the case of suspensions of work (the equivalent of strikes) in areas where the right to organize and bargain collectively has been recognized, these suspensions have been

largely caused and greatly prolonged by the fact that such rights were denied in other areas.

The reason for this has been the difficulty of agreeing upon terms when it was known that any wage scale determined upon would be undercut by operators in other areas who, through their denial of collective bargaining, were able to dictate terms of employment to their employees. This difficulty was a major cause of the suspensions periodically occurring in union areas in the pre-war period (Fg. 80, R. 149) and was the direct cause of the major strikes in such areas in 1922 and 1927 (*supra,* pp. 44, 52–53; Fgs. 85, 108, R. 153–154, 169). In fact, the trial court found that a "main cause" of the suspensions which occurred periodically at the expiration of existing wage contracts, and which continued until the parties could reach an agreement upon terms of renewal, has been the fact that "unionized producers have felt themselves unable to meet the wage proposals of the employees because of cutting of price and of wage rates by producers not bound by wage agreements." (Fg. 132, R. 189.)

It is not mere chance that in this industry, to a far greater extent than in industry generally, denial of the right to organize and bargain collectively causes strikes and suspensions. For one thing, the miner's need for the protection given by organization is exceptional. (*Supra,* pp. 204–206.) For another thing, the wage scale is a decisive factor in in-

terstate competition. Accordingly, the issue of recognition of collective bargaining is one of paramount importance to all groups in the industry. It confers upon the operators who do not give such recognition an artificial competitive advantage. In the case of workers whose employers grant such recognition, the withholding of recognition elsewhere is a constant threat and menace. This is so because low-price coal moving in interstate commerce from areas without collective bargaining not only takes business from operators in collective bargaining areas and thus reduces employment opportunities in these areas, but also exerts a constant pressure upon the latter operators to abrogate their collective agreements, to refuse to renew them, or to renew them only upon less favorable terms.

When there is so much at stake, the issue is bound to be fought out with every weapon at command, and the result is recurrent industrial warfare, usually characterized by acts of violence, intimidation and extra-legal action by both operators and workers. It may be said without peradventure that denial of the right to organize and bargain collectively is a direct cause of repeated strikes. If federal power extends to the strikes themselves, as has been held,[1] Congress certainly may deal with their inciting cause.

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[1] *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295, *supra; International Organization* v. *Red Jacket C. C. & C. Co.*, 18 F. (2d) 839, *supra; Pittsburgh Terminal Coal Corp.* v. *United Mine Workers*, 22 F. (2d) 559 (W. D. Pa.).

Since the existence of two classes of mines, some organized and some not, causes major labor disturbances, it may be contended that Congress, instead of dealing with this source of conflict by adopting measures designed to make collective bargaining general throughout the industry, might better have endeavored to eliminate it wholly from the industry. At the time the present Act was passed, 90% of the industry was organized. (Fg. 144, R. 195.) So strong are the motives for trade union organization in the coal mining industry, for reasons already pointed out (*supra,* pp. 204–206), and so general is the miner's insistence on and belief in the right of collective bargaining, that large portions of the American bituminous industry are certain to remain organized. "Congress was entitled to take cognizance of actual conditions and address itself to practicable measures". *Texas & N. O. R. R.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 570. In any event, it was for Congress to determine which method it should adopt to achieve stability. It certainly cannot be said that the Congressional choice of guaranteeing freedom from interference with collective organization and bargaining, rather than the adoption of measures to restrict or eliminate such activity, was unreasonable or inappropriate.

There remains the question whether the strikes in this industry, occurring on so many occasions in the past, affect interstate commerce so directly and

substantially that the federal commerce power may be exerted to prevent them. No doubt as to such power exists as to strikes for the purpose of preventing the shipment of coal in interstate commerce; they have been judicially determined to be within federal power. *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295, *supra; International Organization* v. *Red Jacket C. C. & C. Co.,* 18 F. (2d) 839, *supra.* See also *Pittsburgh Terminal Coal Corp.* v. *United Mine Workers,* 22 F. (2d) 559 (W. D. Pa.); *Hitchman Coal and Coke Co.* v. *Mitchell,* 245 U. S. 229, *supra.*

This type of strike is illustrated by the *Coronado, Red Jacket,* and *Hitchman* cases. Extracts have already been set forth from the opinions in these cases which indicate the general nature of the controversies there involved. Of course, the number of instances in which strikes of this kind have given rise to judicial opinions dealing with them under statutes resting on the federal commerce power is no true measure of their importance or frequency. The trial court found that various attempts over a period of several years were made by the miners' union to gain recognition of collective bargaining in areas where recognition was withheld, and found that these attempts, which the operators resisted, "were prompted in a large measure by the competitive pressure exerted by the cutting of wage rates in non-union fields upon the union scale of wages in competing areas" (Fg. 107, R. 167–168). The seri-

ous disorders occurring in West Virginia in 1920 and 1921, to which the *Red Jacket* case relates, are an example of strikes of the kind we are now considering, which are carried on with a purpose to prevent movement of coal in interstate commerce.

Likewise suspensions in the areas in which collective bargaining has been carried on fall properly within the commerce power because, apart from the question of intent, their necessary effect is to halt interstate commerce on a wholesale scale. Even when applying the narrower test of what constitutes a conspiracy in restraint of interstate commerce, this Court has recognized that where intrastate action is of such a character that it necessarily would materially and substantially affect interstate commerce, then those who are parties to a conspiracy operating within the intrastate field, but producing these effects on interstate commerce, are deemed to have intended the necessary consequences of their acts and the conspiracy is held to be within the prohibitions of the Sherman Act. *United States* v. *Patten,* 226 U. S. 525, 543. In *Industrial Association* v. *United States,* 268 U. S. 64, 81, this Court pointed out that *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, held that a conspiracy to restrain interstate commerce was not established because the evidence did not show either an intent to interfere with such com-

merce or an effect on such commerce "of such substance that a purpose to restrain interstate commerce might be inferred." In the same case the Court said (p. 77):

> The statute is not aimed alone at combinations and conspiracies which contemplate a restraint of interstate commerce, but includes those which directly and unduly cause such restraint in fact.

The table below[1] shows, for eleven of the last thirty-two years, the number of men on strike, the average number of days lost per man on strike, and the percentage which the number of men on strike is of the total number of men employed.

[1] The table is as follows:

(1) Year	(2) No. of men on strike, suspension, etc.[1]	(3) No. of men employed[2]	(4) % of striking employees to total employees[3]	(5) Aver. days lost per man on strike[1]
1904	75, 533	438, 000	17. 2%	44
1906	211, 304	478, 000	44. 3%	63
1908	145, 145	516, 000	28. 2%	38
1910	215, 640	556, 000	38. 8%	89
1912	159, 098	549, 000	29. 0%	35
1914	135, 605	584, 000	23. 2%	80
1919	418, 279	622, 000	67. 2%	37
1922	460, 589	688, 000	67. 1%	117
1927	172, 844	594, 000	29. 1%	153
1928	50, 742	522, 000	9. 7%	83
1932	62, 867	406, 000	15. 4%	120

[1] Fg. 134, R. 190.
[2] Def. Ex. 4A, R. 1006.
[3] Percent which column (2) is of column (3).

The suspension before the war generally closed down mines in from ten to twelve states, and those occurring in 1919 and 1922 affected more than twenty states. (Fgs. 84, 156, R. 152, 202; R. 297; *Bureau of Mines, Coal in 1922,* p. 519). In the two years last mentioned, over 400,000 men were on strike and in 1927, over 172,000 men. (See foregoing table.) Interference with the production and shipment of coal on such a tremendous scale, simultaneously effective in such a large number of states, would seem clearly to obstruct commerce among the states directly and substantially.

Such large-scale suspensions have interrupted and interfered with the normal flow of interstate commerce in various ways. Their direct effect is to prevent, for the period of their duration, shipment of a large proportion of the national supply of coal. Another immediate result is to raise the price of coal. The price increases brought about by the 1919 and 1922 strikes have already been described. (*Supra,* pp. 43–45.) Sometimes, as was the case in 1926, heavy buying in anticipation of a suspension contributed to a sudden rise in spot prices. (Fg. 111, R. 171.)

The suspensions have tended to interfere with the normal course of movement of coal in interstate commerce. Instead of buying coal as they needed it, consumers purchased large amounts in advance of each threatened suspension at considerable additional cost. (Fg. 111, R. 172.) The flow of coal

in the ordinary and customary channels of interstate commerce was broken; shipments from areas not on strike increased, while shipments from the striking areas ceased. The report of the Coal Commission appointed by the President in 1922 described the effect of pre-war suspensions as follows (Vol. III, p. 1291):

> When production was cut off for a time in the Central Competitive Field, it meant that those industries which were customarily supplied by operators in this field had to seek their fuel elsewhere. Fuel was not always forthcoming at a moment's notice and in any event changing the source of supply meant a dislocation of the ordinary channels of trade, sufficient to cause serious apprehension and inconvenience to the business world, and often sharp increases in the price of coal.

The trial court found (Fg. 184, R. 211):

> * * * many strikes and suspensions of work * * * have closed down many mines, some for long periods of time, have caused violent and wide fluctuations in the price of bituminous coal to the consuming public, have caused hardship and put burdens upon many consumers of bituminous coal, have threatened to interrupt and obstruct, and have interrupted and obstructed interstate commerce in bituminous coal, and at times have even threatened to stop such interstate commerce for indefinite periods; have substantially dislocated and diverted

> the normal flow of interstate commerce in such coal, and have obstructed, burdened and restrained interstate commerce in such coal.

It therefore appears that the strikes which have occurred in this industry have been for the most part strikes of a type which are either engaged in for the direct purpose of preventing interstate movement or which, apart from such purpose, directly and substantially affect interstate commerce. Moreover, they have been recurrent and, as long as collective bargaining is not recognized generally throughout the industry, there is every reason to believe that the same conditions of labor instability and unrest and of interferences with interstate commerce will continue in the future.

On the basis of facts of the kind to which we have referred, disclosed in many Congressional investigations, Congress in Section 1 of the Bituminous Coal Conservation Act found:

> the right of mine workers to organize and collectively bargain * * * should be guaranteed * * * in order to avoid those obstructions to its interstate commerce that recur in the industrial disputes over labor relations at the mines.

Concerning the weight to be given to such a Congressional finding, this Court said in *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, 37 quoting from *Stafford* v. *Wallace,* 258 U. S. 495, 521:

> This court will certainly not substitute its judgment for that of Congress in such a mat-

> ter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent.

When the conditions such as we have described exist, Congress is not limited to dealing with the obstructions to interstate commerce after they have actually occurred, when effective relief through legal means is likely to be of little avail. It may take measures to deal with practices which constitute a potential threat. In *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, 408, this Court, referring to cases upholding regulatory legislation enacted under the commerce power said:

> It is clear from these cases that if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint.

In *Stafford* v. *Wallace,* 258 U. S. 495, 520–521, this Court after earlier citation and discussion of like decisions said:

> If Congress could provide for punishment or restraint of such conspiracies after their formation through the Anti-Trust Law as in the *Swift Case,* certainly it may provide regulation to prevent their formation. * * * Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory

> power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it.

Independently of the considerations which have been urged up to this point as to the validity under the commerce power of the collective bargaining provisions as a means of protecting interstate commerce against the interruptions caused by strikes, these provisions can also be supported as an aid to effective administration of the minimum price provisions of the Act. As long as some producers, by denying to their employees the right to organize and bargain collectively, are left free to vary their wage rates at any time as contrasted with producers whose wage rates are fixed at a definite amount and for a definite period by collective agreements, the resulting advantage to the former constitutes a constant temptation to them, by manipulating their wage rates, to sell their coal below the minimum prices established under the provisions of the Act in the expectation of thereby increasing the volume of their business. Prohibiting interference by employers with the right of employees to organize and bargain collectively will therefore aid materially in, and is a reasonable and appropriate means for, carrying out the policy expressed by Congress in the price provisions of the statute, which provisions have been shown to be clearly within its commerce power.

It is for Congress to select the measures it deems essential to effective administration of regulatory provisions enacted under any of its constitutional powers. In facilitating the administration of such regulation Congress may provide for control of intrastate as well as interstate transactions. In *Westfall* v. *United States,* 274 U. S. 256, 259, the Court said:

> Moreover, when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so. It may punish the forgery and utterance of spurious interstate bills of lading in order to protect the genuine commerce. *United States* v. *Ferger,* 250 U. S. 199. See further, *Southern Ry. Co.* v. *United States,* 222 U. S. 20, 26. That principle is settled.

B. THE LABOR PROVISIONS OF THE ACT DO NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

1. The minimum wage and maximum hour provisions of the Act are reasonably related to a proper legislative purpose and are not arbitrary, unreasonable, or capricious

The due process clause requires that a law be not unreasonable, arbitrary, or capricious, and that the means which it selects for the objects sought to be attained have a reasonable and substantial relation to such objects. *Nebbia* v. *New York,* 291 U. S. 502, 525. The earlier discussion of the commerce question has shown the relation between wages and

hours in the bituminous coal industry and cut-throat competition in interstate commerce and the disastrous effects of such competition on interstate prices. The regulation is, therefore, reasonably and substantially related to a proper object for Congressional action.

There remains the question whether the wage and hour provisions of the Act are arbitrary, unreasonable, or capricious. The burden of proving a statute arbitrary or unreasonable rests upon the person challenging its constitutionality. *O'Gorman & Young, Inc.,* v. *Hartford Fire Ins. Co.,* 282 U. S. 251; *Metropolitan Casualty Ins. Co.* v. *Brownell,* 294 U. S. 580, 584. Petitioner not only offered no evidence to the effect that the fixing of minimum wages in the bituminous coal industry was unreasonable, but instead testified himself that he did not believe that "without the minimum wage and maximum hour provision any degree of stability could have been achieved in the coal industry."[1] (R. 278.) The testimony of other producers supports this view. (R. 386, 402–403, 408, 413, 418.)

[1] Petitioner testified (R. 278):

"I testified before the subcommittee of the Committee on Interstate Commerce of the United States Senate as follows:

> 'Mr. CARTER. Senator, I do not believe that without the minimum wage and maximum hour provision, any degree of stability could have been achieved in the coal industry. I believe that is the base upon which the coal industry must rely to solve its problems, some base, fixed base of wages and hours, keeping in mind of course that there are equitable differentials and changes in districts

Petitioner's contention therefore rests upon the proposition that although governmental regulation of wages and hours in the coal industry is not unreasonable in fact (as he himself testified), such regulation is *per se* and as a matter of law an unreasonable interference with liberty of contract. In *Nebbia* v. *New York, supra,* this Court rejected precisely this contention (see pp. 531, 535, 538), and it declared broadly (p. 537) that "there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business *in any of its aspects.*"

The validity under the due process clause of the minimum wage provisions of the present Act is not governed by the decision in *Adkins* v. *Children's Hospital,* 261 U. S. 525, holding that the minimum wage law for the District of Columbia

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> that must be preserved in order to prevent a dislocation of the industry and that would injure the operators and all the men concerned.'

"That was my opinion and it is now. I also testified as follows:

> 'So far as labor is concerned *I am sure there is a unanimity of feeling* that the men and women employed by and dependent upon the industry should not be subjected to a lowering of their standards of living because of unrestrained play of economic forces. It seems obvious and unanswerable that some provision must be made for the protection of these workers, and it would seem that the best sort of protection which could be afforded them would be the maintenance, by statute, of maximum hours of labor and minimum rates of pay.'

"That was my feeling and it is still my feeling."

(Act of September 19, 1918) violated due process requirements. A brief review of those features of the law emphasized in the opinion of the majority of this Court as amounting to denial of due process will show that the Bituminous Coal Conservation Act is not open to the same objections.

First, the Court in the *Adkins* case found (pp. 555–556) that there was no reasonable relation between "the means selected"—the fixing of minimum wages—and "the object sought to be attained", which in that case was protection of the health and morals of women. Under these circumstances, the statute was characterized (p. 554) as "simply and exclusively a price-fixing law."[1] In the instant case, on the other hand, there is clearly a real and substantial relation between providing for uniformity in minimum wage rates among competing coal operators and preventing unfair and injurious price competition in interstate commerce.

Second, the opinion in the *Adkins* case pointed out (p. 557) that the law took account "of the necessities of only one party to the contract", ignoring those of the employer. But the Act now under review provides that minimum wages become bind-

[1] The *Adkins* case is therefore to be distinguished from cases like *Nebbia* v. *New York*, *supra*, and the present case where the price regulation has a real and substantial relation to carrying out the object or objects sought to be attained by the legislation, in which case the statute is not "simply and exclusively" a price-fixing law.

ing only when at least two-thirds of the employers in a district or group of districts have given their assent to an agreement collectively negotiated with employees. The "necessities" of the employer are therefore protected, under this law, by the employers themselves.

Third, the Court in the *Adkins* case adverted (p. 555) to the fact that the law applied to "any and every occupation in the District." In contrast, the Bituminous Coal Conservation Act regulates minimum wages and maximum hours of work in a particular industry, and in relation to the particular problems of and conditions in this industry.

Wolff Packing Co. v. *Industrial Court,* 262 U. S. 522 (which was again before this Court in 267 U. S. 552), is also clearly distinguishable. The hour and wage regulation there involved was invalidated upon the ground that the regulation was "merely a feature of the system of compulsory arbitration" established under the statute and had "no separate purpose." The present Act does not authorize compulsory arbitration.

While the operation of the present law is such that it may partially restrict the freedom of contract of certain employers, the facts to which we have earlier referred show that there is ample justification in fact for this restriction. Without it, those operators who compete most ruthlessly in the matter of price cutting and wage cutting, in effect

compel their competitors to adopt similar destructive practices. The situation in this respect is not unlike cases involving use of unfair methods of competition. In *Federal Trade Commission* v. *Keppel & Bro., Inc.,* 291 U. S. 304, 313, the Court said that "a trader may not, by pursuing a dishonest practice, force his competitors to choose between its adoption or the loss of their trade."

When federal power is exerted to prevent interstate distribution of candy prepared and packaged so that its retail sale can be promoted by appeal to the gambling instinct in children, the candy manufacturer engaged in such a practice is deprived of some measure of his liberty of contract and freedom to manage his own affairs. The restriction upon his freedom may, in fact, be just as detrimental to his business interests as, in the case of bituminous coal producers, is the fixing of a minimum wage rate for all producers in a given area. When the abuses which in the past have attended full freedom of contract in respect of wage-cutting are borne in mind, a reasonably appropriate regulatory measure to prevent these abuses certainly bears none of the indicia of being violative of due process. The view point of the practical operator upon this matter is enlightening. An executive of a large company, operating mines in six different states, testified (R. 402–403):

> There is a wide distinction between wage reductions secured by agreement between groups of employers and groups of em-

> ployees, and wage cutting by an individual operator to secure an advantage against his competitors. When such wage cutting is practiced secretly, as often it is, I think it is more unfair than the practice of giving rebates. The money involved to secure the advantage through wage cutting is furnished by the employees. The money involved to secure the advantage through the giving of rebates is furnished by the employer.

Surely regulation which frees the competitive system from abuses which thus prevent it from functioning so that the efficient are rewarded and the inefficient ultimately eliminated, is not to be regarded as violating due process. And it appears that wage-cutting in this industry did so thwart the beneficial functioning of the competitive system. The Commissioner of Labor Statistics testified (R. 479):

> Experience has shown, however, that the business does not necessarily go to the most efficient operator. It goes to the operator who can cut his costs most and frequently that means the operator who can sweat his labor most and cut his wages most. If we are to have competition in the industry, we must have a plane of competition. We must fix the lower limits below which nobody can go and then the producers must compete with one another on the basis of efficiency and not on the basis of cutting wages below the minimum plane.

The procedure for establishing minimum wages and maximum hours is not arbitrary or unreasonable. The law provides that when two-thirds of the producers by tonnage in any district or group of districts enter into a collective wage agreement with a majority of the workers, the other producers therein shall not pay less than the minimum wages embodied in such agreement. Similar procedure must be followed before maximum hours of work become binding upon any operator. The plain purpose is to protect producers against being compelled by a minority of their competitors to resort to a competitive practice which experience has shown proves progressively destructive to them and to their employees.

Petitioner alleges, however, that any procedure which allows some of the employers and employees to determine the wages and hours in the mines of their competitors is arbitrary and unreasonable. Petitioner invokes the spectre of the power of the majority arbitrarily to force the minority to pay ridiculously low or high wages and cites such cases as *Eubank* v. *Richmond,* 226 U. S. 137, and *Washington ex rel Seattle Title Trust Co.* v. *Roberge,* 278 U. S. 116, to show that such a grant of power violates the due process clause.

The statutes involved in these cases, as well as those involved in all of the State cases cited by petitioner, authorized one group of persons to make rules which would bind others—in effect to legis-

late. In the present law Congress has merely provided that, when in the ordinary course of business a sufficient portion of producers have agreed upon certain terms as a rule for their own conduct, such terms shall constitute a minimum floor for competition affecting interstate commerce in the industry. This point is more fully elaborated in our later discussion (*infra,* pp. 267–275) of the question of delegation of legislative power.

The nature of the collective bargaining agreement is a guarantee that the majority will not agree upon wages or hours arbitrarily or for the purpose of injuring non-signatories. The majority itself must comply with the standards established. Such an agreement is a bargain, made by adverse interests. The employee will not permit the wage scale to be unreasonably low and the employer will not permit it to become unreasonably high. If he should, although other operators in the same district must pay the same minimum wages, he is at a disadvantage in competing with operators in other districts, since the minimum wages are agreed upon on a district basis, as well as with competing fuels. Under the facts of the *Eubank* and *Roberge* cases, there were no such practical limitations upon arbitrary action. In the *Roberge* case, self-interest would not have served to prevent arbitrary and capricious action by the other property owners in the district in prohibiting erection of a home for the aged, inasmuch as it was reasonably certain that

none of the other property owners was interested in building such a home. In the *Eubank* case, the restriction which property owners were authorized to impose applied only to *new* construction, so that two-thirds of the property owners, with houses already built and with no intention to rebuild, could impose restrictions upon persons seeking to erect new buildings without imposing any similar restriction upon themselves. Such power is clearly subject to arbitrary abuse. But there is no such danger when, as in the instant case, the restriction would burden those who determine the standard to the same extent as the minority who must conform to it.

2. The Collective Bargaining provisions of the Act do not violate the due process clause of the Fifth Amendment

Petitioner's sole reference to the question whether the collective bargaining provisions of the Act are consistent with the due process clause is the following: "The provisions of the instant statute for collective bargaining and majority rule completely destroy the correlative rights of employees to choose their own employers and of employers to choose their own employees." (Pet. Br., p. 246.) This description is, of course, wholly inaccurate. The collective bargaining provisions are designed for the purpose of permitting employees to organize and bargain collectively through representatives of

their own choosing, free from interference, restraint or coercion from their employers. The decision of this Court in *Texas & New Orleans R. R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, precludes any contention that collective bargaining provisions of this character constitute such an arbitrary restriction upon the freedom of contract as to violate the Fifth Amendment. Petitioner (Br., p. 247) classifies the statute sustained in the *Texas & New Orleans* case with others which he says "have been sustained for limited periods and under special circumstances in a few instances" and apparently considers this case as going to the borderline of the law. The decision of the Court in that case gives no warrant for so classifying or describing the statute or the case itself.

B. THE WAGE AND HOUR PROVISIONS OF THE ACT DO NOT CONSTITUTE AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER

Petitioner contends that subsection (g), Part III, Section 4, of the Act (*infra,* pp. 312–313) constitutes an unconstitutional delegation of legislative power. This subsection provides that whenever maximum hours of labor are agreed upon in any contract or contracts between producers of more than two-thirds of the national tonnage and representatives of more than one-half of the employees, such maximum hours of labor shall be accepted by all code members. There is a similar provision that wage agreements made in any district or group of

districts by the same proportions of the producers and employees shall be accepted as the minimum wages by all code members in such district or group of districts. It is the Government's position that these provisions do not delegate legislative power.[1] The producers and employees who enter into wage or hour agreements are not acting in a legislative capacity. They are simply prosecuting their own affairs.

Petitioner's contention that the Congress is here delegating its own power of legislation is made in disregard of what the wage and hour provision of the statute is really dealing with. If Congress were seeking to fix and prescribe the rates and quantum of wages to be paid, or the number of hours to be worked, for the social welfare of the employees, then there would be need for specifying in the statute in mathematical terms the minimum rates of pay or the maximum number of hours to be worked, or else for delegation to an administrative agency with appropriate standards. Here the significant

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[1] It is noteworthy that Congress did not consider that any question of delegation was raised by subsection (g). The report of the Committee on Ways and Means of the House states (H. R. 1800, 74th Cong., 1st Sess., p. 12):

"There is no delegated power to establish maximum hours and minimum wages for labor. The bill specifically grants to employees the right of collective bargaining, and provides that when, as a result of collective bargaining, maximum hours are agreed upon or minimum wages agreed upon such maximum hours and minimum wages shall be effective as set forth in the bill."

and crucial consideration is, that Congress, if required to specify the quantum of wages and of hours in order to deal with the subject matter at all, would be compelled to do just what it wishes to refrain from doing, i. e., to regulate and prescribe wages and hours as conditions of employment from the standpoint of the need and welfare, or the assumed need and welfare, of the workers and thus to enter upon a policy of social legislation in the very field that is the concern of the States. This is what Congress in the statute now before us has carefully refrained from doing. It has not sought to fix wages and hours according to standards of some conception of social desirability or of the needs or the contentment of workers, but it has sought to regulate the standards of competition between enterprisers who ship in interstate commerce.

Thus Congress refers to the wages and hours fixed by agreement among the specified number of competitors and of employees, not to regulate wage scales and hours of employment, but to regulate the *relation,* with respect to such factors, between different groups who compete with each other in interstate commerce. Instead of interfering with the liberty of contract of all competitors, Congress leaves the majority free to make their own bargains and adopts their conjoint action as the standard to be followed by the minority. Only in some such way could Congress confine itself to dealing with the *relation* between wages paid by different competi-

tors and refrain from an effort to fix wages themselves on some assumption of what is fair and desirable from the standpoint of the need or welfare of employees.

In other fields of legislation when the end is to secure uniformity of standards, great weight is necessarily given to the existing practices prevailing among business men. In prescribing forms of insurance policies or of bills of lading, legislatures do not strike out *de novo* and devise standards without regard to what is familiar practice and custom. As the common law defers to and adopts custom, so to a considerable degree must legislators when their aim is to make uniform and universal what heretofore has been merely predominant.

In dealing with the forms of insurance policies or of bills of lading, the legislature can of course set forth explicitly in the statute the provisions which it thus takes over from common or preponderant practice. In such matters, in addition to uniformity, the legislature desires a fixed and established standard not subject to variation. Here, however, Congress desires uniformity without imposition of specific and unvarying standards. It wishes to leave freedom to the full extent that freedom may not destroy the possibility of uniformity. Petitioner's contention that power has here been delegated amounts to a complaint that freedom was not abrogated entirely instead of being curtailed only to a limited extent.

Questions of delegation must always be considered in their particular setting, and the consequences of imposing on the legislature other alternatives than those it has adopted, must be compared from a practical standpoint with the consequences of applying the provisions that the legislature has preferred. Obviously the mode of legislative specification which the petitioner sets up as a constitutional requisite would be more arbitrary, more burdensome and more restrictive of freedom of contract than the much wiser plan which seeks to secure only conformity by the minority to the standards adopted by the free bargaining agreements of the majority.

As already pointed out, the producers and employees who enter into wage and hour agreements are not acting in a legislative capacity; they are simply prosecuting their own affairs. The fallacy in the premise on which petitioner's contention rests lies in the failure to distinguish between a law which grants to some agency or person the right to prescribe regulations or prohibitions governing the conduct of others and a law whose operation is made dependent upon the happening of some future event or upon the future action of individuals in the normal conduct of their own business. The contested provisions of the Act are of the latter type.

Employers and representatives of employees in a large portion of the bituminous coal industry

have been making collective agreements with respect to wages and hours for many years. These agreements determine what shall be done in their own mines, not in the mines of other persons. Subsection (g) does not alter these agreements or change their character. If and when they are made by the requisite percentage of producers and employees, then the declaration of Congress that the wages or the hours embodied in such agreement shall be binding upon other code members becomes operative; and the sole question is as to the power of Congress thus to restrict the freedom of contract of such other code members. By this legislation Congress has not conferred upon a group of operators and employees the power to make laws to govern the conduct of others; [1] it has simply provided that these others shall be subject to certain legal obligations when a specified proportion of producers and employees have, in the ordinary course of their business relations with each other, arrived at certain agreements governing their own conduct.

A statute of this character seems no different in principle from a statute the operation of which is conditioned upon the happening of some future natural phenomenon. The principle does not differ

[1] All of the cases in which the question of delegation of power has been passed on by this Court (including *Eubank* v. *Richmond*, 226 U. S. 137, and *Washington ex rel. Seattle Trust Co.* v. *Roberge*, 278 U. S. 116), and all of the cases in petitioner's brief (pp. 123–124) allowed a person or group of persons to make rules for the conduct of others.

where the operation of a statutory regulation is made to depend upon future human conduct. There would be no delegation if Congress were to provide that whenever foreign manufacturers sell a particular commodity for importation into the United States at prices below a certain figure, the tariff on this commodity should automatically increase a certain amount. Cf. *Field* v. *Clark,* 143 U. S. 649. The problem is no different if the content as well as the operative effect of legislation is made to depend upon such future human conduct; for example, in the case just suggested, the statute might provide that the amount of the tariff increase would be determined by the amount of the decrease in prices by foreign manufacturers—and still it could not be contended that the power was being delegated to foreign merchants to make American law. Cf. *Hampton and Co.* v. *United States,* 276 U. S. 394; *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112, 178.

Cases involving federal adoption of State law make it clear that Congress does not delegate its authority because it makes the contents of a federal prohibition depend upon what other people do in managing their own affairs. Congress can no more delegate its authority to a State legislature than to a federal official or to a private individual. (*In re Rahrer,* 140 U. S. 545, 560; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, 164.) But Congress can refer in advance to the prescriptions of a valid

State law subsequently enacted solely for the purpose of regulating conduct within the power of the state and adopt those prescriptions as an essential element in a federal offense, and such prospective adoption will not be regarded as a delegation of regulation to the States. The conformity acts, the wild game laws, the Webb-Kenyon Act, the bankruptcy exemption laws, and the election laws are familiar examples. In these laws Congress has not delegated legislative authority to the State; Congress defines the circumstances under which conduct will violate federal law, and provides that one of the circumstances shall be that the offender violates a State law enacted, not to create a new federal offense, but to regulate matters of State concern.

The Conformity Acts in effect since the first Congress in 1789 (see especially Rev. Stat. sec. 914, enacted in 1872) have long provided that in certain respects the federal judicial procedure in suits at common law shall be the same as the procedure prescribed by State law for actions in the courts of the respective States. In *Amy* v. *Watertown* (No. 1), 130 U. S. 301, 320, the Court described the effect of the Conformity Act of 1872 as follows:

> The federal courts are bound hand and foot, and are compelled and obliged by the Federal Legislature to obey the state law.

It has never been thought that the Conformity Act contained any delegation of federal legislative or judicial power to the States. Congress was not

giving the States unfettered discretion to make rules for the federal courts, but was providing that the federal judicial procedure should conform to the rules prescribed by the States, in the management of their internal affairs, for their own judiciary—just as here Congress is not authorizing one group of producers and mine workers to legislate for the remainder, but is providing that the federal regulation shall conform to the terms agreed upon by the majority, in the management of their own businesses, for their own mines.

The Lacey Act (31 Stat. 188, 18 U. S. C. Sec. 392), which forbids the transportation in interstate commerce of any birds "the importation of which is prohibited where such * * * birds have been killed * * * in violation of the laws of the state" is another example of a case in which the operation of a federal statute depends upon the contents of a State law. The State conservation law, enacted for a valid State purpose and not for any federal purpose, names the birds and determines the time of year during which they may not be transported in interstate commerce. No question of delegation of power has ever been raised with respect to this statute. See *Rupert* v. *United States,* 181 Fed. 87; *Bogle* v. *White,* 61 Fed. (2d) 930, certiorari denied, 289 U. S. 737. But the argument that a law of this character contains a delegation of power to the States was rejected by this Court in *Clark Distilling Company* v. *Western*

Maryland Railway, 242 U. S. 311. Mr. Chief Justice White there stated (p. 326):

> The argument as to delegation to the states rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply.

Section 5515 of the Revised Statutes (repealed in 1894, 28 Stat. 36) penalized the violation by any "officer of an election at which any representative or delegate in Congress is voted for" of any duty imposed by State law. In *Ex parte Siebold,* 100 U. S. 371, the Court sustained this statute against attack on the ground that it delegated federal power to the States, saying (p. 388):

> The State laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress.

See also *In re Coy,* 127 U. S. 731.

In *Hanover National Bank* v. *Moyses,* 186 U. S. 181, which upheld the validity of the Bankruptcy Act of 1898, it was contended that the Act contained an unconstitutional delegation of legislative power because it permitted the allowance to bankrupts of the exemptions prescribed by State laws in force at the time of the filing of the petition.

The Court disposed of this objection shortly (p. 190):

> Nor can we perceive in the recognition of local law in the matter of exemptions, dower, priority of payments, and the like, any attempt by Congress to unlawfully delegate its legislative power. *In re Rahrer, Petitioner,* 140 U. S. 545, 560.

The clearest expression of the difference between a delegation of power and a provision that the federal law conform to the conduct of another body acting within its own jurisdiction and not purporting to exercise any federal power, is found in the dissenting opinion of Mr. Justice Holmes in *Knickerbocker Ice Company* v. *Stewart,* 253 U. S. 149. In a passage not in conflict with the decision of the majority[1] he declared (p. 169):

> I assume that Congress could not delegate to state legislatures the simple power to decide what the law of the United States should be in that district. *But when institutions are established for ends within the power of the States and not for any purpose of affecting the law of the United States, I take*

[1] The ground upon which the majority decision rests was that the constitutional provisions there involved ("The judicial power shall extend to * * * all cases of admiralty and maritime jurisdiction") required uniformity throughout the nation and thus deprived the State of *power* to pass such legislation. The State law would thus have no independent validity apart from the Act of Congress, and thus Congress could not be said to be adopting a State law enacted in the management of the State's own affairs.

> *it to be an admitted power of Congress to provide that the law of the United States shall conform as nearly as may be to what for the time being exists.* A familiar example is the law directing the common-law practice, etc., in the District courts, to "conform, as near as may be, to the practice," etc., "existing at the time" in the State Courts. Rev. Stats. § 914. This was held by the unanimous Court to be binding in *Amy* v. *Watertown*, 130 U. S. 301. See *Gibbons* v. *Ogden,* 9 Wheat. 1, 207, 208, *Cooley* v. *Board of Wardens,* 12 How. 299, 317, 318.

The principle of these cases is equally applicable when Congress adopts the future acts of individuals as when it adopts the future acts of State legislatures. If the contents of the regulations taken over by Congress are within the jurisdiction or power of the party establishing them and not attempts to exercise federal power over other persons, no delegation of authority exists.

In the examples of adoption above enumerated, the State legislatures are of course aware that their judicial procedure and their election, bankruptcy exemption, or wild game laws will subject persons to the operation of federal statutes. This, of course, does not alter the fundamental character of the act of the State legislature. Similarly, the knowledge of coal producers and mine workers that their agreements with respect to wages and hours will subject others to the operation of a fed-

eral statute does not change the nature of their action from the formation of a private contract to an exercise of legislative or governmental power.

V. Separability

IF ANY OF THE PROVISIONS OF THE ACT ARE INVALID, ITS REMAINING PROVISIONS, AS WELL AS THE CODE PROVISIONS CORRESPONDING TO SUCH REMAINING PROVISIONS, ARE SEVERABLE AND VALID.

The test of whether the constitutional provisions of a statute may stand if other sections are declared invalid is whether, standing alone, they "can be given legal effect," and whether "the legislature intended the unobjectionable provisions to stand in case other provisions held bad should fall." *Lynch* v. *United States,* 292 U. S. 571, 586. See also *Dorchy* v. *Kansas,* 264 U.S. 286, 290. "The point is * * * whether they are essentially and inseparably connected in substance—whether the provisions are so interdependent that one cannot operate without the other." *Loeb* v. *Columbia Township Trustees,* 179 U. S. 472, 490 and *Berea College* v. *Kentucky,* 211 U. S. 45, 55–56.

The first of these tests requires little consideration here for the various regulatory provisions of Section 4 of the Act can clearly be given legal effect regardless of the fate of the remainder. If any should be found invalid, they may be stricken from the Act without in any way affecting the others and without making it necessary to rewrite the statute in order to give effect to the remaining

provisions. Thus the price provisions of Part II may be administered as they stand. Similarly the collective bargaining provisions of subsection (a) of Part III can be given their full legal effect if the wage and hour provisions of subsection (g) of Part III should fail.

The intent of Congress that the various provisions of the Act should be separable, the second test applied by the Court, is equally clear. In the first place, the separability clause in Section 15 creates a presumption of separability. This section provides:

> If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

While a separability clause in a statute "is but an aid to interpretation and not an inexorable command," it creates a "presumption of divisibility; and this presumption must be overcome by considerations that make evident the inseparability of the provisions or clear probability that the legislature would not have been satisfied with the statute unless it had included the invalid part." *Utah Power and Light Co.* v. *Pfost,* 286 U. S. 165, 184–185. See *Railroad Retirement Board* v. *Alton Railroad Co.,* 295 U. S. 330, 362.

Petitioner (Br., p. 129) attempts to apply to this Act the words of the concurring opinion in *Schech-*

ter Poultry Corp. v. *United States,* 295 U. S. 495, 555, that the wage and hour provisions of codes approved under the National Industrial Recovery Act are "its very bone and sinew" and that to take these provisions from such a code "is to destroy it altogether." But there is a vital distinction between the two statutes. The National Industrial Recovery Act required every code approved thereunder to contain certain labor provisions and, apart from this requirement, did not specify in any way the contents of such codes. The Bituminous Coal Conservation Act, on the other hand, incorporates the Bituminous Coal Code in the statute itself as section 4 thereof and includes in this Code regulatory provisions with respect to (1) prices, (2) unfair methods of competition, (3) interference with the employees' right to organize and bargain collectively and (4) minimum wages, maximum hours, and other conditions of employment. On the face of the statute the price provisions, which are set forth in Part II of Section 4 of the Act, and the labor provisions, which constitute Part III of that section, are of equal rank.

Not only did Congress treat the price and the labor provisions as of equal dignity and rank, but each is administered and enforced by a separate agency. The National Bituminous Coal Commission administers and enforces the price provisions of Part II and the Bituminous Coal Labor Board the labor provisions of Part III. The administra-

tion of the two sets of provisions by separate enforcement agencies is a further indication of their separate and independent character. In view of the peculiar arrangement of the provisions of the statute, with all the substantive regulatory provisions embodied in Section 4, no inference of non-separability is to be drawn from the fact that the price and the labor provisions are both found in Section 4. (See Pet. Br., p. 128.) The division of Section 4 into three parts, each, in general, of greater length and importance than the individual sections of the statute other than Section 4, has the same effect as, in the case of an ordinary statute, placing different provisions in different sections.

In earlier sections of this brief the regulatory provisions of Section 4 have been taken up in turn and it has been shown that all are directed toward the end of removing burdens upon and obstructions to interstate commerce in coal by eliminating destructive competition. It has also been shown that such an end is reasonably and appropriately promoted to a greater or less degree (1) by the price provisions, (2) by the provisions for collective bargaining, and (3) by the provisions for standardizing labor costs through standardization of wages and hours. All these means in conjunction would doubtless be more effective in achieving the end desired than would any one of them standing alone, but it cannot be assumed that Congress in-

tended to abandon all three means of promoting its end in case one of them should be adjudged invalid. The proper inference would be exactly the reverse.

Any possible doubt as to the purpose of Congress to make the price provisions separable from the wage and hour provisions would seem to be set at rest by the fact that the Act contemplates that prices may be fixed thereunder when wages and hours are not. The minimum prices which are to be put into effect apply to all producers who accept the code. But a producer accepting the code may pay what wages he pleases and may determine at will how many hours his employees shall work, unless and until specified groups of employers and employees agree upon these matters; and upon termination of any such agreement, the producer is again at liberty until a new agreement applicable to him is entered into. A producer may therefore be bound to observe the minimum prices which are to be established without being similarly bound with reference to his wage payments or the hours of work of his employees. This shows that Congress intended the two sets of provisions to operate independently of one another.

In support of his contention that the price and labor provisions are inseparable, petitioner contends that the price provisions have a "predominant labor motive" and cites as confirmation of this that "the statute expressly states that the prices are to be fixed as provided 'in order to sus-

tain the stabilization of wages, working conditions and maximum hours of labor.' " (Pet. Br., pp. 136–137.) This, he says, makes it clear that the price provisions are enacted in aid of the labor provisions. However, the statute does not state that price regulation is to be for this purpose. The phrase which petitioner quotes comes at the beginning of the provision which sets up the standards to be followed by the price regulating authority. The full language is as follows:

> In order to sustain the stabilization of wages, working conditions, and maximum hours of labor, said prices shall be established so as to yield a return per net ton for each district in a minimum price area * * * equal as nearly as may be to the weighted average of the total costs, per net ton, determined as hereinafter provided, of the tonnage of such minimum price area.

It is apparent that the words in question do not set forth the purpose of the establishment of minimum prices, but constitute an explanation of the choice of average cost per ton as the basis for determining minimum prices. They amount to a direction that minimum prices are not to be established at a level so low as to induce wage cutting and thus to lead to revival of the very labor disputes and conflicts which have hitherto helped to destroy the equilibrium of the industry. It is quite natural that the price provisions of the statute should not neglect this objective of avoiding stoppages and ob-

structions to interstate commerce, which is one of the objectives of the labor provisions also; to this end it is appropriate that the statute itself give notice to the price regulatory authority that the labor element in cost should be dealt with so as to assure stability rather than to promote instability.

It scarcely seems necessary to argue that subsection (a) of Part III of Section 4, which protects the right of employees to bargain collectively free from the domination or interference of employers, is separable from the wage and hour provisions of subsection (g) of Part III. We have previously set forth the independent relationship of the two sets of provisions to interstate commerce. From the standpoint of protection of the interests of workers in the industry, they are equally independent. The former subsection is designed to make collective bargaining a fair and serviceable instrumentality for the adjustment of differences between employers and employees with reference to terms of employment and thereby to minimize the danger of stoppages of commerce. The latter protects certain agreements made through the collective bargaining process, by extending their scope to other producers, so as to remove one of the most potent causes of price cutting competition.

Obviously, the statutory guarantee of freedom of collective bargaining could stand alone and work towards the accomplishment of its intended objective entirely apart from the existence or opera-

tion of the wages and hours provision of the statute. In exactly the same way the wages and hours provision as it stands does not depend upon the statutory guarantee of collective bargaining, since the wages and hours provision would come into operation if collective bargaining were practiced apart from statutory guarantee and since, furthermore, it comes into operation when only a portion of the industry practices collective bargaining.

Petitioner (Br., p. 128), relying upon the fact that the separability section of the Act speaks of "provisions of this Act" and does not specifically use the word "code," urges that, even though the Act itself be severable, it nevertheless defines what the code should contain, and thus treats the code as a single document. The contention is that the Act imposes a tax for failure to accept a code, the provisions of which the statute specifies, and that, if any part of the required code provisions are invalid, the code fails as a whole.

These contentions ignore the fact that the code for which the Act provides is simply the *alter ego* of the statute—a name for its substantive regulatory provisions. Grouping these provisions together into a code and requiring their "acceptance" is a mere administrative device for enforcement. The provisions of the code are nothing but provisions of the Act itself. If the provisions of the Act are separable, the provisions of the code, being provisions of the Act, must be regarded as

equally separable. Thus, if the statutory provision containing a certain code requirement should be shorn away, wiped out, as it were, from the statute, because of constitutional infirmity, and if the other parts of the statute specifying other code requirements are separable, then the latter statutory provisions stand, and the statute as it is left calls for a code which conforms to the valid statutory provisions.

Since every important substantive regulatory feature of the Act appears in the Act only as a provision of the code, it follows that an attempt to interpret the separability section of the Act as not applying to the code is an attempt to make the separability section to all intents meaningless. A construction which would thus render the separability section practically nugatory should certainly be avoided unless clearly required by explicit language. Not only are there no words suggesting this construction, but other provisions of the Act point in the opposite direction. Thus the highly important provision of Section 3 of the Act provides that acceptance of the code or of the 90% drawback from the tax shall not estop any producer "from contesting the constitutionality of any provision of said *code*." This clearly contemplates that some provision or provisions of the code as well as of the Act may be attacked as unconstitutional without attacking the code as a whole, an impossible result unless the code is separable.

VI. The Injunction Below

THE TRIAL COURT ERRED IN PERMANENTLY ENJOINING COLLECTION OF 90% OF THE TAXES ACCRUING PRIOR TO THE ENTRY OF ITS DECREE

Although the trial court held that severable portions of the Act were constitutional and dismissed petitioner's bill, it granted a permanent injunction restraining the collection of taxes in excess of 1½% of the sale price of coal at the mine accruing between November 1, 1935, the effective date of the taxes imposed by the Act (Sec. 20), and December 10, 1935, the date of the trial court's decree. Apparently the court regarded the doctrine announced in *Ex parte Young,* 209 U. S. 123, as applicable to the taxes in excess of 1½% accruing during this period. The Government submits that this portion of the decree, which is before this Court in No. 651, is erroneous.

Ex parte Young held that a statute which imposed heavy cumulative penalties for violation of rates for railroad transportation fixed by statute, when no right to obtain a prior judicial review of the constitutionality of the rates was given, violated due process, since the necessary effect of the legislation was "to preclude a resort to the courts". But the doctrine of this case and of the cases following it applies only to statutes or administrative orders which subject a person to severe penalties without affording a judicial review of the validity of the statute or order before liability for the penal-

ties attach. *Chesapeake & Ohio Railroad* v. *Conley,* 230 U. S. 513, 521–522; *Gulf, Colorado & Santa Fe R. R.* v. *Texas,* 246 U. S. 58, 62; *St. Louis, Iron Mountain & Southern R. R.* v. *Williams,* 251 U. S. 63, 65–66. While there are other limitations upon the scope of the doctrine, this one is sufficient for present purposes.

Section 3 of the Bituminous Coal Conservation Act provides expressly that no producer shall, by reason of his acceptance of the code or of the drawback of taxes, be held to be precluded or estopped from contesting the constitutionality of any provision of the code or its validity as applicable to him. The form of acceptance promulgated by the National Bituminous Coal Commission follows the language of Section 3. (Pl. Ex. 16, R. 804.) A producer who accepts the code is therefore relieved of the tax in excess of 1½% and he is at the same time left free to assert all his constitutional rights. Such filing imposes no injury whatever upon the producer because he will not become liable for payment of the full 15% tax unless and until he fails to comply with the code and the Commission, after a hearing and thirty days' written notice to the member, issues an order revoking his code membership. (Sec. 5 (b), *infra,* p. 313.) Such an order is subject to review in the courts and the reviewing court may affirm, modify or set aside the Commission's order, in whole or in part, and may in its discretion stay the operation of the Commission's

order. (Sec. 6 (b), *infra,* p. 315.) If a stay is granted, the member's right to a drawback of 90% of the tax would continue until the order or revocation of membership had been affirmed by the highest court of review.

Petitioner may contend that these provisions for judicial review are not adequate because, if a producer pursues the statutory remedy and if the Commission's order is affirmed without modification, he would be required to pay the full 15% tax as a condition of restoration of membership, for the time during which the Commission found that his violation of the code had continued. (Sec. 5 (c), *infra,* p. 314.) But the producer, in the proceedings to review the Commission's order, would be free to assert any defence based upon the doctrine of *Ex parte Young* and, if the court found that the defence was well founded in law and in fact, the reviewing court could modify the effective date of the Commission's order of revocation of membership, or otherwise modify the order so as to prevent application of the tax provisions of the Act in an unconstitutional manner.

Petitioner had the choice either of permitting the company of which he is a stockholder to accept the code and thereafter test the constitutionality of its provisions by the procedure therein provided, a procedure which, as we have shown, would have preserved to the company all its constitutional rights, or to enjoin the company from accepting

the code and run the risk that the company be subject to the tax during the period of litigation. Petitioner, having chosen the latter course and having by his own conduct precluded the company from employing the adequate statutory remedy, cannot now assert that it should be relieved of payment of the taxes which the statute imposes upon those who do not accept the code. *Wadley Southern Railway* v. *Georgia,* 235 U. S. 651, 669.

It should be borne in mind in this connection that, as against the burden which payment of the full tax during the period of litigation would impose upon the Carter Coal Company, its freedom from the obligations imposed by the Act upon code members gives it certain competitive advantages which may be of great pecuniary benefit. Not only is it free to engage in various methods of competition prohibited to code members by Part II (i) of Section 4 but, what is much more important, it is free to sell coal under contracts providing for delivery more than thirty days from the contract date, whereas Part II (e) of Section 4 prohibits code members from making such contracts prior to the establishment of minimum prices under the Act.[1] Freedom from the latter requirement is of very great competitive importance since 75% of all bituminous coal is sold under contracts calling for delivery over a period of several months to a year (Fg. 56, R. 136–137).

[1] Minimum prices have not as yet been put into effect.

CONCLUSION

It is respectfully submitted that that portion of the final decree of the Supreme Court of the District of Columbia dismissing the bill of complaint herein should be affirmed, upon the ground that all the regulatory provisions here in issue are constitutional. It is also submitted that that portion of the decree which grants a permanent injunction against collection of those taxes imposed by the Bituminous Coal Conservation Act, in excess of ten per cent thereof, which accrued prior to December 10, 1935, the date of the decree below, should be reversed.

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APPENDIX

The Bituminous Coal Conservation Act of 1935, approved August 30, 1935, Public, No. 402, 74th Congress, provides—

> That it is hereby recognized and declared that the mining of bituminous coal and its distribution by the producers thereof in and throughout the United States are affected with a national public interest; that the service of bituminous coal in relation to the industrial activities, the transportation facilities, the health and comfort of the people of the United States; the conservation of bituminous coal deposits in the United States by controlled production and economical mining and marketing; the maintenance of just and rational relations between the public, owners, producers, and employees; the right of the public to constant and ample supplies of coal at reasonable prices; and the general welfare of the Nation require that the bituminous coal industry be regulated as herein provided.
>
> It is further recognized and declared that all production of bituminous coal and distribution by the producers thereof bear upon and directly affect its interstate commerce and render regulation of all such production and distribution imperative for the protection of such commerce and the national public service of bituminous coal and the normal governmental revenues derivable from such industry; that the excessive facilities for the production of bituminous coal and the over-