this statute in any way from the statutes involved in the *Child Labor Tax Case* and in *Hill* v. *Wallace*. The tax is still for the purpose of regulating the conduct of those taxed; the Act shows on its face that the regulation is the primary purpose; and, to the extent that it is here challenged, it falls only upon those who fail to submit to the regulation. To characterize this as an exercise of the taxing power would have the result thus stated by this Court in both *Hill* v. *Wallace* (259 U. S. at pp. 67-68) and the *Child Labor Tax Case* (259 U. S. at p. 38):

> "Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it."

Constitutional limitations may not be escaped by so transparent a device. It is the substance and not the form which controls. As this Court said in *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, at page 581:

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court."

In what must be regarded as silent acquiesence in the rule of the cases just reviewed, the Government did not attempt, either in pleading or in argument in the court below, to sustain the validity of the so-called "tax" independently of the validity of the statute considered as a regulatory measure. Its position was that the constitutionality of the statute depended upon establishing the regulatory provisions of the Act and of the Code as valid exercises of the commerce power and as consistent with the Fifth Amendment, with the "tax" a mere enforcement device, valid if "in aid of lawful regulation".[5] By confession, therefore, both tax and Code must fall unless the latter is a valid regulation of interstate commerce, and otherwise consistent with constitutional guaranties and restrictions. To the questions thus presented, the remainder of this brief is devoted.

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[5]The phrase is taken from the Government's brief in the court below.

POINT II.

THE STATUTE, CONSIDERED AS A WHOLE, IS INVALID.

1. In determining the constitutionality of the Act, the Court will and must consider its purpose.

This follows of necessity from cases cited under Point I, in which the Court held statutes enacted under the taxing power to be invalid because it appeared that their real purpose was to regulate matters not committed to the Federal Government, but reserved to the people and the States. As early as *M'Culloch* v. *Maryland,* 4 Wheat. 316, Chief Justice Marshall said (p. 423):

> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

In *Linder* v. *United States,* 268 U. S. 5, 17, the Court said:

> "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced."

In *City of New York* v. *Miln,* 11 Pet. 102, 132, where the question was whether a State statute was a regulation of commerce and, therefore, an infringement upon powers granted to the Federal Government, the Court said:

> "If, as we think, it be a regulation, not of commerce, but police; then it is not taken from the States. To decide this, let us examine its *purpose,* the end to be attained, and the means of its attainment."

In three cases at the present term the Court has reaffirmed this doctrine of the *M'Culloch* and *Linder* cases. In *United States* v. *Constantine* (decided December 9, 1935), the rule was applied in respect of a Federal statute as to which it was found that

> "under the guise of a taxing act the *purpose* is to usurp the police powers of the State."

In *United States* v. *Butler* (decided January 6, 1936), again applying the rule, the Court referred to it as the

> "established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted."

And in *Ashwander* v. *Tennessee Valley Authority* (decided February 17, 1936), although the Federal authority under the war and commerce powers as there narrowly asserted was sustained, the Court warned that

> "The Congress may not, 'under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government'. Chief Justice Marshall, in *McCulloch* v. *Maryland,* 4 Wheat. 316, 423; *Linder* v. *United States,* 268 U. S. 15, 17."

and noted that

> "The Government's argument recognizes this essential limitation."

The rule thus stated finds its origin in the fact that the Federal Government is a government of limited and enumerated powers. If, notwithstanding this, Congress under the guise of exercising a delegated power could "pass laws for the accomplishment of objects not entrusted to" the Federal Government, it could by the enactment of a statute, in form within the delegated powers, exercise powers not delegated and invade the rights reserved by the Tenth Amendment to the States and to the people. Accordingly, this Court has not hesitated to declare such statutes unconstitutional.[1]

Many of these decisions were by a unanimous court. In those by a divided court, the division was not as to the right and duty of the court to determine the purpose of the Act, as related to the objects entrusted to the Federal Government, but as to whether the purposes and objects of the Act fell within those so entrusted. In each case the Act in question was in form an exercise of a delegated power. And this, of course, will always be so. The Act, however, having for its purpose and object "the accomplishment of objects not entrusted to" the Federal Government, was set aside.

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[1] *Hill* v. *Wallace,* 259 U. S. 44; *Child Labor Tax Case,* 259 U. S. 20; *Linder* v. *United States,* 268 U. S. 5; *United States* v. *Dewitt,* 9 Wall. 41; *Keller* v. *U. S.,* 213 U. S. 138; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Retirement Board* v. *Alton R. Co.,* 295 U. S. 330; *Schechter Corp.* v. *United States,* 295 U. S. 495; *United States* v. *Constantine* (decided December 9, 1935); *United States* v. *Butler* (decided January 6, 1936).

To examine the purposes and objects of the Act and its necessary effect is not to impinge upon the legislative powers of Congress or to inquire into its motives. The inquiry into such purpose, object and effect is made in order to determine whether or not the Federal Government has exceeded its powers. Were the Court not possessed of authority to make such inquiry, and should it fail to exercise the duty arising therefrom, the Federal Government would cease to be a government of limited and enumerated powers, and its legislative powers would be exercised subject only to the restraint of Congress itself.

2. The Act has for its purpose, not the regulation of interstate commerce, but the stabilization of a productive industry (*i.e.,* bituminous coal), by subjecting it to Federal regulation, to the end that producers and miners alike may obtain a greater degree of the national income than in the past, through regulation and stabilization of wages and the elimination of free competition among producers.

A. THIS APPEARS FROM THE TITLE OF THE ACT AND FROM ITS LEGISLATIVE HISTORY.

Resort to the title of a statute for the determination of its purpose is always the first subject of judicial inquiry. *Hill* v. *Wallace,* 259 U. S. 44, 66, 67. The title of the Guffey Act opens with the declaration that it is an Act "to stabilize the bituminous coal mining industry and promote its interstate commerce"[1] (Appendix, p. *2,* fol. 1).

[1]As appears from the Committee Reports, from the text of the Act, and from the evidence of so-called "economic facts" upon which the Act was sought to be supported in the court below, the object and purpose of the Act is neither to increase the production of bitumi-

The remaining purposes of the Act, as expressed in the title, are:

(1) "To provide for the cooperative marketing of bituminous coal" (Appendix, p. *2*, fol. 1).

> The cooperative marketing provisions of the Act, legalizing the establishment of marketing agencies through a voluntary association of producers (Sec. 4, Part I(a), paragraphs 2, 3, 4 and 5, Appendix, pp. *8-9*, fols. 28-32), constitute wholly minor provisions of the Code sought to be established by the Act and are dependent in turn upon the validity of such Code. This is neither a major purpose nor one disassociated from the purpose to set up a complete scheme of regulation.

(2) "To levy a tax on bituminous coal and provide for a drawback under certain conditions" (Appendix, p. *2*, fol. 1).

> This has already been fully discussed under Point I. As thereby appears, the taxing provisions of the Act are invalid as an exercise of the taxing power and valid only if permissible as a penalty to compel obedience to the regulatory provisions of the statute.

(3) "To declare the *production,* distribution and *use* of bituminous coal to be affected with a national interest" (Appendix, p. *2*, fol. 1).

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nous coal nor to free it in its interstate movement from artificial restraints and burdens (which are non-existent), but, instead, is to control the production of such coal and the conditions under which it is produced, and to impose restraints by operation of law upon its free movement in interstate commerce. See pp. 62, 103-112, *ante* and *post.*

> This is a purpose clearly beyond any power specifically delegated to the Congress by any provision of the Constitution.

(4) "To conserve the bituminous coal resources of the United States" (Appendix, p. *2*, fol. 1).

> The substantive provisions[2] of this Act make no provision for such conservation except as attempted control of production[3] may have such effect. That Congress may not exercise control over production has been repeatedly held by this Court.[4] Under the text of the Act itself, therefore, conservation of bituminous coal resources of the United States may not properly be regarded as an inde-

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[2]Section 16(1) directs the Commission to investigate "the economic operation of mines with the view to the conservation of the national coal resources" (Appendix, p. *35,* fol. 133).

[3]Section 1 of the statute declares that "the conservation of bituminous coal deposits in the United States by *controlled production* * * * require that the bituminous coal industry be regulated as herein provided", and the same section further recites that "control of such production" is necessary to accomplish the purposes of the Act (Appendix, p. *2,* fol. 3).

[4]*Schechter Corp.* v. *United States,* 295 U. S. 495, 547; *Kidd* v. *Pearson,* 128 U. S. 1, 21; *Hammer* v. *Dagenhart,* 247 U. S. 251, 272, 276; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, 407, 410; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, 259; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172, 178; *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis,* 238 U. S. 439, 444, 445; *United Leather Workers* v. *Herkert,* 265 U. S. 457, 464, 465, 470, 471; *Utah Power & L. Co.* v. *Pfost,* 286 U. S. 165, 181; *Champlin Co.* v. *Commission,* 286 U. S. 210; *Chassaniol* v. *Greenwood,* 291 U. S. 584, 587.

While *United States* v. *Butler* (decided January 6, 1936) was decided by a divided court, there was no dissent as to the lack of power in Congress directly to regulate production, and in view of the unanimous decision in *Schechter Poultry Corporation* v. *United States, supra,* and other prior decisions of this Court, could not well have been.

> pendent purpose but as merely a by-product of the regulatory provisions contained in the Act for the purpose of stabilizing the industry.

(5) "To provide for the general welfare and for other purposes" (Appendix, p. *2,* fol. 1).

> Congress is concededly without power to legislate for the general welfare.[5] The inclusion of this as among the purposes of the Act, so far from bringing its object within those entrusted to Congress, discloses that its purpose was to legislate upon matters beyond the federal field.[6]

It thus appears from the title of the Act itself that its fundamental, indeed, as we think, its sole purpose, is to stabilize the bituminous coal industry.

That such was its purpose is evidenced by the Committee Reports.

The *House Committee Report* opens with the statement:

> "The purpose of the bill herewith reported is to provide for federal regulation of the bituminous coal industry" and continues with the statement that the "health and well-being of many people" require it. (H. Rep. No. 1800, 74th Cong., 1st Sess., p. 1.)

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[5]*Jacobson* v. *Massachusetts,* 197 U. S. 11, 22; *cf. United States* v. *Butler* (decided January 9, 1936).

[6]It should be said in passing that when both the Act itself and the economic facts offered in its support are fully analzyed, the Act is seen to be one not to regulate interstate commerce but "to provide for the general welfare" (Appendix, p. *2,* fol. 1) and that this part of the title, while indicative of a purpose to legislate beyond the Federal sphere, is in reality a proper declaration of the power sought to be exercised in its enactment.

The minority of the House Committee (*House Report,* No. 1800, *supra,* p. 45) thus characterized the bill:

> "This bill proposes to establish a 'little N.R.A.' for the bituminous-coal industry, with the attendant regulation of wages, hours, prices, and trade practices."[7] (*Id.,* p. 45.)

B. That such was the purpose of the Act is evidenced both by the provisions of the Act and by the evidence of so-called "economic facts" offered in support of its validity.

The desired stabilization is sought to be brought about by the regulation of wages and the fixing of minimum prices, the latter to be fixed in accordance with a formula provided in the statute "In order to sustain the stabilization of wages, working conditions, and maximum hours of labor" (Act, Sec. 4, Part II (a), Appendix, p. *11,* fol. 38), the determination of which, in turn, is governed by its labor provisions.

The evidence of so-called "economic facts" in support of the constitutionality of the Act as an exercise of the commerce power, failed to establish the existence of any existing restraints or burdens upon the interstate movement of coal, in the sense in which those words have been employed in the prior decisions of this Court, or of the existence of any such burdens or restraints in the past.[8] On the contrary, the complaint is that the movement of

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[7]That this is an accurate statement is evidenced by the fact that the Code, provided for in the Act, is in effect a reenactment by statute of the Bituminous Coal Code adopted under NRA except that its labor provisions are even more onerous and indefensible. The NRA Code is in the record (R. 877-922).

[8]See Review of the Evidence, pp. 28-62, *ante.*

coal is too free, due to keen, and at times "destructive," rivalry among producers, each striving for business.

The Act in its recitals (Sec. 1, Appendix, p. *3*, fol. 5) makes reference to "the excessive facilities for the production of bituminous coal and the overexpansion of the industry". This recital is supported by the evidence of "economic facts" relied on, which show that the industry is overexpanded and that the capacity of the mines exceeds normal demand. As a result of this condition, as appears from the evidence, there has been severe price competition among the several mines and the several areas of production. As a result the returns to the operators as a whole have been inadequate, and many have operated at a loss. Wages constitute 65% of the total cost of mining coal. Consequently, in the competitive strife for business, wages or wage rates have been reduced in one field in order to admit of the sale of coal at lower prices, resulting in reductions in wages or wage rates[9] in competing fields for the purpose of enabling the producers therein to meet such prices. Price competition has, therefore, resulted—not in any burden upon *interstate commerce* or any reduction of it—but in reduction of *wages* or *wage rates* of persons engaged within the several States in mining coal. In order that the miners may receive higher wages and the operators greater return the Act seeks to "stabilize the industry" by stabilizing wages and prices through Federal regulation of both.

That this, and not the regulation of interstate commerce, is the aim and purpose of the Act and of all of its provisions is established not only by the title, the legislative history of the Act, its text and the "economic facts" offered in its support, but by the manner in which obedience to its

[9]See footnote 6, page 26, *ante*.

regulatory provisions is sought to be enforced. The penalty tax (Sec. 3, Appendix, pp. *6-7,* fols. 18-22) is imposed upon *all* bituminous coal produced in the United States, whether the producer thereof sells any of his coal in interstate commerce or not. It is imposed upon captive coal, the producers of which are not engaged in commerce in coal, either state or interstate, but only in the production of coal for their own use. Nevertheless, these producers can escape the penalty tax only by becoming members of the Code and thus subjecting themselves to the labor provisions of the Act regulating the wages, hours and working conditions of their employees, and their labor relations with such employees. Since these captive mine owners are not engaged in the sale of coal, the purpose of compelling their obedience to the Code was not, of course, to subject them to price control. Its purpose was to subject them to the labor provisions of the Act, *i.e.,* a regulation of production, solely in the execution of the purpose to stabilize the industry through the stabilization of wages.

The prices to be fixed under the Act apply to all coal mined and sold within the United States by all Code members, whether sold in interstate commerce or not. All Code members are forbidden to sell coal either in state or interstate commerce at prices below the minimum or above the maximum fixed by the Act (Sec. 4, Part II(e), Appendix p. *17,* fols. 61-63). The only way in which an operator selling no coal in interstate commerce can escape observance of Code prices is by failing to join the Code, in which event he is subjected to the ruinous penalty tax provided by Section 3. There is no way in which a Code member, selling both in inter and in intrastate commerce, can escape observance of prices fixed for coal sold within the State and

never moving beyond it, without becoming guilty of a violation of the Code, and thus becoming subject to the full tax. The evidence shows that but 58% of the coal mined is consigned to interstate destinations, while 42% is not.[10]

By subjecting all to the penalty, labor, and price-fixing provisions of the statute, Congress thus made it manifest that its purpose is not to regulate interstate commerce in coal but to regulate the industry.

Congress may not, under the guise of the commerce power, regulate prices at which *all* coal may be sold irrespective of whether it is the subject of interstate commerce.[11] This is so despite the fact that effective control of the prices of coal sold in interstate commerce may not be exercised without assuming control of the prices of coal sold in intrastate commerce coming in competition therewith (R. 376; FF. 52, R. 134). No support under the commerce clause may be derived from the power exercised by Congress in respect of railroad rates for this attempt *wholly* to regulate intrastate transactions. The exercise of this power must be conditioned in every case upon proof of a resulting discrimination against interstate commerce, itself predicated upon a factual finding made in the exercise of the power exerted.[12] No blanket authority to exercise price control over any service or commodity, to the invasion of

[10]See pp. 41-42, *ante*.

[11]*Employers' Liability Cases,* 207 U. S. 463; *Trade-Mark Cases,* 100 U. S. 82, 96, where it was said with respect to the statute before the Court: "If its main purpose be to establish a regulation applicable to all trade, or to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress." See discussion, Point VII, *post*.

[12]*Houston & Texas Ry.* v. *U. S.*, 234 U. S. 342; *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.,* 257 U. S. 563; *Florida* v. *U. S.* 282 U. S. 194.

the reserved powers of the States, is within the power of Congress. Its attempted exercise in this case finds no parallel either in the decisions under the Transportation Act —distinguished as they are by the fact, among others, that in that instance Congress was regulating an instrumentality of interstate commerce—or in any provision of the Constitution.

The exercise of an assumed power to fix the price of all coal, whether sold in interstate commerce or not, is not the exercise of the power to regulate interstate commerce. If, however, the purpose of the statute was to stabilize the industry as a whole, control of all prices was an appropriate and necessary step in the execution of such purpose. This is evident not only from the face of the Act but also from the evidence of economic facts relied on in its support, from which it appears that at least 42% of the coal mined is not the subject of interstate commerce. For the purpose of regulating interstate commerce, this blanket provision is clearly in excess of Federal power. For the purpose of stabilization, its attempted exercise was necessary to bring this large volume of coal under the regulatory provisions of the Act. If the latter, as we insist, was the real purpose, such provision was not only necessary but it may not be fairly assumed that Congress would have passed the statute except for the inclusion under its regulatory provisions of coal consumed in the state in which mined and never passing outside of it. The extension of the statute to intrastate coal, therefore, is further and conclusive evidence that its purpose was not to regulate interstate commerce in coal but to regulate the entire industry itself in order to stabilize it.

3. The intended purpose and necessary effect of the Act is to allocate the production of coal among the several States, beyond the scope of any power conferred upon Congress, and in violation of the Tenth Amendment.

Congress is without power to regulate or control production.[1]

The necessary effect of the Act is not only to regulate the production of coal through its labor provisions, but to allocate the production of such coal among the several States, and the several mines. This is made plain by the price-fixing provisions of the Act, themselves. This would be true if the minimum prices were required to be fixed upon the basis of cost at each mine. It is no less true because such prices are to be "coordinated" so as to afford "the producers in the several districts substantially the same opportunity to dispose of their coals upon a competitive basis as heretofore existed" (Sec. 4, Part II(b), Appendix, p. *15,* fol. 53). What this means is not plain. No standard for the determination of such "heretofore existing opportunity" is created by the statute.[2] If it means preservation of the "competitive basis" as among the "several districts" at the time of the passage of the Act, the effect is to freeze production of coal in the several competing districts in the relative proportions in which they were producing and selling against each other at the time of the passage of the Act. If it does not refer to the "competitive basis" existing at the time of the pas-

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[1]See cases cited footnote 4, p. 84, *ante.*

[2]This alone is enough to render the price fixing provisions, even if considered independently, void for indefiniteness and as an unauthorized delegation of legislative power (See Point VIII, p. 236, *et seq., post*).

sage of the Act, it leaves to the district boards and the Commission the power to determine as to what period such "competitive basis" shall be determined, without guide or standard. But, whatever it means, it means in the last analysis power not only to control production through regulation of wages, hours, prices and like matters, but to allocate production as among the several States.

This is made plain both by the price-fixing machinery and by the geographical limits of the districts into which coal producing areas are to be divided for the purpose of price-fixing. The "coordination" is to be by districts. Its purpose is to fix relative minimum prices within such districts and at the several mines therein. Upon the relativity of the prices so fixed depends the ability of each mine to produce and sell. Although there does exist a limited amount of storage facilities for coal, it is undisputed that coal is customarily produced only for the purpose of filling orders already received (FF. 49, R. 133). Relative prices as among the several district and mines, therefore, control the amount of coal to be produced by each (FF. 47, R. 132), and this, of course, would be true whether production were usually preceded by orders or not, although less directly so.

Of the twenty-three price-fixing districts established by the Act, fifteen are located wholly within State lines (Districts Nos. 2, 3, 4, 5, 6, 9, 10, 11, 12, 16, 18, 19, 20, 22 and 23—Annex to Act—Schedule of Districts, Appendix p. *37, et seq.,* fol. 144, *et seq.*). The principal production of coal is in minimum price area No. 1, as defined in Sec. 4, Part II, sub-sec. (a) under the sub-heading "Minimum-Price-Area Table" (Appendix, pp. *11-12,* fols. 40-43). This minimum price area includes thirteen districts, each of which is in keen competition with the others, including, as

it does, substantially all of the Northern and Southern mines. Of these thirteen districts nine are located wholly within State lines. The necessary effect of the fixation of the relative minimum prices for these several districts and for each of the mines therein is, therefore, to allocate and control the quantity of coal to be produced in each of such districts. Where the boundaries of the districts are coterminous with State lines, this is a direct allocation to the State of the quantity of coal which may be produced therein. The same is also true where a State is divided into two or more districts. It is equally true where a district includes more than one State or parts of more than one State, particularly since the price-fixing agencies of the Act are not only empowered but directed to make variations in price at the several mines (Sec. 4, Part II (a), Appendix, p. *11,* fols. *37-38*). The Act thus confers upon the price-fixing agencies set up by the Act the power to allocate production and the duty to exercise its powers for that purpose through the fixation of relative prices.

This necessary effect of the Act is not the by-product of the regulation of interstate commerce. Its purpose is not to foster and promote interstate commerce in any proper sense of those words. Its intended purpose is not only to permit, but to require, such allocation as a necessary means of "stabilizing" the industry. It may be said that the purpose is to preserve competitive opportunity, but only that competitive opportunity which the statute and the action taken thereunder permits. Congress is without the power to say to West Virginia or Illinois how much coal it shall produce and where it shall sell it, either absolutely or in relation to each other. To assert the existence of such power in Congress is to assert its power to control

the economic life of the several States under the guise of regulating interstate commerce, and because the products of those States find markets outside the State of their production. To state this proposition is to answer it. Yet it is obvious that the whole purpose of the Act fails unless its purpose to control and allocate production by the coordination of prices, as well as the regulation of wages, hours and labor relations, may be carried out. It is by these means and these means alone that the industry is to be stabilized. Its purpose is not to promote interstate commerce but to determine the extent to which the several States may engage therein. Under its provisions opportunity to engage further in interstate commerce and the extent of such engagement ceases to be a matter of right and becomes one of privilege to be exercised only insofar as the administrative agencies set up by the Act permit.[3]

That one of the chief purposes of the Act is to allocate production among the several states is made plain by the evidence of "economic facts" offered by the Government in support of the Act. From this evidence, it appears that of late years the keenest rivalry to be found in any part of the industry is that between the Northern mines (Pennsylvania, Ohio, Indiana and Illinois) and the Southern mines (Kentucky, Virginia and West Virginia) for the sale of coal in competing markets of consumption. It also appears that as a result of this rivalry there has been a steady increase in the proportion of tonnage supplied by the Southern mines in these consuming markets, and a steady decrease in that supplied by the Northern mines (FF. 70-74, R. 144-146). It also appears that the diver-

[3]As to the right to engage in interstate commerce see Point V, at pp. 153, 184, 188, *post*.

sion of tonnage from the Northern mines to the Southern mines in the past has been due in substantial measure to the relatively lower wage rates paid in the South,[4] particularly at a period when the Northern mines were unionized and the Southern mines were not. By subjecting all to the payment of wages and the observance of hours to be determined as to all by the United Mine Workers, the labor provisions of the Act are intended to control the relative cost of mining in these two competitive areas of production. Minimum prices are then to be based upon such costs, to be coordinated, however, so as to afford producers in the Northern and Southern fields respectively "substantially the same opportunity to dispose of their coals upon a competitive basis as has heretofore existed". The purpose, as well as the effect, therefore, however this indefinite phrase may be construed, and however it may be administered, is to delegate to the price-fixing agencies, set up under the Act, the power to determine how much coal shall be mined in each of these competing States. This is so because their ability to produce depends, of course, upon their ability to sell.

Witnesses for the Government testified that effective control of the industry could not be brought about without a control and allocation of production (R. 326, 363-4). This statute does not, in terms, confer power to allocate production among the several States capable of producing coal, or among the mines engaged therein. The intended purpose, as well as the necessary effect of the price-fixing machinery, however, is to confer upon the price-fixing agencies the

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[4]There is, however, evidence and a finding that the Southern mines during such period have also enjoyed other advantages, including better quality coal, better natural conditions such as thicker seams, etc. (FF. 74, R. 145-146).

power to allocate production[5] among districts upon an indefinite standard of heretofore existing "opportunity", and to exercise the same power in respect of the several mines, since the same price-fixing agencies are empowered to vary the prices within a given district, mine by mine.

The object and purpose of this statute is thus not to regulate interstate commerce in coal, but to stabilize the industry by the regulation of wages, by the prevention of free competition, and by the allocation of production among the States, to the end that the producers as a whole may obtain larger returns from their operations, and the miners higher wages than in the past. Otherwise expressed, the purpose is to insure to those engaged in the industry, whether operators or miners, a larger share of the national income than they have heretofore enjoyed.

4. Congress is without power, generally, either to stabilize or regulate productive industry, and certainly without power to allocate the production of ordinary articles of commerce among the States.

None of the powers stated is within the enumerated powers specifically delegated to the Congress. To read them into the Commerce Clause is in effect to convert that clause into a general welfare clause, under which the Congress would be empowered to enact any statute, affecting the economic life of the Nation, deemed by it to be wise

[5]The introductory section of the Act states that: "It is further recognized and declared * * * that *control of such production* and regulation of the prices * * * are necessary to promote its interstate commerce * * *" (Appendix, p. *3,* fol. 6). The Pennsylvania operator, O'Neill, a Government witness testified that: "I think *price control* can be made to function almost as a *production control* temporarily * * *" (R. 363).

or expedient for the purpose of promoting the national welfare. However broad or narrow the scope of the power to regulate interstate commerce, it does not extend this far, nor does it include the power generally to stabilize or regulate productive industry or allocate production among the several States (See Point V, pp. 140-216, *post*). So to construe it would be contrary to the reserved powers of the States and the people, embodied in the Tenth Amendment, and contrary to the whole scheme of the Constitution.

5. The Act may not be sustained unless its provisions and purpose bear a reasonable relation to the regulation of interstate commerce.

This is well settled.[1] In *Linder* v. *United States,* 268 U. S. 5, 17, the Court stated it to be "established doctrine" that:

> "any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced."

As stated in *Adair* v. *United States,* 208 U. S. 161, 178:

> "Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the

[1] *Adair* v. *United States,* 208 U. S. 161, 178; *Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 347; *Hammer* v. *Dagenhart,* 247 U. S. 251, 276; *Child Labor Tax Case,* 259 U. S. 20, 37. See *Mugler* v. *Kansas,* 123 U. S. 623, 626; *Triegle* v. *Acme Homestead Association* (decided February 3, 1936, p. 6).

> competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulated."

In *Mugler* v. *Kansas,* 123 U. S. 623, 661, the Court, speaking of the scope of the police power,[2] said:

> "* * * If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Unless, therefore, the purpose of the Act and the means of its attainment bear a reasonable relation to the power delegated, the Act falls outside the power. Otherwise the Federal Government would cease to be a government of limited and enumerated powers.[3]

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[2]The requirement of reasonable relation is also a component of due process. See *Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 347.

[3]In those cases in which the court divided there was no difference of view as to the test, but only as to its application. See *Chicago B. & Q. Ry. Co.* v. *Drainage Commissioners,* 200 U. S. 561, 593, where the Court, adverting to this rule, remarked that "Upon the general subject there is no real conflict among the adjudged cases."

6. Neither the purpose of the statute nor the means adopted for its accomplishment bear any reasonable relation to the regulation of interstate commerce.

A. THE BASIC CONTENTION OF THE GOVERNMENT AND THE SO-CALLED ECONOMIC FACTS UPON WHICH PREDICATED ARE PRECISELY THOSE SUBMITTED AND REJECTED IN SUPPORT OF THE CONSTITUTIONALITY OF THE NATIONAL RECOVERY ACT; AND, IF ACCEPTED, WOULD BE EQUIVALENT TO THE ACCEPTANCE OF A CONCEPT OF THE COMMERCE POWER UNDER WHICH CONGRESS COULD REGULATE ALL PRODUCTIVE INDUSTRY.

The basic argument of the Government in the Court below was as follows:

> (1) That bituminous coal is an essential commodity, necessary for the maintenance of industrial activity and for the transportation of other articles in interstate commerce;
>
> (2) That it is produced in some, only, of the States, its principal production being confined to four States, while it is used in all;
>
> (3) That over a period of years the wages paid and returns received have been inadequate;
>
> (4) That only the Federal Government can effectively control and regulate the industry so as to eradicate the unsatisfactory conditions existing therein, and hence
>
> (5) That it is competent for the Congress to declare such industry to be affected with a national public interest, and assume regulation and control thereof.

Precisely the same considerations were pressed upon the Court in *Schechter Corp.* v. *United States,* in support of the constitutionality of the National Recovery Act. In that case the argument was, not that a single industry was demoralized, but that all industry was demoralized; that producers were receiving inadequate prices, resulting in inadequate returns, and that workers were receiving insufficient wages, resulting in a reduction of purchasing power and in the creation or continued existence of social evils calculated to produce disorder and unrest; that these conditions affected interstate commerce and could be remedied only by the Federal Government, since the States, acting by themselves, were powerless to meet the situation. All of these arguments were rejected by the Court, either directly or by necessary implication. The parallel between the basic contentions of the Government in this case and in that case is demonstrated by the following excerpt from the reporter's analysis of the argument for the United States in that case:

> "It is submitted that what practices and conditions materially affect interstate commerce, so as to be within federal control, is a question of fact. Trade practices and labor conditions, which in normal times would have only an indirect and incidental effect upon interstate commerce, may substantially burden interstate commerce during a period of overproduction, cutthroat competition, unemployment, and reduced purchasing power. * * *"
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> * * *
>
> "The provisions of the Code are supported also on an independent ground: they are in one aspect part of a comprehensive effort by Congress to remedy the breakdown of interstate commerce which culminated in 1933. In this view, practices which

contribute to a sharp decline in wages, prices and employment, contribute to a frustration of commerce among the States and are subject to federal regulation in the interest of protecting and promoting that commerce. *Atchison, T. & S. F. Ry. Co.* v. *United States,* 284 U. S. 248, 260; *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 372.

"Congress alone could deal effectively with the causes contributing to the breakdown of interstate commerce. Nor could the situation have been met by separate action of the States. It would have been impossible to obtain prompt and uniform action by the individual state legislatures; and applied to interstate commerce, their legislation would be invalid. *Baldwin* v. *Seelig, Inc.,* 294 U. S. 511."

* * *

"* * * Congress must have power to deal with activities and practices which, because of their widespread character and effect, contribute substantially to the impairment of interstate commerce as a whole."

* * *

"The contention is not that Congress may control any form of activity which may conceivably to some degree affect interstate commerce, or that an economic crisis confers such power. The contention rests upon the facts. The depressed state of the national economy made it evident that interstate commerce was demoralized and endangered by acts which under other conditions might not seriously affect it. * * *"

"An additional basis on which the wage and hour provisions rest is that they are reasonable means for the prevention of labor disputes arising out of those subjects, and so are adapted to protecting interstate commerce from the burdens caused by labor disturbances. * * *" (pp. 512-514).

The Government's argument in support of the validity of the regulation of this single industry is, therefore, basically the same as that addressed to the Court in support of the power sought to be exercised in the National Recovery Act over all industry. There is, however, one important distinction, which makes the instant case an infinitely weaker case for the Government than was the *Schechter* case. In that case the demoralization of all industry, which gave rise to the enactment of that statute, had actually reduced the volume of interstate commerce, whereas in this case the evidence of "economic facts" relied upon by the Government shows that the conditions prevailing in the industry, and which it is the purpose of this Act to cure, have not affected the volume of coal moving in interstate commerce but only the distribution of its production among the several producing states, and this not as a result of monopolistic practices or artificial restraints, but as a result of the free play of competition among producers in keen rivalry with each other.

If in a time of nation-wide depression Congress, for the purpose of stimulating industrial activity, may not assume control over all industry, clearly it may not assume such control for the purpose of increasing that share of the national income to be derived by those engaged in a single industry, whether producers or workers, because believed by Congress to have been chronically insufficient over a period of years. If it may, Congress thus becomes the guardian of all industry and the sole judge of the time and circumstances under which it may assume such guardianship. Planned economy and full and complete paternalism in respect of all our economic activities awaits only an Act or series of Acts of Congress to be made effective. But this cannot be so. However distressing

conditions in an industry may be, whether it be coal or agriculture, the Constitution does not confer upon Congress the power to wrest control of that industry from its owners solely because they have not been able to make a success of it, whether their failure be due to their own incompetence or to economic causes beyond their control.

Insofar as the argument is predicated not upon the condition of the industry but upon its relation to our national economy, there is no substantial distinction between the coal industry and any other. Coal is no more of a national necessity than wheat, corn, cotton, cattle, iron ore and its products, salt, oil, clothing and many other articles that could be named. As in respect of coal, the predominant production of each of these is confined within a few States, while their consumption is nation-wide (Pl. Ex. 81-81X, R. 966-983). To sustain the power asserted upon this ground would be to sustain the power of Congress to regulate piecemeal, one by one, substantially every productive industry in the country—for there is none in respect of which the same relation between productive and consumptive States does not exist. Thus, by a series of Acts, Congress would be enabled to exercise the power specifically denied to it in the *Schechter* case when attempted through the enactment of a single law pertaining to all industry.

7. None of the objects and purposes of the Act, as evidenced either by the Act itself or by the economic facts relied on, bears any reasonable relation to the regulation of interstate commerce, but, on the contrary, they conclusively negative the existence of such relation.

The Act may not be sustained as one having for its purpose the removal of "burdens" or "restraints" upon

interstate commerce, or "obstructions" thereto. This is so because the economic facts relied on fail to disclose the existence of any such.[1]

It is true that the trial court in certain of its ultimate findings of fact found the existence of burdens, obstructions and restraints (FF. 180, 181, 182, 184, R. 210-212). These findings, excepted to by the petitioner (R. 239), are unsupported by and contradictory to both the evidentiary findings and the evidence itself, as appears from the summary review of the evidence in the statement, at pp. 7-9, *ante,* and in the more detailed Review of the Evidence, at pp. 28-62, *ante.*

But it is unnecessary to go either to the evidentiary findings or the evidence to show that these so-called ultimate findings of fact in respect of "burdens", "restraints" or "obstructions" are entitled to no consideration. On their face, and when read in the light of other findings of ultimate fact upon which they depend, they are clearly based upon a misconception of what constitutes a "burden", "restraint" or "obstruction" in the legal and constitutional sense.

What is a "burden" or "restraint" upon interstate commerce or an "obstruction" thereto in a legal and constitutional sense is in the last analysis a question of law and not of ultimate fact, although its determination will depend upon questions of fact. That this is so is evident from a consideration of the inherent limitations of the interstate commerce power itself, which is not the equivalent of a power to regulate any and all matters "affecting" interstate commerce.[2] It is evident from a consideration of the

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[1]See Statement, pp. 7-9, *ante;* and Review of Evidence, pp. 28-62, *ante.*

[2]*Schechter Corp.* v. *United States,* 295 U. S. 495.

Acts passed under the commerce power—notably the Anti-Trust Acts—and the cases interpreting the same. The Sherman Act in terms forbids any contract, combination or conspiracy "in restraint of" interstate commerce. Under such Act what is a restraint is a question of law. Not every restraint is within the Act. An ultimate finding of fact by a district court in an anti-trust case that a given contract or combination restrained interstate commerce would be without legal significance on appeal as a finding of fact. The question on appeal, as below, would be whether the facts relied on to support such conclusion established the existence of a "restraint" upon interstate commerce in the legal and constitutional sense.

Similarly what constitutes an "obstruction" to or "interference" with interstate commerce is a question of law and not one of ultimate fact, although dependent upon the evidentiary facts. A strike resulting in complete stoppage of production at a mine and in the destruction of the mine itself results in an "obstruction" to, or interference with, interstate commerce by preventing and destroying it. But since the effect upon interstate commerce in such case is indirect and not direct, the resulting obstruction or interference is not an obstruction or interference within a legal or constitutional sense.[3] This and other kindred cases,[4] although involving questions of statutory interpretation only, were held by the Court in *Schechter Corp.* v. *U. S.*, *supra,* as expressive of constitutional limitations as well.

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[3]*United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344.

[4]*United Leather Workers* v. *Herkert,* 265 U. S. 457; *Industrial Association* v. *United States,* 268 U. S. 64; *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103.

On their face, and read in the light of other findings of ultimate fact upon which they depend, it is obvious that the findings referred to are based upon the erroneous assumption that diversions of tonnage from one district to another (resulting from the play of free competition, and referred to in the findings, in the answer of the Government, in the evidentiary findings and in the findings of fact as "dislocations"), constitute a burden or restraint upon interstate commerce. On the contrary, they are, of course, the normal result of free competition.

All of the findings (FF. 180, 181, 182 and 184, R. 210-212) in which the words "burden," "restraint," and "obstruction" occur purport to set out the effect of "destructive competition". They must, therefore, be read in the light of the immediately preceding findings (FF. 178, 179, R. 210) in which "destructive competition" and its nature and cause are set forth. Reading all these findings altogether, as they must be, they amount to this:

1. That "unrestrained and destructive competition" has existed in the industry for many years (FF. 178, R. 210). This is equivalent to a finding of the absence of monopolistic control or artificial restraint and of the existence of uncontrolled and "unrestrained" competition.

2. That these "competitive conditions * * * have led to *destructive price cutting*" resulting in the receipt of inadequate prices by producers (FF. 179, R. 210). This is again an affirmative finding of the existence of the free play of competition and of its effect upon profits, not upon interstate commerce.

3. That "such *destructive price cutting*" (*i.e.,* that described in Findings 178 and 179) has caused "substantial diversions" of tonnage or so-called "dislocations." But diversions from one producing area to another are the com-

mon and necessary result of the free play of competition in an industry where, as found with respect to the coal industry, such competition is severe and unrestrained. In so far as these are said to constitute "dislocations" of the "normal flow" of commerce the finding is without support in the record. There is no evidence and could be none as to such "normal flow". It is not, of course, the function of the Federal Government under the Commerce Clause to determine how much coal shall be supplied from one field as against another. Diversions due to the free play of competition do not constitute burdens or restraints upon, interferences with, or obstructions to interstate commerce or "dislocation" of its "normal flow." These are mere words, indicative of the free play of competition and of the absence of burdens and restraints.

4. That "such unrestrained and destructive conditions" have given rise to "unfair practices" serving "to further demoralize the industry" (FF. 181; R. 210).

5. That "disparities" in wages rates in competing areas of production resulting in "disparities in prices" have resulted in *diversions* of tonnage from one competing area to another and *consequently* in burdening, restraining and obstructing interstate commerce (FF. 182; R. 211). This is only another way of saying that free and unrestrained competition in the industry has given rise to "disparities in wage rates", resulting in "disparities in prices", and thereby affecting the proportion of tonnage moving from one district or another under the free play of competition. But this result is in no legal sense a burden or restraint upon interstate commerce. On the contrary, it discloses a lack of restraint. And, as we have repeatedly said, the complaint is not of the existence of artificial restraints but that competition is too free. Moreover, in so far as diversions of tonnage are due to "disparities in wage rates" they are beyond

the power of Congress to control as a "burden", "restraint", "obstruction" or interference with interstate commerce,[1] as the trial court itself recognized in holding the labor provisions of the Act to be unconstitutional.

6. That "such unrestrained and destructive competition * * * and the cutting of wage rates before described" have resulted in strikes, suspension of work and interruption and obstructions to interstate commerce (FF. 184, R. 211-212). This is no more than a finding that when there is a suspension of work due to strikes or other causes interstate commerce from the mine affected ceases; but the resulting "interruption" is not an "obstruction" or interference with interstate commerce in the legal and constitutional sense[2], as the trial court recognized in declaring invalid the labor provisions[3].

It is obvious, therefore, upon the face of each of these findings itself, when read in the light of the preceeding findings descriptive of what is meant by "destructive com-

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[1]*Schechter Corp.* v. *United States,* 295 U. S. 495.

[2]*Schechter Corp.* v. *United States, supra; United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344; *United Leather Workers* v. *Herkert,* 265 U. S. 457; *Industrial Association* v. *United States,* 268 U. S. 64; *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103.

[3]This same finding (FF. 184, R. 211) contains the statement that such strikes "have caused violent and wide fluctuations in the price of bituminous coal to the consuming public." This finding of so-called ultimate fact is directly contrary to the court's evidentiary findings (FF. 97-99, R. 162-163) from which it appears that there have been no violent fluctuations since the early part of 1923, and that from 1926 to 1934 (FF. 99, R. 163) coal prices have fluctuated less than either "the average of all commodities or the average of all raw materials or of the following specific commodities: Non-ferrous metals, petroleum products, lumber, cotton goods, and hides and skins." Only during the war period and the immediate post war period, both wholly abnormal, have there been any wide fluctuations in the price of coal for 35 years (R. 1002). But assuming there were, it is difficult to perceive upon what theory Congress could assume regulation and control of productive industry to prevent the recurrence of wide or violent fluctuations in price due to the free play of competition.

petition", or price cutting, that the court below proceeded upon the erroneous assumption that diversions of tonnage resulting from the free play of competition or inadequacy of prices or wages due to the same cause or interruption of movement due to labor disputes, constitute "burdens" or "restraints". This is a new conception of these words, utterly contrary to previous decisions of this Court. Moreover, if the existence of such consequences may be the predicate for Federal regulation of industry, it is obvious that it has no limits and may be exercised in any case where Congress is of the opinion that the geographical distribution of interstate sales, resulting from the play of free competition, is inequitable, or that the prices received are inadequate, or that labor disputes or the potentiality of labor disputes have or may interrupt the movement of commerce. Congress is, of course, possessed of no such power. It thus appears that the court in its findings was proceeding upon a wholly erroneous conception of the law in trying to justify its decision upon the power of Congress to remove burdens or restraints to interstate commerce. On the contrary the ultimate findings disclose the complete absence of "burdens," "restraints," or "interruptions," as these words are understood either in law or in trade.

Neither may the Act be sustained as one to promote, foster and protect interstate commerce. The purpose is not to promote, foster and protect interstate commerce from any evil of any description whatsoever, but to promote the interests of persons engaged in the production of coal, a part of which is sold in interstate commerce. This is not a protection of interstate commerce but an act designed to improve the economic well-being of persons engaged in an industry. If, under the guise of regulating interstate commerce, Congress may seize upon the coal industry and regulate its activities for that purpose, then clearly it may equally seize upon any other industry similarly en-

gaged in the production of goods, thereafter finding their way, in part, in interstate commerce, and regulate its activities. Neither the regulation nor promotion of interstate commerce, as such, is the purpose of this statute. Its object is to regulate productive industry, in which interstate commerce is now free, by subjecting its operations to Federal control. There is neither finding nor evidence that one additional ton of coal will move in interstate commerce under the provisions of this Act than before its passage, or that one additional ton of coal will be mined and offered for sale in such commerce. On the contrary, the effect of the statute, if any, will be to reduce the volume of coal produced and moved in interstate commerce through increases in price tending to the substitution of other fuels and increased fuel burning efficiency (FF. 53-55, R. 134-136, FF. 75, R. 146-147; Pl. Exs. 22-34, R. 817-865).

After all the weeks consumed in the taking of testimony, the record is barren of the existence of restraints, burdens, obstructions, interruptions, or any factor whatsoever, the eradication of which would promote interstate commerce in coal. What the record is full of is evidence of an over-expanded industry, in which the keenest competition exists, as a result of which the economic well-being of those engaged therein is not as satisfactory as might be wished. But Congress is possessed of no general welfare power. It may not, under the guise of regulating interstate commerce, seek to control the productive activities of the people in the various States for the purpose of improving their economic well-being. Such power, if to be exercised by government at all, must be exercised by the State, and to the extent not possessed by the State Government has been reserved to the people, to be exercised by them, if occasion requires, through amendments to State or Federal Constitutions.

What has been said is sufficient to dispose both of ultimate findings of fact and of the evidence of record in so far as they pertain to burdens and restraints upon interstate commerce in the ordinary sense of the word.

It remains only to consider the legal effect of the "unfair competitive practices" referred to in FF. 181 (R. 210) as the result of "unrestrained and destructive competitive conditions". As appears from this finding the practices referred to are those set forth in Finding 166. That finding (R. 207) is a finding of the past and present existence of practices described in paragraphs 2 to 12, inclusive, of subsection (i) of Part II of Section 4 of the Act. In the same finding the court found that such practices "are not and have not been engaged in by reputable firms and are not and have not been the general practice." It also found that "similar practices existed and exist in other industries."

The pursuit of such practices, whether constituting a burden or restraint in the legal and constitutional sense or not, is no warrant for the enactment of a statute assuming complete control over the industry itself. The practices referred to (Section 4, Part II, paragraph (i)) relate to various devices employed for the purpose of underselling a competitor. Assuming for the sake of argument, that all the practices described are within the power of Congress to control under the Commerce Clause, they may be eradicated by appropriate legislation confined to that purpose. This Congress has done by prohibiting their use pursuant to the unfair practice provisions of the Act (Sec. 4, Part II, par. (i)), and it clearly exhausted its power by such prohibition, assuming *arguendo* that it had any. The existence of some competitive practices of the type proscribed cannot be made a predicate upon which to support the re-

maining provisions of the Act seeking to bring the industry within a complete scheme of Federal regulation. Regulation of wages and prices has neither a reasonable relation to unfair practices in interstate commerce, nor would they be a means reasonably adapted to the removal of such practices. On the contrary, regulation of wages and prices would in themselves not put an end to such practices. Such practices, to the extent that they may be within the reach of the commerce power, may be adequately dealt with by themselves. Their existence cannot be made the excuse for an invasion of the rights reserved under the Tenth Amendment through the attempted subjection of the whole industry, in all its aspects, to Federal regulation.

This argument receives added force when it is recalled that the Court found that "similar practices existed and exist in other industries" (FF. 166, R. 207). If the existence of such practices, therefore, may be made the predicate for Federal regulation of this industry, there is no limit to its exercise. It is therefore unnecessary to consider the practices prohibited one by one for the purpose of determining whether or not each is within the power of Congress to prohibit under the commerce clause. The evils resulting therefrom may be corrected, as they have been, by direct enactment. Regulation of the industry, including regulation of labor relations and prices is neither necessary nor appropriate for this purpose and cannot be based upon the existence of such practices.

The statute, therefore, may not be sustained as one having for its purpose the removal of "burdens or restraints upon interstate commerce or obstructions thereto" since the economic facts relied on in support of the statute fail to disclose the existence of any such. On the contrary the purpose of the statute is to create restraints upon the free flow of interstate commerce, by legislative fiat, in order to "stabilize" the industry.

POINT III

THE LABOR PROVISIONS OF THE ACT ARE INVALID.

1. The wage and hour provisions of the Act are not within the Commerce Clause.

The statute requires that all producers subscribing to the Code shall observe wages and hours determined in accordance with the provisions of the Act, the inclusion of which within the Code is made mandatory upon the Commission (Sec. 4, Part III (g), Appendix, pp. *24-25,* fols. 91-93).

The Act provides that hours of labor agreed upon by operators representing two-thirds of the national tonnage and miners representing fifty per cent. of the total number of miners within the country as a whole shall be observed by all producers, whether parties to such agreement or not (Sec. 4, Part III(g), Appendix, pp. *24-25,* fols. 91-93). It further provides that the wages to be paid by all producers in any given district shall be those agreed upon by producers representing two-thirds of the tonnage in such district and miners representing fifty per cent. of the total number of miners in such district (*Id.*). In other words, every coal producer in the United States is required to observe wages and hours as determined by agreement between the requisite proportion of producers and miners set forth in the statute, and every miner in the United States is required to accept the wages so fixed and to observe the hours so determined, whether a party to such agreement or not. Obedience to these provisions is sought to be compelled, upon the part of the producers, by the penalty tax prescribed

in Section 3 of the Act (Appendix, pp. *6-7,* fols. 18-22). Only those producers conforming to such provisions may escape the payment of such penalty tax, and only so long as they observe them. Any producer found by the Labor Board established under the labor provisions of the Code to have violated such wage and hour regulations becomes immediately subject to expulsion from the Code (Sec. 5(b), Appendix, pp. *25-26,* fols. 94-98) and to payment of the penalty tax, whether expelled or not (Sec. 3, Appendix, pp. *6-7,* fols. 18-22). The Act, therefore, seeks to subject to Federal regulation wages to be paid and hours to be worked throughout the industry.

That Congress is without power to regulate wages and hours in productive industry was authoritatively decided by this Court in *Schechter Corp.* v. *United States,* 295 U. S. 495. Notwithstanding this decision and prior decisions of the Court, leading to the same conclusion, the Government, in the court below, urged that the wage and hour provisions of the Act were within the power conferred upon Congress by the Commerce Clause. These arguments will without doubt be renewed in this Court:

1. The Government, in the court below, sought to distinguish the *Schechter* case upon the ground that the activities in which the defendants were engaged in that case were strictly local in character, since it appeared that interstate commerce had ceased in the articles in respect of which the labor therein sought to be regulated was performed. It is plain, however, that the decision of the Court was predicated upon no such narrow ground. It was based primarily upon the proposition that the effect of wages and hours upon interstate commerce is indirect only, and hence beyond the power of Congress to regulate.

The Court said:

> "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, but the distinction is clear in principle. Direct effects are illustrated by the railroad cases we have cited, as *e.g.,* the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control. As we said in the *Minnesota Rate Cases,* 230 U. S. 352, 410: 'In the intimacy of commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. The development of local resources and the extension of local facilities may have a very important effect upon communities less favored and to an ap-

preciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the State enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the State.' See, also, *Kidd* v. *Pearson,* 128 U. S. 1, 21; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, 259, 260" (pp. 546-547).

Moreover, wages and hours are an incident of production and not of commerce, whether the article of commerce in respect of which the labor involved is performed is an article produced for subsequent movement in interstate commerce or one which has come to rest in the State and is being prepared for further use as an article of State commerce. This is so because production is not commerce, but the mere preparation of articles for the commerce therein which may follow. In a long line of decisions preceding the *Schechter* case the Court held that the production of articles intended for subsequent movement in interstate commerce was not subject to regulation by the Federal Government[1]. These cases included mining as well as other operations. In three of these cases the question was whether the mining of coal was interstate commerce and as a consequence was within the reach of the com-

[1]*Kidd* v. *Pearson,* 128 U. S. 1; *Hammer* v. *Dagenhart,* 247 U. S. 251; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172; *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis,* 238 U. S. 439; *United Leather Workers* v. *Herkert,* 265 U. S. 457; *Utah Power & L. Co.* v. *Pfost,* 286 U. S. 165; *Champlin Refining Co.* v. *Commission,* 286 U. S. 210; *Chassaniol* v. *Greenwood,* 291 U. S. 584.

merce clause[2], and in a fourth the same question was presented in respect of iron ore[3]; and in each of the cases the Court held that such mining was not interstate commerce. The distinction sought to be made is, therefore, inconsistent not only with the *Schechter* case itself but with all prior decisions of this Court.

2. The Government also contended below that the regulation of wages and hours in the coal industry was subject to Federal regulation because it was said wages constituted 60% or 65% of the total cost of production, and were hence the controlling element in the determination of price, which in turn affected the volume and distribution of coal produced. The same argument was made and rejected in the *Schechter* case. In that case it was earnestly insisted that since prices affected the volume and distribution of interstate commerce, and wages and hours affected prices, wages and hours were, therefore, within the power of Congress to regulate under the Commerce Clause. In that case, as in this, the Government sought to extend the operation of the Commerce Clause to activities that "affected" interstate commerce. This argument was rejected by the Court and is equally without force here. It may be noted in passing that in that case it appeared that 50-60% of the operating costs of the defendants was represented by wages (295 U. S. 548). The power of the Federal Government is not to be determined by the degree to which wages and hours affect prices, but by the manner in which they are affected. The primary question is one of power. And, as pointed out in the opinion in the *Schechter* case, if Congress may

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[2]*United Mine Workers* v. *Coronado Coal Co., supra; Heisler* v. *Thomas Colliery Co., supra; Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis, supra.*

[3]*Oliver Iron Co.* v. *Lord, supra.*

control one element of cost affecting price, and hence affecting interstate commerce, it may control all elements of cost, and hence assume complete control of the processes of production. The Court said:

> "The argument of the Government proves too much. If the federal government may determine the wages and hours of employees in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation of cost would be a question of discretion and not of power" (p. 549).

The question is not as to the extent to which wages and hours, or any other item of cost, affect total cost or price, but whether the effect upon interstate commerce is direct or indirect. That it is equally indirect, whether the element of cost sought to be regulated represents a large or small proportion of cost, is clear. The power of Congress under the Commerce Clause does not depend upon the degree to which the activity sought to be brought within Federal regulation affects interstate commerce, but upon the manner in which it affects it. Since the regulation of production is not within the Commerce Clause (see cases footnote 1, p. 116, *ante*), and since the regulation of wages and hours is a regulation of production, the relation between the wages paid in a given industry and the total

cost of producing the articles produced by such industry is wholly immaterial.

3. It was argued below that Congress might regulate wages and hours in the coal industry for the purpose of avoiding interruptions to the movement of interstate commerce by preventing labor disputes causing such interruptions. The same argument was made (Argument for the United States, 295 U. S. at 514) and rejected in the *Schechter* case. Indeed, if Congress may regulate wages and hours in the coal industry for this reason, it may regulate wages and hours in all industries. The possibility of interruption to commerce by reason of such disputes is equally present in all, as shown by this record (FF. 135, R. 190; Pl. Ex. 75, 75A, R. 954B-954C). Moreover, this Court has repeatedly held that interruption to interstate commerce on account of labor disputes directly affecting local activities alone, and only indirectly affecting interstate commerce, is not within the reach of Federal power.[4] While these cases involved primarily the interpretation and application of the Sherman Act, the Court, in its opinion in the *Schechter* case, made it plain that the test was the same in respect of the extent of constitutional power.

Speaking of these cases and applying them to the argument that Congress may regulate wages and hours for the purpose of preventing stoppage of interstate commerce arising out of labor disputes, the Court said:

> "In the case last cited [*Levering & Garrigues* v. *Morrin, supra*] we quoted with approval the rule

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[4] *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344; *United Leather Workers* v. *Herkert,* 265 U. S. 457; *Industrial Assn.* v. *United States,* 268 U. S. 64; *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103.

> that had been stated and applied in *Industrial Association* v. *United States, supra,* after review of the decision, as follows: 'The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act.' "
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> "While these decisions related to the application of the federal statute, and not to its constitutional validity, the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government * * *" (pp. 547-548).

Interference with, or prevention of, production by reason of labor disputes, although indirectly affecting interstate commerce, may not be made the predicate of action by Congress.

4. Neither may Congress regulate wages and hours for the purpose of increasing the purchasing power, social security or standards of living of employees engaged in the production of articles subsequently to move in interstate commerce. This argument was also made and rejected in the *Schechter* case. Such objects, so far as within the power

of government to promote, rest wholly within the control of the States. This is so because the accomplishment of such objects only indirectly affects interstate commerce, and is primarily the concern of the States. It is so for the more fundamental reason that so to interpret the Commerce Clause would be equivalent to converting it into a general welfare clause whereby power to legislate generally for the promotion of economic and social welfare within the States would rest with the Federal Government. No such power was conferred or sought to be conferred.

5. Equally unavailing is the argument that only the Federal Government, by Federal regulation, can bring about that uniformity of wages and hours or relation of wages and hours among producing districts necessary to prevent producers in one State from obtaining an advantage in interstate markets over producers of another State paying lower wages or working their employees longer hours. This argument, like all others made by the Government in the court below, was made and rejected in the *Schechter* case. It is an argument equally applicable to all productive activity. It is an argument which, carried to its logical conclusion, would convert the Federal Government from one of delegated and enumerated powers to one capable of exercising complete control over the economic life of the several States. It is based upon the false assumption that the Constitution attempted to confer upon the Federal Government plenary power to legislate for all the States in all matters in which uniformity of practice might appear to Congress at any time to be desirable in the national interest.[5] No such power was conferred or intended to be

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[5] *Kansas* v. *Colorado,* 206 U. S. 46, 89-91.

conferred.[6] Had it been intended to be conferred, the careful enumeration of powers conferred upon the Federal Government would have been wholly unnecessary. Under this theory, Congress could at any time assume control of any activity carried on within the States in any manner affecting interstate commerce, and hence regulate all productive industry. Under all of the decisions of this Court, as well as under the fundamental scheme of government embodied in the Constitution, Congress is without such power.

As stated in the *Schechter* case, referring to the necessity of limiting the interference of the Congress with intrastate activities to such only as directly affect interstate commerce:

> "While these decisions [under the Anti-Trust Acts] related to the application of the federal statute, and not to its constitutional validity, the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government. We must consider the provisions here in question in the light of this distinction" (295 U. S. at p. 548).

2. The wage and hour provisions are invalid as an unauthorized delegation of legislative power.

Under the Act, power to determine wages and hours to be observed by all producers in the industry is delegated

[6]See Debates in Constitutional Convention discussed in Point V, *post.*

to the stated percentages of operators and miners agreeing thereon (Sec. 4, Part III(g), Appendix, pp. *24-25,* fols. 91-93). This is a clear delegation of legislative power and in itself is sufficient to render the provisions unconstitutional since no standard whatsoever is prescribed.[1]

Not only is no standard prescribed, but the delegation is not to public officers but to private persons, constituting a further reason why these provisions of the Act are void as an unauthorized delegation of power.

Unlike the National Industrial Recovery Act, under which the codes did not take effect until they had received the *imprimatur* of the President,[2] insofar as wages and hours are concerned, the Guffey Act requires no executive action by any duly appointed officer of the Federal Government. As pointed out in the *Schechter* case,[3] the cases are clearly distinguishable in which the Congress has relied upon private citizens with respect to local or trade customs[4] or with respect to regulations of a purely technical nature.[5] Under the Constitution, the executive power must be invested either in (1) primary officers whom the President shall have nominated, and by and with the advice and consent of the Senate appointed, or (2) inferior officers appointed either by the President alone or by the Courts of Law or by the heads of depart-

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[1]*Schechter Corp.* v. *United States,* 295 U. S. 495, 530; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 414.

[2]*Cf. Schechter Corp.* v. *United States,* 295 U. S. 495, 529, and concurring opinion at pages 551-552.

[3]295 U. S. 495, at page 537.

[4]*Jackson* v. *Roby,* 109 U. S. 440, 441; *Erhardt* v. *Boaro,* 113 U. S. 527, 535; *Butte City Water Co.* v. *Baker,* 196 U. S. 119, 126.

[5]*St. Louis & Iron Mountain Ry. Co.* v. *Taylor,* 210 U. S. 281, 286.

ments.[6] As said in *Ekiu* v. *United States,* 142 U. S. 651, 663:

> "The Constitution does not allow Congress to vest the appointment of inferior officers elsewhere than 'in the President alone, in the courts of law or in the heads of departments'."

There is a wealth of authority in the state decisions denying to the legislatures the power to delegate to private citizens.[7] This Court has recognized the same principle in invalidating municipal ordinances on the ground of repugnance to the Fourteenth Amendment in requiring action upon the request of two-thirds of the property owners concerned, the Court holding that in such cases the owners

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[6]Article II, Section 1, Clause 1, of the Constitution:

> "The executive Power shall be vested in a President of the United States of America."

Article II, Section 2, Clause 2:

> "He shall * * * nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law or in the Heads of Departments."

[7]*Shumway* v. *Bennett,* 29 Mich. 451, 465; *Elliott* v. *Wille,* 112 Neb. 78, 89; *Morton* v. *Holes,* 17 N. Dak. 154, 159; *State ex rel. Jackson* v. *School District,* 140 Kan. 171, 174-175; *State* v. *Crawford,* 104 Kan. 141, 143; *Rowe* v. *Ray,* 120 Neb. 118; *McCown* v. *Gose,* 244 Ky. 402; *State* v. *Withnell,* 78 Neb. 33; *State ex rel. Nehrbass* v. *Harper,* 162 Wis. 589; *Tilford* v. *Belknap,* 126 Ky. 244; *City of St. Louis* v. *Russell,* 116 Mo. 248; *City of St. Louis* v. *Howard,* 119 Mo. 41; *Hays* v. *Poplar Bluff,* 263 Mo. 516. Those cases are of course distinguishable in which the individual citizens may only *initiate* a petition for an improvement and lack the power to *require* it, the latter power being vested in an administrative body, just as under the N. I. R. A. the executive power remained in the President. *State* v. *Raub,* 106 Kan. 196; *Barrett* v. *City of Osawatomie,* 131 Kan. 50.

might withhold their consent wilfully, capriciously, selfishly or arbitrarily.[8]

3. The collective bargaining provisions of the Act are equally outside the Commerce Clause.

These provisions undertake to prescribe the method by which wages and hours shall be determined. But if determination of wages and hours themselves is outside the power of Congress because a regulation of production and not of commerce, a determination of the method is equally outside such power.

Texas & N. O. R. Co. v. *Ry. Clerks,* 281 U. S. 548, lends no support to the validity of the labor provisions of the Act relating to collective bargaining or otherwise. In that case the Court sustained the validity of an act regulating to a very limited extent the relations between interstate carriers and their employees. The decision is predicated upon the power of Congress to regulate such carriers. It affords no support for the proposition that, under the Commerce Clause, the Federal Government may regulate the labor relations of the employees of persons engaged in production, whether by way of manufacture or otherwise. To give it such effect would be inconsistent with the rulings of the Court in all of the cases cited above and with the recent decision in the *Schechter* case. Collective bargaining among employees and employers engaged in the production of articles of commerce may or may not be socially or economically desirable. The Federal Government is as much without power to regulate the labor relations of such persons in this respect as in the determination of wages and hours. This follows conclusively from the cases cited.

[8]*Eubank* v. *Richmond,* 226 U. S. 137; *Seattle Trust Co.* v. *Roberge,* 278 U. S. 116; *Cf. Cusack Co.* v. *City of Chicago,* 242 U. S. 526, which was distinguished in the *Seattle Trust Co.* case.

POINT IV

SINCE THE LABOR PROVISIONS ARE INVALID AND THE CODE WAS SOUGHT TO BE ENACTED AS A WHOLE, THE ENTIRE REGULATORY SCHEME REPRESENTED BY THE CODE IS INVALID.

Section 4 of the statute provides that its provisions "shall be formulated by the Commission into a working agreement, to be known as the 'Bituminous Coal Code'" (Appendix, p. 7, fol. 23). It is to the Code thus prescribed, as a whole, that all producers must adhere to escape the payment of the penalty tax imposed by Section 3. The two main subdivisions of the Code are that regulating wages, hours and labor relations (R. 70-71) and that providing for the fixing of prices (R. 61-70). The labor provisions are clearly invalid (Point III, p. 113, *et seq., ante*) and the trial court so held (R. 1180-1181). Subsequent discussion herein will demonstrate that the price fixing provisions are likewise invalid (Points V and VI, p. 140, *et seq., post*). But the invalidity of *either* of such provisions invalidates the Code as a whole. In view of this, if the Court should be convinced that we are correct in our contentions as to the labor provisions, it will be unnecessary for the Court to give separate consideration to the price fixing provisions, which so considered present a wholly novel question in that they represent the first attempt upon the part of Congress, under the Commerce Clause, to fix the sale price of a commodity. Therefore, it seems appropriate before passing to a consideration of the price fixing provisions, taken independently, to explain why we believe that the invalidity

of the labor provisions renders all of Section 4, providing for the enactment of a Code, invalid without regard to the question as to the power of Congress to fix prices.

As already pointed out in Point II, p. 79, *et seq., ante,* this statute constitutes a plan or scheme for the regulation of the bituminous coal industry for the purpose of increasing the wages of miners and increasing the financial return of the operators, or some of them. If any provision of the statute which is essential to the accomplishment of that plan or scheme, or any substantial part thereof, is invalid, then the scheme as a whole must fall, for the Court cannot presume that the Congress would have legislated either for labor alone, or for the operators alone. While the statute contains the usual separability clause (Sec. 15, Appendix, p. *34,* fol. 132), it is settled that separability provisions in the precise language of that contained in the present Act are merely aids in determining the legislative intent and not inexorable commands.[1] The effect of including such clauses in statutes is simply to reverse the presumption, which otherwise would be indulged in, of an intent that the Act should be wholly ineffective unless held to be validly operative as an entirety.[2] But the inclusion of a separability clause and the presumption thereby created does not authorize the Court to rewrite the statute and give it an effect altogether different from that sought by the statute viewed as a whole.[3] On the contrary, the statute as an entirety is invalid if there is a "clear probability that the invalid part

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[1]*Dorchy* v. *Kansas,* 264 U. S. 286; *Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 362.

[2]*Williams* v. *Standard Oil Co.,* 278 U. S. 235, 242; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 184.

[3]*Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 362.

being eliminated, the legislature would not have been satisfied with what remains."[4]

It will be observed that the separability provision[5] does not in terms provide that the Code shall be separable, but only that the "provisions" of "the Act" shall be separable. The usual rule that mutually dependent provisions of a statute must fall if either is bad[6] has increased force when the provisions are found in the same section of the statute.[7] In the case of the Act before this Court, the Code appears *in toto* in a single section of the Act (Sec. 4, Appendix, pp. *7-25,* fols. 23-93),—convincing evidence that it was intended to operate as a whole. Moreover, Section 4 provides that "The provisions of *this section* shall be formulated by the Commission into a working agreement, to be known as the 'Bituminous Coal Code.'" (Appendix, p. *7,* fol. 23). The Commission is thus given no authority to formulate a portion or portions of that section into a Code, and if it had been given such authority the statute in that respect would be clearly unconstitutional upon the grounds of improper delegation of legislative power, since it would

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[4]*Williams* v. *Standard Oil Co.,* 278 U. S. 235, 242. An inseparability clause creates only "a presumption that, eliminating invalid parts, the legislature would have been satisfied with what remained" (*Champlin Co.* v. *Commission,* 286 U. S. 210, 235). As pointed out in *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 184, the presumption created by the separability clause is overcome by considerations which show a "clear probability that the legislature would not have been satisfied with the statute unless it had included the invalid part".

[5]"Sec. 15. 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." (Appendix, p. *34,* fol. 132).

[6]*Allen* v. *Louisiana,* 103 U. S. 80, 84.

[7]*International Textbook Co.* v. *Pigg,* 217 U. S. 91, 112, 113.

have granted unlimited discretion to the Commission to determine what parts of the section should be placed in the Code and thereby becomes binding as law of the United States.[8]

The regulations of the Code are also so mutually interdependent that it cannot be supposed that the Congress would have enacted the statute had it lacked any of the present provisions of Section 4—certainly not without the price or labor provisions. Lacking any one of these regulatory provisions the Code either could not as a practical matter be enforced or, if enforced, would fail to effectuate the manifest intent of the Legislature.[9]

This is clearly so as to the wage provisions, for they are the heart of the Act, and, coupled with the collective bargaining provisions, constitute the means for effectuating one of the two major purposes, if not *the* major purpose, of the Act, *i.e.,* increasing the wages of the miners. It is true of this Act, no less than of the National Industrial Recovery Act, that "Wages and hours of labor are essential features of the plan, its very bone and sinew", and that "To take from this Code the provisions as to wages and the hours of labor is to destroy it altogether."[10]

The conclusion as to the predominant labor motive in the statute is confirmed by the voluminous evidence offered by the Government in respect of wage rates and living conditions at the mines (R. 428-448, 475-483, 494-502, 503-510, 510-517, 520-523, 523-528, 539-543; FF. 64-65, R. 140-141; FF. 79-82, R. 149-151; FF. 106-117, R. 166-

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[8]*Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *Schechter Corp.* v. *United States,* 295 U. S. 495.

[9]*International Textbook Co.* v. *Pigg, supra.*

[10]*Schechter Corp.* v. *United States,* 295 U. S. 495, 554, 555.

178; FF. 124-125, R. 183-185; FF. 127-140, R. 186-192; FF. 142-144, R. 193-195; FF. 147-148, R. 197-198). The labor union, the United Mine Workers of America, was largely instrumental in the preparation and introduction in the Congress of the bills from which the Act originated (*Hearings before Sub-Committee of Committee on Ways and Means, House of Representatives, 74th Cong., 1st Sess., on H. R. 8479,* at pp. 26-28).

This is also confirmed by the language of the statute itself. Thus, the statute expressly states that the prices are to be fixed as provided in "order to sustain the stabilization of wages, working conditions, and maximum hours of labor" (Sec. 4, Part II(a), Appendix, p. *11,* fol. 38). It seems entirely clear, therefore, that as between the two the price provisions are enacted in aid of the labor provisions and not vice versa. But even if the reverse be true, it is certainly the fact that the fixing of prices and of wages are interdependent. The whole scheme of price fixing under the Act is based upon average costs of production for districts and price areas (Sec. 4, Part II(a)-(b), Appendix, p. *11,* fol. 38, pp. *13-14,* fols. 46-49). It was testified that cost of production is one of the most important factors in determining the coal producer's competitive position in any particular market (R. 340). And it was found that 60-65% of the producer's cost of production is the cost to him of his labor (FF. 64, R. 140). It must be perfectly apparent, therefore, that without the item of labor costs controlled there can be no "stabilization" effected in the industry, nor any effective control of price when the price itself is based upon labor costs. Government witnesses so testified (R. 481-482, 432-434, 441-442). The opening Section of the Act provides,

in part, that: "It is further recognized and declared * * * that the right of mine workers to organize and collectively bargain for wages, hours of labor, and conditions of employment should be guaranteed in order to prevent constant wage cutting and the establishment of disparate labor costs *detrimental to fair competition in the interstate marketing of bituminous coal* * * *" (Appendix, p. *3,* fols. 6-7).

At the very least, it is certainly true that the purpose of the Congress was to aid *both* labor and the operators, if not *primarily* labor, and the Court cannot sustain the statute in the one aspect if it be invalid in the other without doing violence to the Congressional intent.

POINT V

THE FACT THAT SALES OF BITUMINOUS COAL CONTEMPLATE AND RESULT IN INTERSTATE MOVEMENTS OF SUCH COAL DOES NOT AUTHORIZE THE CONGRESS TO FIX THE SALES PRICE.

PART I. The Question Presented as to the Scope of the Commerce Clause, and the Settled Rules of Constitutional Interpretation Applicable to its Solution.

PART II. The Power Asserted by the Government is Destructive of the Principle of Duality in our System of Government, and is Repugnant to the Tenth Amendment.

PART III. The History of the Formation, Adoption and Ratification of the Constitution, and Contemporary Expositions thereof, Establish that the Power Now Asserted Was Not Granted.

PART IV. The Decisions of this Court under the Commerce Clause Support and are Consistent with this View.

PART I

THE QUESTION PRESENTED AS TO THE SCOPE OF THE COMMERCE CLAUSE, AND THE SETTLED RULES OF CONSTITUTIONAL INTERPRETATION APPLICABLE TO ITS SOLUTION.

1. The absolute character of the power asserted by the primary argument in support of the price fixing provisions.

The primary argument, ultimately relied upon by the Government in the court below in support of the price fixing provisions,[1] is that the sale of coal f. o. b. mines for shipment to interstate destinations is a transaction "in" interstate commerce,[2] and that the fixing of its sales price, when thus sold for transportation across State lines, is a regulation of interstate commerce, and needs no further justification.[3] This may be the ground upon which the price fixing regulations of the instant statute were sustained by the court below.[4]

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[1]Notwithstanding the Government's insistence upon a trial as to "economic facts" (see p. 28, *ante*), the argument now to be treated was principally pressed in the court below in support of the validity of the price-fixing provisions under the commerce clause.

[2]*Flanagan* v. *Federal Coal Co.,* 267 U. S. 222.

[3]While the commerce power must be exercised in subordination to the protection which the Fifth Amendment accords to "private property" (*U. S.* v. *Cress,* 243 U. S. 316, 326) and to "fundamental personal rights" (*Carroll* v. *Greenwich Ins. Co.,* 199 U. S. 401, 410), it is obvious that there is neither private property nor personal right in selling goods across State lines, if the Government's view as to the scope of the interstate commerce clause be accepted.

[4]The opinion below may be read as accepting this absolute view and as referring to the "economic facts" only for the purpose of showing that price fixing is "reasonable"—*i.e.,* justified in the national interest (R. 1181-1195). Or the opinion (R. 1192) and the ultimate findings (R. 209-212) may be regarded as sustaining the price fixing provisions under the necessary and proper clause, as means reasonably related to the removal of burdens and obstructions from interstate commerce. The "burden and obstruction" argument is considered in Point VI, *post.*

The question is thus as to the scope of the power "to regulate Commerce among the several States".

Within this scope, that power acknowledges no restrictions or limitations other than those prescribed in the Constitution,[5] but is as plenary and absolute a power as the war power,[6] and the sole condition which the Government's argument would admit upon its exercise as now asserted, is that the commodity shall be moved, or shall be intended to be moved, across a State line.[7]

Neither the argument nor the statute acknowledge any limitation in respect of the nature of the commodity[8] or the volume or the manner of its movement.[9] There is no limitation as to uniformity, since the regulation of interstate commerce is not restricted in the Constitution by any such requirement,[10] and the Fifth Amendment cannot supply that lack since it contains no equal protection clause.[11] The public or private character of the business in which

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[5]*United States* v. *Joint Traffic Association,* 171 U. S. 505, 571.

[6]*Gibbons* v. *Ogden,* 9 Wheat. 1, 197.

[7]For the purpose of the argument upon this point, the fact that the statute applies to all coal sold, whether or not interstate movement of it is ever intended or ever occurs, is disregarded. The fact that it does so is independently sufficient to render the entire Act invalid (see Point VII, pp. 232-235, *post*).

[8]The court below found:

> "Coal is an innocuous commodity, the transportation of which in interstate commerce is not harmful to that commerce or to the public health, safety, morals or general welfare" (Finding 171, R. 208).

[9]The tax (Sec. 3, Appendix, pp. *6-7,* fols. 18-22) and the code (Sec. 4, Appendix, p. *7,* fol. 23) apply to *all* producers, and "producer" is defined to include "all persons * * * engaged in mining bituminous coal" (Sec. 19, Appendix, pp. *36-37,* fols. 140-141). The statute does not say "engaged in the business of mining bituminous coal" or engaged in it exclusively; and it applies equally whether the coal is moved by rail or truck or wagon, or carried in a sack on the back.

[10]*Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U. S. 311, 326, 327.

[11]*U. S.* v. *N. Y. N. H. & H. R. Co.,* 165 Fed. 742, 745, 746.

the commodity is produced or is to be used can supply no limitation, for the Federal power is not a power to regulate any business, whether "public" or private, but a power to regulate commerce, and that power, within its scope, operates irrespective of the ownership of the commodities affected.[12] Nor can it be said that the exercise of the power here asserted is conditioned upon proof that it be "reasonably" related to the promotion of the national general welfare, for the United States has no power to regulate for the general welfare,[13] and the only power of the Federal Government which is conditioned in that way is the taxing and appropriating power.[14]

Nor is it pertinent to the argument whether the present statute will in operation confine coal producing States, areas and mines to their existing markets, or reapportion and reallocate markets among them. The power asserted comprises alike its use to accomplish either result, and the courts are not concerned with the wisdom or justness of the result of the particular statute, but with the question of the existence of the power upon which it is asserted to be based.[15]

It is an absolute power that is asserted—a power which extends to the fixing of prices of all commodities whenever and however transported across State lines, solely because so transported. If the interstate commerce power has the

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[12]*Board of Trustees* v. *U. S.*, 289 U. S. 48, 57, 59.

[13]*Jacobson* v. *Massachusetts,* 197 U. S. 11; *U. S.* v. *Butler* (decided Jan. 6, 1936, p. 9).

[14]*U. S.* v. *Butler* (decided Jan. 6, p. 9). The statutory recital that the bituminous coal industry is "affected with a national public interest" (Sec. 1, Appendix, p. *2,* fol. 3) is therefore plainly not germane on the fundamental question as to the scope of the interstate commerce power.

[15]*Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 447, 448, 483; *United States* v. *Lanza,* 260 U. S. 377, 385; *Everard's Breweries* v. *Day,* 265 U. S. 545, 559.

scope claimed, the Federal power in respect of the movement of commodities from one State to another is as absolute as its power to control the entry of commodities from foreign nations into the United States, or to prohibit the importation of any commodity altogether, for any reason or for no reason.[16] The selling of goods across State lines becomes a privilege which the Federal Government may grant or withhold at will; which it may grant to one and withhold from another, for any reason or for none; or which it may condition upon the acceptance and observance of prescribed prices for goods so sold.[17]

2. The applicable rules of constitutional interpretation.

The interstate commerce clause does not in express terms confer the power to fix the price of commodities.[1]

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[16]See *Atlantic Cleaners & Dyers* v. *U. S.,* 286 U. S. 427, 434; *Board of Trustees* v. *U. S.,* 289 U. S. 48, 57; *The Abby Dodge,* 223 U. S. 166, 176, 177; *Brolan* v. *U. S.,* 236 U. S. 216, 218, 219, 222; *Weber* v. *Freed,* 239 U. S. 325, 329, 330; *Buttfield* v. *Stranahan,* 192 U. S. 470, 492.

[17]Upon this naked question of power, the voluminous evidence taken in the court below is, of course, irrelevant. The evidence was not taken upon this issue as to the scope of the commerce power, but upon the issue as to the existence of burdens and obstructions and as to the "reasonableness" of the statute under the Fifth Amendment, the Government stating, in insisting upon a factual trial, that: "In the view of these defendants the constitutionality of said Act *depends upon* the existence of the burdens, dislocations, restraints and interruptions to interstate commerce in bituminous coal specified in the separate defense set up in sub-division II of defendant's answer and upon the facts relative to the causes and effects thereof, as therein set forth, and also upon facts relative to the reasonableness under the due process clause of the Fifth Amendment of the regulatory provisions of the proposed coal code" (R. 48).

[1]As pointed out in *U. S.* v. *Sutherland,* 9 Fed. Supp. 204, W. D. Mo. 1934 (holding unconstitutional the price fixing provisions of the lumber code under N.R.A.), the clause does *not* read "The Congress shall have power to regulate commerce among the several States, *including the power to fix prices at which persons may sell in such commerce their property.*"

The present statute is the first instance in the 150 years of our history of an attempt to exercise the commerce power in that way.[2] Obviously, the language of the grant is no sufficient test as to the scope of the power intended to be conferred, especially in view of the settled rule that the same words may, according to intent, confer powers of different scope as used in different portions of the Constitution or even as used twice in the same granting clause.[3] The provisions of the Constitution are not to be subjected to "a severe literal construction, which would be better adapted to special pleadings"[4]; but the instrument must be construed as a whole, and each clause given a scope and extent consistent with the nature and objects of the Federal Union and the provisions of all other parts of the instrument.[5]

In the application of this rule, views as to the scope of the commerce clause inconsistent with the maintenance of the principle of duality in our Government, and the necessary effect of which would be destruction of the rights reserved to the States and to the people by the Tenth Amendment, have been repeatedly rejected by this Court.[6]

While the case must be considered "in the light of our whole experience and not merely in that of what was said

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[2]Price fixing of commodities has been attempted under the war power under the Lever Act. See *U. S.* v. *Cohen Grocery Co.,* 255 U. S. 81; *Highland* v. *Russell Car & Snow Plow Co.,* 279 U. S. 253, 261, 262.

[3]*Russell Co.* v. *U. S.,* 261 U. S. 514, 520, 521; *Atlantic Cleaners & Dyers* v. *U. S.,* 286 U. S. 427, 434; *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 427.

[4]*Ogden* v. *Saunders,* 12 Wheat. 213, 286; *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 428.

[5]*Prout* v. *Starr,* 188 U. S. 537, 543; Story, Com. Sec. 405; Willoughby, Const. Law, 2nd Ed. 1929, Sec. 40, *cf.* Sec. 42.

[6]Thus, in *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, 259, the Court refused to construe the commerce clause so broadly as to reach coals which had been mined and prepared and made ready

a hundred years ago",[7] the scope of power intended to be conferred by constitutional grants must be determined with regard to the conditions prevailing antecedent to and contemporaneously with the adoption of the Constitution, and great weight is to be attached to contemporaneous exposi-

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for shipment to markets in other States but not yet shipped, stating that "the *reach and consequences*" of the contention repelled its acceptance since it would "nationalize all industries" and withdraw them "from State jurisdiction and deliver [them] to federal control". In *Kidd* v. *Pearson*, 128 U. S. 1, 20, a construction of the commerce clause which would prevent the States from prohibiting the manufacture of intoxicants even when for transportation into other States, was rejected because it would "extend the words of the grant to Congress, in the Constitution, beyond their obvious import, and is *inconsistent with its object and scope*". In the *Employers' Liability Cases*, 207 U. S. 463, 502, a construction of the commerce clause broad enough to support a statute requiring one engaged in interstate commerce to submit all his business concerns to the regulating authority of the Congress, was rejected because it rested "upon *the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve*, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even though the conditions would otherwise be beyond the power of Congress". In *Hammer* v. *Dagenhart*, 247 U. S. 251, 276, a construction of the Commerce Clause broad enough to authorize the prohibition of interstate movement of ordinary commodities made by child labor was rejected because "*the necessary effect*" was to infringe upon "a purely state authority". Applications of the same principle to defeat taxes regulatory of matters not within the Federal authority are familiar. *Child Labor Tax Case*, 259 U. S. 20, 38; *Hill* v. *Wallace*, 259 U. S. 44, 67, 68; *United States* v. *Constantine* (decided December 9, 1935). The same principle has been applied, without any express language in the Constitution. to prevent State taxation which would place the continued existence of the United States at the mercy of the States (*M'Culloch* v. *Maryland*, 4 Wheat. 316), or Federal taxation which would place the continued existence of the States at the mercy of the Federal Government (*Collector* v. *Day*, 11 Wall. 113, 127). *Cf. United States* v. *California* (decided February 3, 1936, pp. 4-5).

[7]*Missouri* v. *Holland*, 252 U. S. 416, 433; *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 443.

tion and interpretation,[8] as well as to the history of the clause for the last one hundred fifty years, as interpreted in the decisions of this Court.[9]

The fundamental principle upon which the framers acted, that is, to create a Federal Government of enumerated powers, rather than a centralized system of government, must likewise be given effect; and this requires that any power asserted by the United States must be "clearly within the reach of its constitutional charter", for the Court is "not at liberty to add one jot of power to the National Government beyond what the people have granted by the Constitution",[10] however socially desirable that might be.

Effect upon the scheme of the Federal Union as a whole, and intent, established by history, are, therefore, the tests to be applied in determining whether the commerce clause confers the novel power now claimed. The sources are (a) the history of the formation, adoption and ratification of the Constitution, and contemporaneous expositions of it, and (b) the history of its application and interpretation during the past 150 years in the decisions of this Court.

[8]*Martin* v. *Hunter's Lessee,* 1 Wheat. 304; *Cohens* v. *Virginia,* 6 Wheat. 264, 418; *Prigg* v. *Pennsylvania,* 16 Pet. 539, 610, 611.

[9]*Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 429-442.

[10]Brewer, *J.*, speaking for the Court in *Keller* v. *U. S.*, 213 U. S. 138, 145 and quoting Story, *J.*, in *Houston* v. *Moore,* 5 Wheat. 1, 48:

> "Nor ought any power to be sought, much less be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the National Government beyond what the people have granted by the Constitution."

See, also, *Passenger Cases,* 7 How. 283, 394:

> "It is admitted that, in regard to the commercial, as to other powers, the States cannot be held to have parted with any of the attributes of sovereignty which are not plainly vested in the Federal Government and inhibited to the States, either expressly or by necessary implication."

PART II

THE POWER ASSERTED BY THE GOVERNMENT IS DESTRUCTIVE OF THE PRINCIPLE OF DUALITY IN OUR SYSTEM OF GOVERNMENT, AND IS REPUGNANT TO THE TENTH AMENDMENT.

1. The power to fix the price at which commodities may move in interstate commerce is the power to control markets and to depress and destroy production, employment and population. The possession of this power by the Federal Government would place the very existence of the States at its mercy.

As to markets:

(a) "The power to fix prices, whether reasonably exercised or not, involves power to control the market * * * ."[1] The power to fix the price at which commodities may move in interstate commerce involves the power to set "a rampart of customs duties" at State lines; to establish, as respects particular States, "an economic barrier against competition with the products of another State or the labor of its residents"; to "neutralize advantages belonging to the place of origin" of the commodity; and to "neutralize the economic consequences of free trade among the States."[2]

(b) The rule of "free trade between the States" prescribed by the interstate commerce clause, for-

[1] *U. S.* v. *Trenton Potteries,* 273 U. S. 392, 397.
[2] *Baldwin* v. *Seelig,* 294 U. S. 511, 526, 527.

bids any State to legislate to keep its own *markets* for its own *products,* either by a prohibition upon the bringing in of commodities from other States, or by price regulation of such commodities.[3] It likewise forbids a State to legislate to retain its own *products* for its own *markets,* even though those products are a necessity to its people, are exhaustible, and are in danger of being exhausted.[4] The applicable principle of these cases is that, by the Constitution, "each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it."[5]

(c) As a result of this rule and of the development of transportation facilities, no State or community in this country is now independent of interstate markets or interstate products. This is certainly true of the coal producing States, 58% of whose production now moves to interstate consumption points.[6] It is true of the company involved in this suit, 97% of whose coal production in Virginia and West Virginia moves to markets in other States.[7] As this Court has said, "Primitive conditions have passed, business is now transacted on a national scale."[8]

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[3]*Baldwin* v. *Seelig,* 294 U. S. 511, 526, 527.

[4]*West* v. *Kansas Natural Gas Co.,* 221 U. S. 229, 255; *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 598-600; *Foster Packing Co.* v. *Haydel,* 278 U. S. 1, 10, 11. This does not, however, prevent a State from legislating to prevent physical waste in production. *Champlin Rfg. Co.* v. *Commission,* 286 U. S. 210, 233-235; *Bandini Co.* v. *Superior Court,* 284 U. S. 8, 19, *et seq.*

[5]*West* v. *Kansas Natural Gas Co.,* 221 U. S. 229, 255.

[6]R. 940.

[7]FF. 22, R. 121; R. 4; R. 253.

[8]*Farmers L. & T. Co.* v. *Minn.,* 280 U. S. 204, 211, 212; *Burnet* v. *Brooks,* 288 U. S. 378, 402.

It thus appears that, under the economic conditions of today, the power to fix the price at which a commodity may move in interstate commerce is the power to control and destroy the markets of the States severally. It will not do to say that the framers did not realize how vast a power they were conferring; to urge that interstate commerce was relatively unimportant to the economic lives of the States in those days. The power would have been as destructive of the States and of the scheme of government if attempted to be exerted in 1787 as it is today, for by its use the Federal Government could have prevented the products of non-navigating States from reaching the seaports for export to the then important foreign markets.

Moreover, we are not concerned with the inquiry as to whether the framers in 1787 supposed that the interstate commerce power would ever be exercised in just this way. We are inquiring into the effect of the possession of the authority presently claimed upon the type of dual government the framers intended to found. The inquiry is as to the *nature* and *scope* of the power intended to be granted. That inquiry is not made by saying that, because of the different economic conditions of that day, the framers did not realize how vast a power they were unwittingly conferring. That is to read the Constitution "with literal exactness like a mathematical formula";[9] to ignore the fact that the Constitution was intended "to endure for ages to come";[10] to be blind to the principle which requires the construction of the Constitution as a whole and in the light of its object to create a division of powers between the State and Federal Governments, to create "an indestruc-

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[9]*Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 428.
[10]*M'Culloch* v. *Maryland,* 4 Wheat. 316, 415.

tible Union, composed of indestructible States."[11] "Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation."[12] It is impossible to maintain that, by the general language of the interstate commerce clause, the framers intended to confer a power capable of constitutional use for the complete economic destruction of the States either under the economic conditions of 1787 or under the economic conditions of 1936.

As to production, employment and population:

Whether price fixing is used for the purpose of stabilizing an industry by allocating to each producing State, area, and mine its existing quota of interstate markets (if such a result is humanly possible) or whether used discriminately, with a purpose, as well as an effect, of changing and shifting existing markets, the result is control of production, employment, and population. When price fixing is used discriminately, the extent of the power as above stated is clearly seen. It no less clearly exists though there be an attempt to "stabilize" prices as between producing districts and States. Price is the component of numerous fluctuating factors, many of which could not be controlled and are not attempted to be controlled by the present statute. These factors have heretofore exerted their effect upon the price, and have resulted in fluctuations thereof. With a stabilized price and with no attempt to stabilize these other components (except wages), the numerous fluctuations

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[11]*Texas* v. *White*, 7 Wall. 700, 725.

[12]*In re Debs*, 158 U. S. 564, 591; *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, 9.

hitherto absorbed within the price system may now be reflected only in changes in *production* and *employment*.

Viewed in the light of these plain realities, the scope of the power now claimed by the Federal Government over the movements, livelihood and liberties of the people, and over the continued existence of the States as social and economic units, is appalling.

Possessed of such power, and unfettered as it is by any Constitutional requirement of uniformity, the Congress in its sole will could redistribute, restrict, or destroy the interstate markets, production and employment, and consequently the population of any State or community in the Nation.

The findings and exhibits in the records tell us that 94% of the iron ore in the United States is produced within Minnesota, Michigan and Alabama.[1] Under the power now claimed by the Government, it would be a political question for the Congress how much of the interstate markets each or any was to supply, and consequently how much iron ore should be produced in each of these States. Similarly, it would be for the Congress to prorate, allocate and discriminate between Montana, Utah, Arizona and Michigan as to which of them, and in what proportions, were to supply the 79% of copper production now produced by those four States.[2] It would be for the Congress to say whether Kansas, or Michigan, or Ohio, or New York, is hereafter to supply to the Nation the 80% of salt production which they now collectively supply, or whether each should continue to have a share of the interstate markets, and if

[1]FF. 165, R. 206; Pl. Ex. 81 F-H, R. 970B-972A.

[2]FF. 165, R. 206; Pl. Ex. 81 I-K, R. 972B-974A.

so, how much.[3] To Congress also would fall the delicate task of determining as between California and Florida, whether either one in the future is to supply the whole of the 98% of oranges produced within the nation which they now collectively supply to interstate markets; or, if it were found expedient and "reasonable" that both should continue to share such markets, then Congress would have the still more delicate task of allocating those markets as between them.[4]

Illustrations might be multiplied. Congress would face allocation of motor vehicle production and distribution as between Michigan, California, Ohio and Indiana;[5] of motion picture production as between California and New York.[6]

Can any State in this *Federal*[7] Union have intended to confer such power upon a central government; have intended to make such questions political questions?

By the use of the price-fixing power, States and communities now thriving, farming lands and mines now productive, may be made idle and empty. Many wise reforms, perfectly "reasonable", no doubt, from the standpoint of the sentimental paternalist not directly affected thereby, could be effected by deflecting streams of commerce in order to shift the location of production and manufacture to better the conditions of individuals or to conserve natural resources. That such a course would destroy the States in a very literal sense no one can doubt.

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[3]FF. 165, R. 206; Pl. Ex. 81 L-N, R. 974B-976A.

[4]FF. 165, R. 206; Pl. Ex. 81 O-Q, R. 976B-978A.

[5]FF. 165, R. 207; Pl. Ex. 81 U-W, R. 980B-982A.

[6]FF. 165, R. 207; Pl. Ex. 81 R-T, R. 978B-980A.

[7]*U. S.* v. *Butler* (decided January 6, 1936, p. 6; see also pp. 13-14).

There is no need to speculate whether present Congresses would in fact be subject to the cliques and combinations of States so much discussed in the Constitutional Convention, which would set about to depress the commerce of particular States and to favor that of others.[8] It is enough that the opportunity would exist. The question is not how the power would be used but whether it exists. But, as we have seen, the scope and consequences of the authority asserted upon our Federal System are proper subjects of inquiry in determining the meaning and extent of the great general clauses of the Constitution, and it is therefore essential to note, as we have done, that the power contended for is a power to control and allocate and, if desired, destroy production and employment in particular communities for the supposed general good of all; and that such power, as asserted, is without any real or substantial check other than the discretion of a majority in the Congress.

That the illustrations above given as to the scope of the power now claimed by the Government are not fanciful is proved by the record in this present case, and by the arguments urged in support of this statute in the court below. An object of the present statute[9] is through price control to set a term to the competition for markets which has been going on between the northern and southern mines at least since 1880 (FF. 70-74, R. 144-146). An excuse offered for the price fixing measures adopted is that the competition of the southern mines has caused diversions and dislocations of commerce; in other words, that it has taken markets and business away from the northern mines. If the Congress may prevent or correct

[8]For discussions on this point in the Constitutional Convention see pp. 159-161, 164-165, 166, 168, 169, 170, 171, 175, *post*.
[9]See p. 91, *ante*.

that, then it might have prevented the opening, through prohibitory price provisions, of any new mines in the year 1820, at which time, so far as the records show, the only coal production going on was in Maryland (FF. 70, R. 144; Pl. Ex. 69, R. 946A); and this, on the ground that the opening of new mines would divert and dislocate the interstate commerce of the Maryland mines. If Maryland had thought of it and had been able to muster a sufficient majority in the Congress, all future coal development in this country could have been halted at that point.

Possessing the power now claimed by the Government, Massachusetts and its neighbors, securing a majority of the Congress to aid them, could have prevented the well known "shift" of cotton mills from the North to the South which was undertaken in recent decades on a large scale in order to take advantage of the lower labor costs obtaining in Georgia and the Carolinas consequent upon the lower cost of living in those states.

Similarly, the growth of the automobile industry could have been halted in its tracks by prohibitory price control of interstate shipments of automobiles, upon the ground that interstate commerce in automobiles would "divert" or "dislocate" interstate commerce in horse drawn vehicles and in horses and mules, with consequent injury to the production of wagons, buggies, horses and mules,—a result which the Congress of that day might "reasonably" have regarded as opposed to the then general interests of the Nation at large.[10]

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[10]That this is not an extravagant statement as to the scope and effect of the asserted power is shown by the following quotation from an address of Professor Tugwell of the Department of Agriculture to the American Economic Association entitled "Principle of Planning and Laissez Faire" (The American Economic Review, Vol. XXII, Supplement No. 1, 1932, pp. 74-92):

> "Planning will necessarily become a function of the Federal Government; either that or the planning agency will supersede that government * * * business will logically be re-

Upon like grounds, price regulations could be made to-day to ameliorate or altogether to destroy the competition of oil with coal, or vice versa. Nor need the use of price regulation of commodities moving in interstate commerce be limited to redistribution of the localities of production. Upon the same basic theory advanced to support the statute now at bar, price discriminations might also be made as between the interstate movement of various kinds of food-stuffs, upon the ground that it is for the Congress to say what it is for the general welfare of the Nation that the people should eat. Under this disguise, sumptuary laws (with which we have had recent unfortunate experience[11]) could again be thrust upon us,—this time without constitutional amendment.

Obviously, also, the power to fix the prices at which commodities may cross State lines "might be made use of to compel the States to comply with the will of the Genl Government and to grant it any new powers which might be demanded".[12] The quoted language is taken from the

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quired to disappear. This is not an overstatement for the sake of emphasis; it is literally meant. The essense of business is its free venture for profits in an unregulated economy. Planning implies guidance of capital uses; this would limit entrance into or expansion of operations. Planning also implies adjustment of production to consumption; and there is no way of accomplishing this except through a control of prices and of profit margins. * * * New industries will not just happen as the automobile industry did; they will have to be foreseen, to be argued for, to seem probably desirable features of the whole economy before they can be entered upon [*ib.* 89-90] * * * The future is becoming visible in Russia. * * * Perhaps our statesmen will give way or be more or less gently removed from duty; perhaps our constitutions and statutes will be revised; perhaps our vested interests will submit to control without too violent resistance. It is difficult to believe that any of these will happen; it seems just as incredible that we may have a revolution. Yet the new kind of economic machinery we have in prospect cannot function in our present economy [*ib.* 92]".

[11]Eighteenth and Twenty-First Amendments.

[12]Madison, II Farrand 306, 362.

debate in the Constitutional Convention which resulted in prohibiting the Federal Government from laying any duty on exports to foreign countries,[13] duties on foreign commerce being in those days "the principal means by which commerce is regulated".[14]

2. The economic and social existences and rights of the States and of the people are as much protected by the Tenth Amendment against Federal encroachment as are the separate political existences of the States.

What has been said sufficiently indicates the complete control which the suggested view of the scope of the Commerce Clause would give the Federal Government over the economic and social lives of the people, and over the economic and social interests and existences of the States.

Consistently with the settled rules of constitutional interpretation previously discussed, the general language of the interstate commerce clause cannot be construed as conferring a power having such inevitable results upon the continued maintenance of the type of dual government for which the framers admittedly provided.

The Tenth Amendment did not preserve rights and powers to the States alone. It preserved rights and powers also to "the people".[1] Among these are social and economic rights which current history teaches will not lightly be surrendered, in no matter how worthy a cause.[2]

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[13]Const. Art. 1, sec. 9, cl. 5. For fuller discussion see pp. 167-174, *post*.

[14]*Passenger Cases,* 7 How. 283, 406.

[1]*Kansas* v. *Colorado,* 206 U. S. 46, 89-91.

[2]Following this Court's decisions in *Hammer* v. *Dagenhart,* 247 U. S. 251 (1918), and *Child Labor Tax Case,* 259 U. S. 20 (1922), a Child Labor Amendment was submitted to the State legislatures by the Congress in 1924. More than ten years of debates in the

Nor does the Tenth Amendment preserve merely the political existence of the States. The suggestion that the States be reduced to mere political corporations for local purposes was repeatedly rejected in the Constitutional Convention.[3] The adoption of the Constitution left the States as social and economic entities possessed of citizens owing loyalty to them and having their homes and businesses within their borders. The retention of that population, the preservation of those homes and those businesses, is a matter of the first importance not only to the States severally but to the people therein. Despite one hundred and fifty years of union, there are still local interests of an economic and social nature to be preserved. We were not in 1787, and have not yet become, one floating mass of population to be directed hither and yon in search of employment and homes by a central government in Washington. The vast majority of our people have fixed abodes with economic and social stakes of the first importance in the preservation of the existence, and the promotion of the prosperity, of their particular communities.

These economic and social interests and rights of the individual States and of the people therein were the primary concern of the framers of the Constitution. The history of the formation, adoption and ratification of the Constitution and of the first ten amendments establishes beyond cavil that the protection of those local economic interests,

States upon this amendment have uncovered not merely economic but also social and religious objections to the granting of additional power to the Federal Government to accomplish even so worthy an object as this,—objections never presented to this Court at the argument of the *Hammer* and *Child Labor Tax Cases*. At this writing, the amendment has been accepted by only 24 States, having earlier been rejected by some of such States. More than ten years of argument have not as yet persuaded any of the remaining 24 States to grant additional power to the Central Government.

[3] I Farrand 287, 363, 366; II *id.*, 362-363; I *id.*, 167; II *id.*, 28.

rather than the mere preservation of the political entities of the States, was the primary consideration which impelled the granting of only a restricted commercial power to the national government and which impelled the adoption of the Tenth Amendment.[4]

Those interests require protection against the despotism of a centralized government as much today as they did in 1787.

When the ratification of the Constitution was trembling in the balance; when the friends of the new Constitution "found it necessary to urge", as Chief Justice Marshall points out, that the new central government was to be one "of enumerated powers" (*M'Culloch* v. *Maryland,* 4 Wheat. 316, 405), the States and the people were told in respect of those enumerated powers:

> "The powers of the general government relate to external objects, and are but few. But the powers in the states relate to those great objects which immediately concern the prosperity of the people."[5]

Notwithstanding this assurance, the States and the people enacted the Tenth Amendment as a guarantee to them that the Constitution should not thereafter be construed to have lurking within it the means for the destruction of the economic life of the States and "the prosperity of the people". If the view as to the scope of the commerce power now advanced be accepted, that guarantee will have been written in vain.

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[4]See pp. 154-181, *post*.

[5]Madison before the Virginia Convention, 3 Elliot's Debates 259.

PART III

THE HISTORY OF THE FORMATION, ADOPTION AND RATIFICATION OF THE CONSTITUTION, AND CONTEMPORARY EXPOSITIONS THEREOF, ESTABLISH THAT THE POWER NOW ASSERTED WAS NOT GRANTED.

1. This history demonstrates that had price fixing of commodities moving in interstate commerce been suggested as within the commerce grant, the language would have been varied so as to exclude it, or it would have been made a special exception.

Obviously, it is not a sound ground for denying the asserted scope of a granted power to say that it was not in the minds of the framers or the ratifiers of the Constitution when it was framed and ratified. As Chief Justice Marshall pointed out in the *Dartmouth College* case[1] "It is not enough to say that this particular case was not in the mind of the Convention when the article was framed, nor of the American people when it was adopted." We accept the burden of the test there laid down by the Chief Justice: "It is necessary to go further and to say that had this particular case been suggested, the language would have been varied as to exclude it, or it would have been made a special exception."

More than that appears here. A study of the whole of the record of the Federal Convention and of all of the documents relating to the history of the times, discloses not merely that it was not intended that the commerce

[1]4 Wheat. 518, 644.

clause should have the scope now asserted; not merely that had price fixing of commodities moving in interstate commerce been suggested it would have been in terms excluded; but that specific proposals made in place of the commerce clause, in terms which would unquestionably have included the power now asserted, were repeatedly and emphatically rejected, and that specific other provisions were inserted in the Constitution with the express purpose of preserving the control of the individual States over their own economic and social interests and existences, including the right freely to trade beyond their own borders, and the preservations of the economic and social independence, and the business and industry, of the people.

2. The right to engage in interstate commerce antedated the Constitution and was not created by that instrument.

"The constitution", acknowledged Marshall in *Gibbons* v. *Ogden,*[1] "does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized men throughout the world". Said he: "The Constitution found it an existing right, and gave to Congress the power to regulate it". That right existed long before the Constitution was adopted and had been expressly guaranteed by the Articles of Confederation.[2]

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[1]9 Wheat. 1, 211.

[2]See *Slaughter-House Cases,* 16 Wall. 36, 75. As stated by Mr. Chief Justice Baldwin in *Hoxie* v. *N. Y., N. H. & H. R. Co.,* 82 Conn. 352, 364: "The right to engage in commerce between the States is not a right created by or under the Constitution of the United States. It existed long before that Constitution was adopted. It was expressly guaranteed to the free inhabitants of each State by the Articles of Confederation (Art. IV) and impliedly guaranteed by Art. IV, § 2, of the Constitution of the United States as a privilege inherent in American citizenship."

3. The power over interstate commerce was conferred upon Congress in order to remove restraints upon that right which the States had imposed against each other.

After the Revolution and prior to the Constitution, commerce between the States was obstructed by "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation."[1] Madison points out that:

> "the States having ports for foreign commerce, taxed & irritated the adjoining States, trading thro' them, as N. Y. Pena. Virga. & S- Carolina. Some of the States, as Connecticut, taxed imports as from Massts higher than imports even from G. B. of wch Massts. complained to Virga. and doubtless to other States (see letter of J. M.) In sundry instances of as N. Y. N. J. Pa. & Maryd. (see) the navigation laws treated the Citizens of other States as aliens."[2]

The discussions of the Congress under the Articles of Confederation "are full of the subject of the injustice done by the States who had good seaports, by duties levied in those States on foreign goods designed for States who had no such ports"[3]; and the subsequent debates in the Constitutional Convention show that the purpose of the interstate commerce clause was that: "The oppression of the uncommercial States [those without seaports] was guarded agst. by the power to regulate trade between the States".[4]

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[1] *Baldwin* v. *Seelig,* 294 U. S. 511, 522.
[2] III Farrand 548.
[3] *Woodruff* v. *Parham,* 8 Wall. 123, 134.
[4] II Farrand 308.

In urging the ratification of the Constitution, it was pointed out in the Federalist[5] that this power was a "supplemental provision" to "the great and essential power of regulating foreign commerce", and that a very material object of the commerce power was "the relief of the states which import and export through other states, from the improper contributions levied on them by the latter". In that paper Madison explains what is meant by the federal regulation of interstate commerce by giving examples of its exercise in other confederated States, such as Switzerland, Germany and the Netherlands; and in every instance the only purpose mentioned is the prevention of the imposition of tariff duties between confederated States.[6]

Years later, Madison records, in a document to which we shall later refer, that the interstate commerce power "grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice against the States themselves * * *".[7]

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[5]No. XLII (Madison).

[6]"The necessity of a superintending authority over the reciprocal trade of confederated states, has been illustrated by other examples as well as our own. In Switzerland, where the union is so very slight, each canton is obliged to allow to merchandises, a passage through its jurisdiction into other cantons, without an augmentation of the tolls. In Germany, it is a law of the empire, that the princes and states shall not lay tolls or customs on bridges, rivers, or passages, without the consent of the emperor and diet; though it appears from a quotation in an antecedent paper, that the practice in this, as in many other instances in that confederacy, has not followed the law, and has produced there the mischiefs which have been foreseen here. Among the restraints imposed by the union of the Netherlands on its members, one is, that they shall not establish imposts disadvantageous to their neighbours, without the general permission." The Federalist, No. XLII.

[7]Madison to Cabell, III Farrand 478.

Every statement in the debates or by contemporaries, directly referring to the purpose of the Commerce Clause, is in line with the references just reviewed. At no time in the Constitutional Convention or during any of the proceedings leading to the ratification of the Constitution is there anything to intimate that this power was intended to give the Federal Government authority to prohibit the movement of commerce between the States, to fix the prices at which commodities could move in that commerce, or otherwise to accomplish the same obstruction to the freedom of that commerce which the States had practiced before the adoption of the Constitution.

This is not conclusive; but much more appears.

4. Formation and adoption of commerce clause—Repeated refusal to grant powers to legislate where states incompetent or to negative state laws.

The records of the Federal Convention do not disclose debate upon the motion for adoption of the commerce clause itself. It appears that the clause in its present form[1] was agreed to *nem. con.*,[2] but since this occurred immediately after a temporary adjournment of a heated debate respecting the enactment of a prohibition upon the commerce power forbidding the Federal Government to tax exports from any state, every suggestion that the power of interstate commerce was intended to include the power to stifle or destroy the economic lives of the individual states is repelled.[3]

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[1]With the exception of the Indian clause which was added later without debate. II Farrand 497, 499.

[2]II Farrand 308.

[3]II Farrand 308. See discussion pp. 167-174, *post*.

But the conclusion as to the intended scope of the power over interstate commerce, already pointed out as having been voiced in the general debates, is fortified by consideration of the general affirmative legislative power and the general negative on state laws which it was originally proposed to give to the Federal Government and which the commerce clause and other enumerated powers replaced.

When the Convention opened, it had before it the Virginia Plan. In that plan the provisions for the legislative power of the General Government were as follows:

> "6. Resolved that each branch ought to possess the right of originating Acts; that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof."[3a]

This last clause was promptly dropped[4]; so that the important provisions were those (a) giving the Federal Government a general legislative power in all cases in which the states were incompetent and (b) giving it a power to negative all laws of the states which in the opinion of the National Legislature violated the Articles of the Union.

These provisions were initially agreed to as statements of principle only, objection being made "to the vagueness

[3a] I Farrand 21.
[4] I Farrand 54.

of the term *incompetent*" [sic] and to the fear that the Convention was "running into an extreme in taking away the powers of the states".[5] Both these provisions were subsequently rejected, specific enumeration of the powers being substituted for the general affirmative legislative power, and the supremacy clause and judicial review being substituted for the negative.[6]

The proposals for legislative powers in respect of matters in which the States were incompetent, and proposals for the negative, both died hard; and in the debates thereon it appears that among objections successfully urged against them was the fear of restriction of the economic lives of the several states.

The provision for a negative on state laws was early proposed in an even broader form, that is, to give to the National Legislature the power to negative all state laws "which to them shall appear improper" instead of those "contravening in the opinion of the National Legislature the Articles of the Union."[7]

Madison defended "an indefinite power to negative legislative acts of the States as absolutely necessary to a perfect system",[8] and Dickenson, supporting him, said that it

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[5]I Farrand 53.

[6]II Farrand 28-29. In the early days of the Convention, delegates from New Jersey offered a plan which enumerated a few legislative powers, including a power "to pass Acts for the regulation of trade & commerce as well with foreign nations as with each other." (I Farrand 243). This plan was compared with the Virginia plan and rejected. As to the legislative powers, it was thought that the New Jersey plan gave the Congress power "only in a few inadequate instances." (I Farrand 277). It will be noted that the subsequent enumeration of powers under the Virginia plan did not go beyond the New Jersey plan in its grant of power over commerce.

[7]I Farrand 162, 164.

[8]I Farrand 164.

was impossible to draw the line between proper and improper laws of the states and that "We must take our choice of two things. We must either subject the States to the danger of being injured by the power of the Natl. Govt. or the latter to the danger of being injured by that of the States."[9]

The states did make their choice, and voted the proposal down.[10] The debates show that consideration of their continued economic interest was a controlling factor as well as consideration of the preservation of their interstate rivalry. Said Gerry:

> "The Natl. Legislature with such a power may enslave the States".[10a] "* * * This power may enable the Genl. Govt. to depress a part for the benefit of another part— it may prevent the encouragements which particular States may be disposed to give to particular manufactures."[11]

And that the preservation of intrastate industry was not the only point in the minds of the delegates is shown by Bedford's objection:

> "Is there no difference of interests, *no rivalship of commerce,* of manufactures?"[12]

The negative in its narrow form, that is, limited to negativing those state laws which in the opinion of the National Legislature varied the Articles of the Union, then came on for consideration. Madison disclosed that he re-

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[9]I Farrand 167.

[10]I Farrand 168. In the debate it was urged on behalf of proponents of the negative: "We are now one nation of brethren. We must bury all local interests & distinctions." I Farrand 166.

[10a]I Farrand 165.

[11]I Farrand 171-172.

[12]I Farrand 167.

garded this also as in effect an indefinite negative since it was "in the opinion of the National Legislature" that they should act; and referred to the prerogative of the British Crown as a precedent, stating:

> "Nothing could maintain the harmony & subordination of the various parts of the empire, but the prerogative by which the Crown, stifles in the birth every Act of every part tending to discord or encroachment. It is true the prerogative is sometimes misapplied thro' ignorance or a partiality to one particular part of ye. empire: but we have not the same reason to fear such misapplications in our System."

In opposition it was stated that this proposal would "disgust all the states". It was promptly voted down followed by *nem. con.* adoption of the supremacy rule.[13]

A final attempt to include a broad negative was made later in the convention after the enumerated powers had been settled and the supremacy clause had been adopted, the excuse being given that the small states could no longer have any objection to a negative power since the disproportion in representation had been cured by the equality established in the Senate. This broad negative was as follows:

> "To negative all laws passed by the several States interfering, in the opinion of the Legislature, with the general interests and harmony of the Union —provided that two thirds of the Members of each House assent to the same."[13a]

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[13] II Farrand 28-29.
[13a] II Farrand 382, 390.

Madison supported the measure, and Wilson "considered this as the key-stone wanted to compleat the wide arch of Government we are raising".[14]

But Mason "wished to know how the power was to be exercised", and Rutledge thought that "this alone would damn and ought to damn the Constitution".[14a] So the proposition was voted down.[15]

Even after the adoption of the enumerated powers there were three further attempts by proponents of centralized government to secure authority to legislate in respect of matters to which single states were incompetent. Madison proposed a new power to read:

> "To grant charters of incorporation in cases where the Public good may require them, and the authority of a single State may be incompetent."[16]

The committee to which this was referred reported back:

> "The Committee report that in their opinion the following additions should be made to the report now before the Convention vizt"
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> * * * * * * * *
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> " 'and to provide, as may become necessary, from time to time, for the well managing and securing the common property and general interests and welfare of the United States in such manner as shall not interfere with the Governments of individual States in matters which respect only their internal Police, or for which their individual authorities may be competent.' "[17]

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[14] II Farrand 391.
[14a] II Farrand 390-391.
[15] II Farrand 382, 391.
[16] II Farrand 325.
[17] II Farrand 366, 367.

But this attempt likewise met defeat. The committee report was postponed[17a] and never again taken up.

Madison resubmitted his proposal in the closing days of the convention and it was once again voted down.[18]

While, therefore, debates upon the express subject of the commerce clause itself are lacking, these things at least are clear:

(a) That the states had in mind the preservation of their individual economic existence; and

(b) That they consistently refused to give to the General Government such indefinite powers as the power to legislate upon matters in which the states were individually incompetent and refused also to give to the General Government any negative of any kind upon state laws.

5. Distinctions between power over foreign commerce and power over interstate commerce—Grounds therefor—Express restrictions on foreign commerce power.

Controlling light is thrown on the purpose and intended scope of the interstate commerce power by the debates and actions of the Convention in respect of the foreign commerce power.

While the power to regulate both interstate and foreign commerce is conferred upon the Congress in the same clause and in the same language of grant,[1] the Constitution con-

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[17a]II Farrand 368.

[18]II Farrand 615, 616.

[1]Art. I, Sec. 9, Clause 3: "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;". The clause respecting Indian Tribes is unimportant to the instant question. It was added during the closing days of the Constitutional Convention without debate. See II Farrand 497, 499.

tains express exceptions and restrictions to the power in the one case and not in the other; and it is settled that there is wide distinction in the extent of the power that Congress may exercise over foreign commerce and that which it may exercise in respect of commerce among the States themselves.[2] The history of the origin of this distinction is decisive in interpretation of the *interstate* commerce power in respect of the validity of the present claim that it includes a power to fix the price at which commodities may move from one State to another.

Prior to and at the time of the adoption of the Constitution, the commerce that was important to the several States was commerce with foreign nations; and the chief, if not the sole, important *instrumentality* of commerce, both foreign and domestic, was navigation. The dangers, delays, and expense of land travel between the States at that period are too well known to need review here.[3]

The interstate commerce power, as already pointed out, was intended as a negative and preventive provision to put an end to customs barriers and other restrictive provisions as between States, by empowering the Federal Government to keep that commerce free. But, in respect of the foreign commerce power, it was recognized to be necessary to confer upon the Federal Government the authority to deal drastically with the sorry condition in which our foreign commerce stood, and to establish a uniform policy of free trade, of protection, or of reciprocity with foreign nations.[4] So long as the thirteen States had different policies in this

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[2]*Atlantic Cleaners & Dyers* v. *U. S.*, 286 U. S. 427, 434; *Board of Trustees* v. *U. S.*, 289 U. S. 48, 57.
Weber v. *Freed*, 239 U. S. 325, 329, 330.
[3]See, for example, Beveridge, Life of Marshall, ch. VII.
[4]Story, Com., Sec. 261.

regard, no foreign nation would enter into any reciprocal trade agreement with the United States, for foreign nations monopolized the American trade at the ports of those States which left it free for their own advantages, while at the same time placing heavy duties and prohibitions against American vessels in foreign ports. The result was ruin to American shipping, failure to secure from Great Britain any relaxation of its monopoly of the West India trade, and general humiliation at the impotency of the Congress, which could not take any steps in respect of foreign trade which were not consistent with the policies of all the States.[5] As Madison points out, the grant of the foreign commerce power to the Congress grew out of the fact that: "The want of authy. in Congs. to regulate Commerce had produced in Foreign nations particularly G. B. a monopolizing policy injurious to the trade of the U. S. and destructive to their navigation; the imbecility and anticipated dissolution of the Confederacy extinguishg. all apprehensions of a Countervailing policy on the part of the U. States."[6]

Notwithstanding these weighty reasons for an absolute foreign commerce power in the Federal Government, the southern non-navigating States were fearful that the northern States would use such power to pass a navigation act in restraint of the navigation of foreigners and in favor of that of the northern States and that this would enhance the freights which the southern States paid upon the export of their commodities.[7] They accordingly insisted that a two-thirds vote of the Congress should be necessary to pass

[5]Story, *id.;* Madison, III Farrand 547, 548.
[6]III Farrand 547.
[7]Hamilton, in the New York convention, 2 Elliot, Debates, 235; Madison, II Farrand 449, 452.

a navigation act.[8] They finally gave up this demand on a compromise in which they secured the provision permitting the Congress to prohibit the importation of slaves prior to 1808.[9]

But this compromise was limited to permitting the regulation of *imports* in foreign commerce. The south refused to make the question of Federal regulation of exports a matter of compromise, stating that they "would never agree to the power of taxing exports."[9a] Not satisfied with this, three additional specific restrictions were placed upon the authority of the Congress to regulate foreign commerce, and two were placed upon the authority of the States. Most important of these is the provision prohibiting the Federal Government from laying any tax or duty upon articles exported from any State.[10] The debates upon that restriction, which are discussed fully in the next sub-division of this brief, disclose that the express purpose of it was to prevent Federal domination and control of the extra State commerce, and hence of the local production, of the individual States,—the very thing that the present statute seeks to accomplish. The debates upon that clause are conclusive against the power now claimed, as more fully developed hereinafter. Before proceeding to that, brief reference to the other restrictions upon the foreign commerce power may be made.

After the Constitutional Convention had agreed upon the Commerce Clause in its present form, the question of

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[8]Some of the motions presented spoke of acts "regulating commerce", but that meant navigation and foreign commerce in that day, and the debates disclose that what they feared was a navigation act. II Farrand 449-453.

[9]Const. Art. I, Sec. 9, Clause 1.

[9a]II Farrand 374, 366, 183.

[10]Const. Art. I, Sec. 9, Cl. 5.

restrictions upon the foreign commerce power was presented for consideration. The four restrictions upon the Federal power in this respect[11] were placed in a single section as express restrictions on the commerce power, but were subsequently placed in their present positions in the Constitution by the Committee on Style & Arrangement.[12]

The provisions prohibiting preferences against ports and respecting clearances of vessels[13] and for uniform duties, imposts and excises[14] were introduced by the Maryland delegates who "almost shuddered at the fate of the commerce of Maryland should we be unable to make any change in this extraordinary power."[15]

The purpose of these provisions is plain. The provision respecting ports and clearance "is a limitation upon the power of Congress to regulate commerce for the purpose of producing entire commercial equality within the United States". It "was intended to establish among them a perfect equality in commerce and navigation. That all should be alike, in respect to commerce and navigation, is an enjoined constitutional equality, which can neither be interrupted by Congress nor by the States." (*Passenger Cases,* 7 How. 283, 414, 420); and the same purpose is involved in the provision respecting uniformity of duties, imposts and excises. (*Id.,* p. 420.)

A provision was likewise included prohibiting State imposts or duties on either imports or exports[16] in order to supplement the interstate commerce power in preventing

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[11]Importing slaves; tax on exports; port preferences and clearance; uniformity of duties, imposts and excises.

[12]II Farrand 571, 590, *et seq.*

[13]Const. Art. I, Sec. 9, Cl. 6.

[14]Const. Art. I, Sec. 8, Cl. 1.

[15]II Farrand 211, 378, 410, 417-418.

[16]Const., Art. I, Sec. 10, Cl. 2.

the seaport States from restricting the commerce through them to and from the States without ports. An express restriction for this purpose was regarded as proper, although Madison remarked that "perhaps the best guard against an abuse of the power of the States on this subject was the right in the Genl. Government to regulate trade between State & State."[17]

The final restriction, forbidding any State without the consent of Congress to lay any duty of tonnage,[18] was for the purpose of preventing the States from restricting the instrumentalities of interstate commerce, *i.e.,* vessels, while permitting the States a concurrent jurisdiction where Congress deemed it wise.[19]

6. "No Tax or Duty shall be laid on Articles exported from any State" (Article I, Section 9, Clause 5).

This clause is a restriction on the Federal Government. It was enacted solely to prevent that Government from controlling the movement of products of the agricultural States into commerce,—in that day and age, into foreign commerce.

The prohibition was enacted over Madison's contention that it might sometimes be necessary for the General Government to tax exports and that "we ought to be governed

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[17]II Farrand 588, 589.

[18]Const., Art. I, Sec. 10, Cl. 3.

[19]Speaking of this clause, this Court said in *Huse* v. *Glover,* 119 U. S. 543, 549-550:

> "A duty on tonnage within the meaning of the Constitution is a charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country; and the prohibition was designed to prevent the States from imposing hindrances of this kind to commerce carried on by vessels."

by national and permanent views",[1] and over Wilson's complaint that "to deny this power is to take from the Common Govt. half the regulation of trade";[2] and over Governeur Morris's suggestion that "local consideration ought not to impede the general interest",[3] and that "however the [national] legislative power may be formed, it will if disposed be able to ruin the Country".[3a]

The debate arose when a committee explained that the taxing clause by including the word "imposts" intended to give the General Government an authority to tax in respect of commerce.[4] Whereupon, Mason moved to add a prohibition against taxing exports as a rider to the Federal taxing power,[5] Pinkney having previously served notice that the Southern States would require such a clause as a security to them.[6]

The reasons for the demand of the South for the enactment of this clause were that the Southern or "the Staple States" not only feared that a tax falling largely upon their productions would be unjust but they feared combinations in the Congress against them through the use of this power.[7] Mr. Mason

> "hoped the Northn. States did not mean to deny the Southern this security. It would hereafter be as desirable to the former when the latter should become the most populous. He professed his jealousy for the *productions* of the Southern or as he called

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[1] II Farrand 361.
[2] II Farrand 362.
[3] II Farrand 360.
[3a] II Farrand 307.
[4] II Farrand 305.
[5] II Farrand 305-306.
[6] II Farrand 95, I Farrand 592.
[7] II Farrand 305-306, 362-363.

> them, the staple States. * * * If he were for reducing the States to mere corporations as seemed to be the tendency of some arguments, he should be for subjecting their exports as well as imports to a power of general taxation—. He went on a principle often advanced & in which he concurred, that 'a majority when interested will oppress the minority.' "[8]

The Southern States had previously won their battle for equal representation in the Senate on the same ground of discrimination against their trade by the Legislature elected only on a proportionate basis, but they were not satisfied with this for they pointed out they were still in a minority and "The Southern States had therefore ground for their suspicions."[9]

Supporting the Southern view:

> "Mr. Gerry thought the legislature could not be trusted with such a power. It might ruin the Country. It might be exercised partially, raising one and depressing another part of it. * * * It might be made use of to compel the States to comply with the will of the Genl Government, and to grant it any new powers which might be demanded— We have given it more power already than we know how will be exercised— It will enable the Genl Govt to oppress the States, as much as Ireland is oppressed by Great Britain."[10]
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> "Mr. Sherman * * * The Government would not be trusted with such a power. Objections are most likely to be excited by considerations relating to taxes & money. A power to tax exports would shipwreck the whole."[11]

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[8]*Ibid.*
[9]II Farrand 362-363.
[10]II Farrand 307, 362.
[11]II Farrand 307-308.

> "Mr. Butler was strenuously opposed to a power over exports; as unjust and alarming to the staple States."[12]

Various compromises were suggested by the friends of a centralized government in the hope of averting a complete prohibition of the power. Mr. Dickenson suggested while the power of taxing exports

> "may be inconvenient at present; but it must be of dangerous consequence to prohibit it with respect to all articles and for ever. He thought it would be better to except particular articles from the power."

but Sherman answered:

> "It is best to prohibit the National legislature in all cases. *The States will never give up all power over trade.* An enumeration of particular articles would be difficult invidious and improper."[13]

Mr. Langdon suggested:

> "It seems to be feared that the Northern States will oppress the trade of the Southn. This may be guarded agst by requiring the concurrence of ⅔ or ¾ of the legislature in such cases."[14]

but on a vote moved by Mr. Madison the suggestion was voted down.[15]

It was finally suggested that the Federal Government's power to tax the export trade of the States be qualified to taxation for revenue purposes, the argument being made:

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[12] II Farrand 360.
[13] II Farrand 361.
[14] II Farrand 359.
[15] II Farrand 363.

> "that every State might reason with regard to its particular *productions*, in the same manner as the Southern States. The middle States may apprehend an oppression of their wheat flour, provisions, &c. and with more reason, as these articles were exposed to a competition in foreign markets not incident to Tobo. rice &c— They may apprehend also combinations agst. them between the Eastern & Southern States as much as the latter can apprehend them between the Eastern & middle—"[16]

but this suggestion likewise was voted down and the unqualified prohibition as we now have it in the Constitution was enacted by a vote of seven states to four.[17]

In the light of the debate on this export tax, can there be any possible doubt that "had this particular case been suggested", that is, had it been suggested that the interstate commerce clause included a power to condition the movement of articles of commerce in interstate commerce upon acceptance of Federal price control, that "the language would have been so varied as to exclude it, or it would have been made a special exception", *Dartmouth College* case, 4 Wheat. 518, 614? Does not the action thus specifically taken by the States to prevent the Central Government from regulating their outgoing trade and commerce to foreign nations by financial restrictions completely repel the conclusion that it was intended to give precisely that power to the Central Government in respect of trade between the States?

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[16]Madison, II Farrand 363.

[17]Madison, II Farrand 363. This export tax prohibition was not involved in the great convention compromise on the commerce clause (discussed pp. 164-165, *ante*). The Southern States refused to permit this prohibition to be committed as a part of the compromise movement, considering it as a *sine qua non* of their entry into the Union that they have this protection against domination by the general government of their export trade. See II Farrand 374, 366, 183.

Moreover, this express prohibition of Federal regulation of export trade ("duties" being the primary method of "regulating commerce" in those days)[18] was put in the Constitution at the instance, and primarily for the economic protection, of States without good seaports or a developed navigation. Yet if the Federal power to regulate interstate commerce was intended to authorize the Congress to prohibit or restrict commerce *among* the States for economic reasons, the commodities of those States could reach the seaports only with the permission of the Federal Government, and this export tax clause would be no protection to them whatever, and hence utterly meaningless.[19] This consideration, alone, must fairly be regarded as establishing conclusively that the authority intended for and given to the Congress by the interstate commerce clause is an authority to free interstate commerce from State restrictions, and not an authority itself to restrict or prohibit such commerce for economic or social reasons, however lofty.

We do not, however, rely merely upon implications of this debate upon the export tax provision and of the action taken thereon. During that debate, the meaning of the interstate commerce clause itself came into question and received a construction wholly at variance with that now suggested by the Government. In the debate on the proposal to ban Federal taxes on articles exported from any State, it was suggested on behalf of the smaller northern "non-commercial" states of New Jersey, Connecticut and Delaware, that the prohibition of a Federal tax would not relieve their difficulties since the Constitution as it then

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[18]*Passenger Cases,* 7 How. 283, 406.

[19]The Guffey Act expressly provides for Federal fixation of the prices at which coal may be shipped to Canada and to Cuba (Sec. 4, Part II(e), Appendix, p. 17, fol. 64).

stood left the non-commercial States, that is, the non-navigating States, still open to be taxed on their exports by exporting States.[20] In answer to this, it was suggested that "the power of regulating trade between the States will protect agst each other",[21] and that "the oppression of the uncommercial States was guarded agst. by the power to regulate trade between the States."[22]

Madison thereupon pointed out that the authority of the National Government to regulate commerce among the several States could never other than indirectly restrict the liberty which the Constitution then left to the exporting States to tax exports. Said he:

> "The regulation of trade between State and State can not effect more than indirectly to hinder a State from taxing its own exports; *by authorizing its Citizens to carry their commodities freely into a neighbouring State* which might decline taxing exports in order to draw into its channel the trade of its neighbours"[23]

This view of the power over interstate commerce, *i.e.*, that it was a power to keep commerce free between the States, and no more, led to the inclusion in the Constitution of the express prohibition forbidding any State to lay imposts or duties on either imports or exports, previously mentioned.

The view of the Interstate Commerce Clause thus expressed by Madison, as above quoted, was stated by him after the Commerce Clause itself had been agreed upon

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[20]II Farrand 306, 307, 359, 360.
[21]II Farrand 360.
[22]II Farrand 308.
[23]II Farrand 362.

in the Convention and after attempts to secure a broader grant of Federal legislative power for internal regulations had been defeated. This statement, therefore, can be regarded as nothing less than an admission, as to the Interstate Commerce Clause issue, of defeat met on the field of battle by the then champion of centralized form of government, an admission repeated by Madison more than forty years later, as will be seen.

7. Conclusions from these debates—Madison's final view as to the limited scope of the interstate commerce clause.

What has been reviewed leads inescapably to the conclusion that, against the advice and wishes of those desiring a centralized form of government, the States desired and intended to, and in fact did, preserve their individual economic interests and existence against the possibility of domination, prejudice or destruction either by the Federal Government, by a combination of other States, or by any other State singly.

The conditions of that day were responsible for the form which the framers took to preserve such economic State rights. The purpose and intent is plain and the only possible conclusion,—a conclusion already accepted by this Court,[1]—is that the interstate commerce power was intended to have a narrower scope than the foreign commerce power. If, as is clear, the express restrictions were placed upon the foreign commerce power to prevent its being used to burden or condition the right of States to export commodities into foreign commerce in precisely the same way

[1] *Atlantic Cleaners & Dyers* v. *U. S.*, 286 U. S. 427, 434; *The Abby Dodge,* 223 U. S. 166, 176, 177; *Board of Trustees* v. *U. S.*, 289 U. S. 48, 57; *Brolan* v. *U. S.*, 236 U. S. 216, 218-222.

that the present statute attempts to burden and restrain the export of a State's commodities into another State, how is it possible to say that the narrower grant to regulate interstate commerce comprehends precisely the power that was stricken expressly from the broader grant?

"The clear and obvious intention" of these express restrictions upon the power of the Congress to regulate *foreign* commerce "was that Congress might not have the power of imposing unequal burdens; that it might not be in their power to gratify one part of the Union by oppressing another"; "to guard us against the dangerous bias of interest, and the power of numbers"; "to defend the great staples of the Southern States—tobacco, rice and indigo—from the operation of unequal regulations of commerce, or unequal indirect taxes, as another article had defended us from unequal direct taxes."[2] And the same contemporary adds that "the present Constitution had never been adopted without those preliminary guards in it."[3]

And yet, although it is equally certain that the Constitution would not have been adopted had it been supposed that the *interstate* commerce grant conferred upon the Congress a power to do those things, we find not one single express exception or restriction in the Constitution to the power to regulate commerce among the States themselves.

But can anyone doubt that had it been so much as suggested that the interstate commerce power was intended as anything more than a supplement to the foreign commerce power, intended to keep the movement of goods

[2]Hugh Williamson in the House of Representatives, February 3, 1792, III Farrand 365, 366.

[3]*Ibid.*

within the United States free from restrictions, that that power, too, would likewise have been expressly limited to preserve the same economic State's rights?

We also find express statements confirming the narrower scope intended for the interstate commerce power, and a Convention history replete with attempts to enact, in the place of the commerce and other express powers, a broad general power to legislate as to all matters in which the several States might be incompetent, or in which the harmony of the Union might require legislation; replete with the defeat of those attempts by those bent upon maintaining, not merely the political existence of the separate States, but their separate economic lives and their commercial interests against domination by a central government.

No one will contend that it was or is desirable or that it was intended, that the Nation should have a *lesser* power in respect of foreign commerce than in relation to *internal* commerce. No one will assert that States unwilling to trust their economic lives to the unrestricted control of their Sister States, or of a General Government, in respect of their foreign commerce, should be willing to do so in respect of domestic. The explanation must and does lie in the lesser scope and extent intended for the internal commerce grant; otherwise, why the exceptions and restrictions to the grant respecting foreign commerce, and the absence of any restrictions or exceptions to the internal commerce grant?

Surely, on such a history, the only conclusion to be drawn is that the power given to the Federal Government over interstate commerce was not feared because it was intended as a negative and preventive provision to keep commerce among the States themselves free from restrictions of the States, and was not intended to permit the