Federal Government itself to burden that commerce or apportion or allocate it as between States; and, because of the restricted scope and extent of the power intended by the interstate commerce grant,—great though that power is,—it was not found necessary to place upon it the restrictions to secure uniformity and to prevent economic strangulation or favoritism as between State and State which were expressly placed upon the exercise of the Federal power to regulate foreign commerce.

No one can read the *whole* of the history of the times and of the formation and adoption of the Constitution, and its contemporary construction, with an open mind, without concluding that Madison voiced the only possible conclusion respecting the difference in scope between the foreign and interstate commerce powers when he said in later years:

> "For a like reason, I made no reference to the 'power to regulate commerce among the several States.' I always foresaw that difficulties might be started in relation to that power which could not be fully explained without recurring to views of it, which, however just, might give birth to specious though unsound objections. Being in the same terms with the power over foreign commerce, the same extent, if taken literally, would belong to it. Yet it is very certain that it 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 among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged."[4]

[4]Madison to Cabell, February 13, 1829, III Farrand 478. Cited in *Baldwin* v. *Seelig,* 294 U. S. 511, 522.

The force of this statement is best appreciated when it is remembered that it was Madison, the Father of the Constitution,[5] whose journal is accepted as the authoritative report of the proceedings of the Constitutional Convention, who was the leading spirit throughout its progress in attempting to have the commerce power broadened; in attempting to build a centralized form of government; in attempting to have adopted, in place of as well as in addition to the Commerce Clause and other specific grants of power, a general power to legislate in respect of all matters for the general welfare of the Nation, and in which the several States should be incompetent to act. Yet even he has had to admit that his wishes, and the desires of those holding his view, met with defeat; and that the only power —great as it is—intended to be conferred, and in fact conferred by the interstate commerce clause upon the Federal Government, is as he stated.

8. Scope of the commerce clause as explained by framers in order to secure ratification—The Tenth Amendment.

The wide fears of the States and the people which sprang up when the new Constitution was submitted to the State legislatures and became known, are familiar. To quiet these alarms the proponents of the Constitution found it necessary to utter reassurances both in debates in the State ratifying bodies and in documents of public distribution. What were the States and the people told respecting the commerce clause during this period?

They were told by the framers of the instrument that the commerce clause would provide "An unrestrained inter-

[5]See *Woodruff* v. *Parham,* 8 Wall. 123, 135.

course between the States themselves * * * a free circulation of the commodities of every part," and that failure to adopt the Constitution would result in intercourse between States being "fettered, interrupted, and narrowed."[1]

They were told that

> "If the new Constitution be examined with accuracy and candour, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the union, than in the invigoration of its ORIGINAL POWERS. The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained."[2]

They were told that

> "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."

and that

> "All agree that the general government ought to have power for the regulation of commerce. I will

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[1]"An unrestrained intercourse between the states themselves, will advance the trade of each, by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and vigor from a free circulation of the commodities of every part. * * *

"It may perhaps be replied to this, that whether the states are united or disunited, there would still be an intimate intercourse between them which would answer the same ends: But this intercourse would be fettered, interrupted, and narrowed, by a multiplicity of causes; which in the course of these papers have been amply detailed. An unity of commercial, as well as political, interests, can only result from an unity of government." The Federalist, No. XI.

[2]The Federalist, No. XLV.

> venture to say that very great improvements, and very economical regulations, will be made. It will be a principal object to guard against smuggling, and such other attacks on the revenue as other nations are subject to. We are now obliged to defend against those lawless attempts; but, from the interfering regulations of different states, with little success. There are regulations in different states which are unfavorable to the inhabitants of other states, and which militate against the revenue. New York levies money from New Jersey by her imposts. In New Jersey, instead of co-operating with New York, the legislature favors violations on her regulations. This will not be the case when uniform regulations will be made."[3]

And yet, with all this, the States were not satisfied. Many of them coupled their ratifications with proposed amendments, including the substance of the present Tenth Amendment.[4] And one refused to ratify until after the Tenth Amendment should be adopted.[5]

That amendment provided then, and still provides now:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

9. Conclusions as to scope of interstate commerce clause.

These things can clearly be said as to the scope of the interstate commerce clause as disclosed by this review of the intent of those who framed, adopted and ratified it:

[3]Madison before the Virginia Convention, 3 Elliot's Debates, 259-260.

[4]1 Elliot 322, 325, 326, 327.

[5]1 Elliot 331, 332; 4 Elliot 249.

(1) The grant intended and made by States acutely conscious of conflicting commercial and economic interests and jealous of strong central governments and of each other, is "to regulate commerce", —not to act in respect of such commercial or economic matters as to which State legislation should prove incompetent.

(2) The intention was to make commerce free among the several States.

(3) To that end, regulation of the instrumentalities of that commerce was contemplated.

(4) There was no intention to give to the Federal Government, or to a majority of States in the Congress thereof, the power to sacrifice, discriminate against or destroy the economic interests or life of any State or geographic area in order to promote majority interests, or those of the Nation as a whole.

PART IV.

THE DECISIONS OF THIS COURT ON THE COMMERCE CLAUSE SUPPORT AND ARE CONSISTENT WITH THIS VIEW.

1. The decisions of this Court recognize that under the power to regulate foreign commerce the Congress has broad authority absolutely to control or prohibit the movement of commodities into this country in foreign commerce; a power which it does not possess under the interstate commerce clause in respect of the movement of commodities from one State to another.

Within its scope, the power over interstate commerce is as absolute as the power over foreign commerce.[1] But, for the historical reasons just reviewed, the scope of the two powers is not the same, although both are conferred in the same clause of the Constitution and in the same language of grant.

Thus, under the foreign commerce power, the Congress has "a plenary power in respect to the exclusion of merchandise brought from foreign countries" (*Buttfield* v. *Stranahan,* 192 U. S. 470, 492); "so complete is the authority of Congress over the subject that no one can be said to have a vested right to carry on foreign commerce with the United States" (*The Abby Dodge,* 223 U. S. 166, 176, 177). Acting under the foreign commerce power, the Congress may "exclude merchandise at discretion" (*Buttfield* v. *Stranahan,* p. 493), "for any reason"

[1]*Gibbons* v. *Ogden,* 9 Wheat. 1, 197; *Crutcher* v. *Kentucky,* 141 U. S. 47, 57; *Bowman* v. *C. & N. W. R. Co.,* 125 U. S. 465, 482; *Brown* v. *Houston,* 114 U. S. 622, 630.

(*Brolan* v. *United States,* 236 U. S. 216, 218); and the scope of this power is so thoroughly settled that contentions to the contrary "are so devoid of merit as to cause them to be frivolous" (*Weber* v. *Freed,* 239 U. S. 325, 329).

But this Court has said that an act of Congress excluding a commodity from a State or prescribing the conditions of its entry when it comes in from foreign commerce would be clearly good, and yet the self-same statute in respect of the self-same commodity would "plainly" be unconstitutional as applied to the movement of that commodity from one State to another. *The Abby Dodge,* 223 U. S. 166, 173.[2] The foreign commerce clause was there regarded as authorizing the Congress to exclude that commodity from the States at will, while the interstate commerce clause was deemed to give the Federal Government

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[2]In that case, a Federal statute made it unlawful to land in any place in the United States any sponges taken from the waters of the Gulf of Mexico or the Straits of Florida, except under certain conditions as to their size and the manner of their taking. *The Abby Dodge* was libeled and fined for landing sponges in Florida in violation of this law. The Court ruled that if the statute applied "to sponges taken or gathered from land under water within the territorial limits of the State of Florida or other States, the repugnancy of the act to the Constitution would plainly be established by the decisions of this Court" (p. 173). Not so, however, if the sponges were taken on the high seas, for then the vessel would be engaged in foreign commerce and the Congress "by an exertion of its power to regulate foreign commerce has the authority to forbid merchandise carried in such commerce from entering the United States" (p. 176). Although broad enough to cover sponges taken within the territorial waters of any State bordering upon the Gulf (p. 173), the statute was construed, to keep it from being "inevitably and plainly" unconstitutional (p. 175), as not applying to sponges taken in territorial waters of a State, and the decree was reversed, with leave to the Government to amend, if desired, to plead a case within the statute, as construed.

no authority either to prohibit or to condition the movement of the same commodity among the States of the Union.

"The authority of Congress to absolutely prohibit foreign importations as expounded by the decisions of this Court" rests, as stated in *Brolan* v. *United States,* 236 U. S. 216, 222, upon "the broad distinction which exists between the two powers"; and decisions respecting the scope of the one power "have obviously no relation" to the question as to the scope of the other (*ib.* p. 222).

Quite recently, in *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 434, a unanimous court took occasion to point out the distinction between the scope of the power over foreign and over interstate commerce and to note that the one power includes authority to place an embargo "in respect of legitimate and unobjectionable articles", while the other does not:

> "And, again in the Constitution, the power to regulate commerce is conferred by the same words of the commerce clause with respect both to foreign commerce and interstate commerce. Yet the power when exercised in respect of foreign commerce may be broader than when exercised as to interstate commerce. In the regulation of foreign commerce an embargo is admissible; but it reasonably cannot be thought that, in respect of legitimate and unobjectionable articles, an embargo would be admissible as a regulation of interstate commerce, since the primary purpose of the clause in respect of the latter was to secure freedom of commercial intercourse among the states. See *Groves* v. *Slaughter,* 15 Pet. 449, 505; *Steamship Co.* v. *Portwardens,* 6 Wall. 31, 32-33; *Buttfield* v. *Stranahan,* 192 U. S. 470, 492. Compare *Russell Motor Car Co.* v. *United States.* 261 U. S. 514. 520-521."

2. The holdings of this Court in cases involving the interstate commerce clause support and are consistent with this view of its limited scope.

The decisions of this Court applying the interstate commerce clause have been mindful of the *character* of the *preexisting*[1] rights intended to be preserved to the States and to the people by the Tenth Amendment, and not intended to be placed under Federal domination and control by the interstate commerce clause—that is, the right to engage in commerce in total disregard of State lines:[2] the right of free access to interstate markets and products.

Prohibitions or conditions upon interstate transportation.

Thus, in view of their nature and purpose, the grant and the reservation have not been regarded as denying to the Congress the power to police interstate commerce in order to keep it safe and free,—quite a different thing from "regulating" interstate commerce in such manner as to control or to destroy the economic life of the States. The Court has ruled that, consistently with the true purpose of the Constitution, a regulation of interstate commerce may "under some circumstances, properly take the form or have the effect of prohibition", but that the validity of such a prohibition must always be judged in the light of "the nature of the interstate traffic" which it seeks "to suppress" (*Champion* v. *Ames,* 188 U. S. 321, 355).

Applying this test of the police function of the Federal Government to impose prohibitions or conditions upon

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[1]*Gibbons* v. *Ogden,* 9 Wheat. 1, 211. See p. 153, *ante*.

[2]*West* v. *Kansas Natural Gas Co.,* 221 U. S. 229, 255; *Penna.* v. *West Virginia*. 262 U. S. 553, 599.

interstate movement for the purpose of keeping interstate commerce safe and free, the Court has sustained the validity of the Federal Cattle Quarantine Acts[1] by which the Congress assumed "to stop and regulate" interstate commerce in cattle by suitable inspection and treatment to eradicate diseases until such commerce "could be safely carried on", a function deemed appropriate to "preventing burdens to that commerce" by "the spread of disease from one State to another". (*Thornton* v. *United States,* 271 U. S. 414, 424, 425). The contention in that case that the power claimed by the Federal Government was "vested in the Legislature of the state under the reservations of the Tenth Amendment to the Federal Constitution" was summarily overruled (*ib.* p. 424).[2]

Upon the same ground, the Court has sustained statutes denying the facilities of interstate commerce to adulterated or misbranded foods and drugs,[3] articles dangerous in themselves. Like unquestioned authority has been exerted in regulating the interstate transportation of dangerous corrosive and caustic substances[4] and the various kinds of virus, serums and toxins.[5]

Similarly, the commerce power has been sustained as exerted in a series of statutes regarded as having "only supplemented"[6] the action of the States in the protection of

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[1]Acts of February 2, 1903, 32 Stat. 791, and March 3, 1905, 33 Stat. 1264.

[2]But in the absence of Federal regulation, a like statute of a State is not to be regarded as a burden upon interstate commerce. *Reid* v. *Colorado,* 187 U. S. 137, 151.

[3]*Hipolite Egg Co.* v. *U. S.,* 220 U. S. 45, 57, 58; *Weeks* v. *U. S.,* 245 U. S. 618, 622.

[4]Act of March 24, 1927, 44 Stat. 1906.

[5]Act of March 4, 1913, 37 Stat. 828.

[6]*Champion* v. *Ames,* 188 U. S. 321, 357.

the public morals by prohibiting the use of the channels of interstate commerce for the transportation of women for immoral purposes,[7] of stolen automobiles[8] and of lottery tickets.[9] And it was "in view of the nature and character of intoxicants",—that is, upon the consideration of the dangers inherent in that commodity itself,—that similar regulations of its interstate transportation by the Federal Government have been sustained, in supplement to State laws.[10]

The differences of opinion exhibited in the decision of the above cases were not bottomed upon doubt as to the rule and principle, but upon the application of the rule and the drawing of the line in particular cases. It will not be contended that if the Federal statutes sustained in those cases were properly regarded as mere provision for the protection of public health and the safety of life and limb, or as supplementing the criminal statutes of the States in the protection of the public morals, they are inconsistent with the purpose of the Constitution to provide that commercial life and intercourse in this country shall be carried on without regard to State lines,—as a right, and not as a mere privilege which may be granted or denied, contracted or conditioned, by the will of government, State or Federal.

The true bases of those decisions, and the true meaning of the Constitution, become apparent when it is considered

[7]*Hoke* v. *United States,* 227 U. S. 308, 322; *Caminetti* v. *United States,* 242 U. S. 470, 491.

[8]*Brooks* v. *U. S.,* 267 U. S. 432, 436, *et seq.*

[9]*Champion* v. *Ames,* 188 U. S. 321, 355-357. A recent addition to this line of statutes is the "Lindbergh Law", punishing the use of channels of interstate commerce by kidnapers. See *Gooch* v. *U. S.* (decided February 3, 1936).

[10]*Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U. S. 311, 331, and *U. S.* v. *Hill,* 248 U. S. 420, 426; *In re Rahrer,* 140 U. S. 545.

that this Court has unanimously ruled that it is beyond the authority of the Congress under the Commerce Clause to prohibit or to condition the right to transport *sponges* in interstate commerce (*The Abby Dodge,* 223 U. S. 166, 173); that the right to do business in interstate commerce in the sale of *cotton yarns and cloths* has been regarded as not within the Federal power to prohibit (*Hammer* v. *Dagenhart,* 247 U. S. 251); and that quite recently in *Baldwin* v. *Seelig,* 294 U. S. 511, 525-527, a unanimous court held that a State may not prohibit the introduction into her territory of wholesome *milk* from other States; nor regulate the price at which that milk may be sold within its borders; nor deny the right to sell it therein in convenient receptacles, because to do so would have the effect:

> "of establishing an economic barrier against competition with the products of another State or the labor of its residents" (p. 527);
> to "set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin" (p. 527);
> "would neutralize the economic consequences of free trade among the States" (pp. 525-526),

—consequences which would assuredly follow from Federal action of like character as applied to the useful and wholesome commodity of bituminous coal, sold across State lines in this case without any showing or claim of fraud or deception.

And in the case last cited the Court reaffirmed the right of the States to prevent the importation into their borders, and the right of the Congress to prevent the movement in interstate commerce, of decayed or obnoxious food or unhealthy animals, and to protect the inhabitants of receiving

States from fraud and deception in respect of commodities imported in interstate commerce from other States (294 U. S. 511 at 525). It was the prohibition or conditioning of the right to sell *wholesome* commodities across State lines *without fraud or deception* which was found to be repugnant to the doctrine of "free trade among the States" embodied in the Commerce Clause.

These rulings make plain the grounds of this Court's recent observation in a unanimous decision,—an observation utterly at war with the Government's contention, as are the rulings in the several cases last discussed above:

> "it reasonably cannot be thought that, in respect of legitimate and unobjectionable articles, an embargo would be admissible as a regulation of interstate commerce, since the primary purpose of the clause in respect of the latter was to secure freedom of commercial intercourse among the states."[11]

Anti-Trust Acts—Sherman, Clayton and Federal Trade Commission Acts.

These statutes, enacted pursuant to the interstate commerce power,[1] afford no support for a view of that power as comprehending the fixing of prices at which commodities may move in interstate commerce. Quite the contrary.

The Sherman Act is *"a charter of freedom"* having "a generality and adaptability comparable to that found to be desirable in Constitutional provisions".[2] Its purpose, like that of the Commerce Clause itself, is to remove obstruc-

[11] *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 434.

[1] Except in their relation to the District of Columbia and to the territories. *Atlantic Cleaners & Dyers* v. *U. S.,* 286 U. S. 427, 434.

[2] *Appalachian Coals, Inc.* v. *U. S.,* 288 U. S. 344, 359, 360.

tions to *"the free flow of commerce between the States"*[3] resulting from "contracts, combinations and conspiracies in restraint of trade";[4] which restrict "in that regard, the liberty of a trader to engage in business";[5] and to that end the Congress in enacting it meant "to exercise all the power it possessed".[6]

Again and again the Court has emphasized "that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade";[7] that the purpose is the "frustration of all efforts unduly to restrain the *free course of interstate commerce*" "to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influence of *monopolistic* endeavors";[8] to prohibit contracts and combinations which "limit or restrain" interstate commerce.[9]

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[3]*Loewe* v. *Lawlor,* 208 U. S., 274, 293.

[4]*Atlantic Cleaners & Dyers* v. *U. S.,* 286 U. S. 427, 435.

[5]*Loewe* v. *Lawlor, supra.*

[6]*Atlantic Cleaners & Dyers* v. *U. S.,* 286 U. S. 427, 435.

[7]*Nash* v. *U. S.,* 229 U. S. 373, 376. See *Standard Oil Co.* v. *United States,* 221 U. S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 106; *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238; *Window Glass Manufacturers* v. *United States,* 263 U. S. 403, 412; *Maple Flooring Association* v. *United States,* 268 U. S. 563, 583, 584; *Paramount Famous Corp.* v. *United States,* 282 U. S. 30, 43; *Standard Oil Co.* v. *United States,* 283 U. S. 163, 169.

[8]*Appalachian Coals, Inc.,* v. *U. S.,* 288 U. S. 344, 359, 360. Summarizing the cases under this statute, Black concludes: "The purpose of the statute is to permit interstate commerce to flow in its natural channels, unobstructed by any combinations, contracts, or monopolies, and its prohibitions apply to any contract or combination which stifles, obstructs, or directly and substantially restricts such commerce or free competition therein." (American Const. Law, 3d Ed., p. 237.)

[9]*Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 229. In the course of that opinion, the Court remarked: "If Congress has

The Clayton Act and the Federal Trade Commission Act have like purposes. Each, this Court has pointed out, is directed at removing restraints put upon "the natural flow of commerce and the freedom of competition in the channels of interstate trade which it has been the purpose of all the anti-trust acts to maintain."[10]

Anti-Trust Acts—Prices

The Anti-Trust Acts have been applied to forbid certain practices in respect of prices. These exertions of the Federal commerce power have a purpose the antithesis of price fixing, and afford no precedent or support for the price regulations of the present statute, or for the view of

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not the power to legislate upon the subject of contracts of the kind mentioned, because the constitutional provision as to the liberty of the citizen limits, to that extent, its power to regulate interstate commerce, then it would seem to follow that the several States have that power, although such contracts relate to interstate commerce, and, more or less, regulate it. If neither Congress nor the state legislatures have such power, then we are brought to the somewhat extraordinary position that there is no authority, state or national, which can legislate upon the subject of or prohibit *such* contracts. This cannot be the case" (p. 231). This argumentative statement in answer to a due process argument, does not indicate any disposition to adopt the view that national power must exist wherever State power is impotent. The Court was speaking of "such contracts", *i.e.*, contracts limiting, restraining or burdening interstate commerce. As subsequently explained by the Court in *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, at 375: "In *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, the combination was effected by those who were in a position to deprive, and who sought to deprive, the public in a large territory of the advantages of fair competition, and was for the actual purpose, and had the result, of enhancing prices,—which in fact had been unreasonably increased (*id.*, pp. 237, 238)."

[10]*Federal Trade Commission* v. *Beech-Nut Co.*, 257 U. S. 441, 454; *Van Camp & Sons* v. *American Can Co.*, 278 U. S. 245, 254.

the scope of the Commerce Clause which the Government urges in their support.

Price Fixing: Agreements between competitors to fix and maintain uniform prices are violative of the Sherman Act whether the prices in themselves are reasonable or unreasonable.[1] The reason is that "the aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices"; and it is the object of the Sherman Act to protect against "the evils of monopoly and price control by the maintenance of competition."[2]

For the like reason, agreements for the maintenance of resale prices have been regarded as having for their purpose "the control of the entire trade"; and the public policy of the Sherman Act "in maintaining freedom of trade with respect to future sales after the article has been placed on the market and the producer has parted with his title," has condemned them, regardless of the reasonableness of the price.[3] Similarly, a scheme or plan for the enforcement of resale prices, necessarily resulting in its practical operation in the suppression of competition among retail distributors, is an unfair method of competition within the Federal Trade Commission Act.[4]

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[1]*United States* v. *Trenton Potteries,* 273 U. S. 392, 397.

[2]*Ibid,* p. 397.

[3]*Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373, 400, 403; *United States* v. *Trenton Potteries, supra,* at page 401.

[4]*Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U. S. 441. But "the words 'unfair method of competition' are * * * clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tend-

In *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 237, a combination of manufacturers in a scheme having the purpose and effect of fixing and increasing prices was held violative of the Sherman Act upon the same ground, and in *Swift & Co.* v. *United States,* 196 U. S. 375, competing meat packers were enjoined from combining, conspiring or contracting together either to raise, lower or fix uniform prices for the sale of their product in interstate commerce. These and other familiar cases are all based upon the ground that the inherent nature of a price-fixing agreement between competitors is a restraint upon the freedom of interstate trade. How far the doctrine of these cases is from supporting the statute at bar or the view of the Commerce Clause upon which the Government attempts to support it appears from the fact that the statute presently under review not only sanctions but commands competitors to enter upon an agreement to fix and maintain prices.

In *Local 167* v. *United States,* 291 U. S. 293, 295-297, a conspiracy of purchasing middlemen to allocate incoming commodities among themselves and to raise the price at which they should sell to retailers was found to be bottomed upon an intent, and in fact to result in, burdening and restraining the transportation of the commodity while it was still in interstate commerce. The Court noted that "The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly *to restrain and monopolize interstate com-*

ency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade" *Federal Trade Commission* v. *Gratz,* 253 U. S. 421, 427.

merce"; and found that in the case then before it "The interference by appellants and others with the unloading, the transportation, the sales by marketmen to retailers, the prices charged and the amount of profits exacted *operates substantially and directly to restrain and burden the untrammelled shipment and movement of the poultry while unquestionably it is in interstate commerce."* The case, of course, affords no support whatever for price fixing, but directly condemns it as constituting a burden on "the untrammelled shipment and movement" of commodities "in interstate commerce".

The Sherman Act has not been regarded, however, as prohibiting competitors from openly and fairly exchanging full information as to costs and past prices with a view to the intelligent future conduct of their business, so long as they do not reach or attempt to reach any agreement or concerted action respecting prices. (*Maple Flooring Manufacturers Assn.* v. *United States,* 268 U. S. 563; *Cement Manufacturers' Protective Assn.* v. *United States,* 268 U. S. 588). Moreover, competing producers in a geographic portion of a wide-flung industry such as the bituminous coal industry may, during a period of depression, appoint a common selling agent with authority to set their prices, for the purpose of promoting the sale of their coal in fair competition and eliminating injurious practices within the industry; and this will not violate the Sherman Act where it appears that such agent must sell in a highly competitive market abundantly supplied with coal from other sources so that the plan could not result in, and could not be regarded as contemplating, the fixing of market prices.

(*Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 373 *et seq.*).[5]

On the other hand purported "open competition plans" between competitors found to have the purpose and effect of restricting competition and increasing prices (*American Column & Lumber Co.* v. *United States,* 257 U. S. 377, 410), or to be directed to the secret dissemination of price information to competitive producers coupled with rebates and concessions to favored dealers (*United States* v. *American Linseed Oil Co.,* 262 U. S. 371), are restrictive of competition and violative of the Sherman law.

The purport of all these cases is simply this: that while price is recognized as a controlling factor in interstate trade in commodities, there has been no suggestion that either Governments or combinations of private persons may fix the prices at which commodities shall move in interstate commerce. On the contrary, it clearly appears that it has always heretofore been regarded that the freedom of that trade enjoined by the Constitution and sought to be protected and preserved by the Anti-Trust laws requires price competition, not price fixing. It is clear, therefore, that the Anti-Trust Acts, and the decisions of this Court under them in respect of price fixing, are consistent only with the view as to the purpose and scope of the interstate commerce clause presented in this brief, and that they afford no support whatever for the view advanced by the Government.

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[5]See also *Board of Trade* v. *United States,* 246 U. S. 231, holding not violative of the Sherman Act a call rule of the Chicago Board of Trade limiting the allowable period during the business day during which its members might make prices on a particular type of contract for the sale of grain, it being found the rule accommodated the convenience of the members, made for more adequate knowledge of market conditions in buying and selling, and had no appreciable effect upon general market prices.

Price Discrimination: Section 2 of the Clayton Act[6] proscribes price discrimination between different purchasers where its effect may be substantially to lessen competition or tend to create a monopoly in any line of interstate commerce, with exceptions in favor of discriminations on account of grade, quality, quantity, difference in selling or transportation costs, or discriminations made in good faith to meet competition, and reserving the right to select one's own customers "in bona fide transactions and not in restraint of trade".

This provision has been held to prohibit a large manufacturer of cans and can sealing machines from gross discrimination between packing companies in the sale of its cans and rental of its machines where the effect is to substantially lessen competition and tend to create a monopoly (*Van Camp & Sons* v. *American Can Company,* 278 U. S. 245). The ground of the decision is that in respect of persons engaged in the same lines of interstate commerce the statute regards competition as desirable, and that

[6]"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided,* That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition; *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

"whatever substantially lessens it or tends to create a monopoly in such line of commerce is an evil",—a restraint upon "the freedom of competition in the channels of interstate trade which it has been the purpose of all the anti-trust acts to maintain" (*Ibid.*, p. 254).

Price Cutting: The lowering of prices has not, of course, been regarded as a restraint of trade under the anti-trust acts.[7] "Price cutting" under those acts has had a very narrow significance. "Local price cutting at the points where necessary to suppress competition" has been looked to as one element showing intent in cases involving the use of "fighting ships", "fighting brands" or "bogus independents" or similar expedients as part of a plan for the use of temporary expedients to stifle and destroy competition and to create a monopoly in interstate commerce.[8] Price cutting, combined with numerous similar devices used as temporary expedients to suppress competition, has been considered significant only as demonstrative "of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize trade by driving competitors out of business."[9]

These cases under the Anti-Trust Acts, those involving price fixing, price discrimination and price cutting, as well as those involving other practices burdening and obstructing the free flow of interstate commerce in a competi-

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[7]*U. S.* v. *International Harvester Co.*, 274 U. S. 693, 708.

[8]*Standard Oil Company* v. *United States,* 221 U. S. 1, 43, 75-77; *United States* v. *American Tobacco Company,* 221 U. S. 106; *Nash* v. *United States,* 229 U. S. 373; Compare *United States* v. *International Harvester Company,* 274 U. S. 693, 708.

[9]*United States* v. *American Tobacco Company,* 221 U. S. 106, 160, 181.

tive system, obviously offer no support for, and indeed are directly antithetical to, a claim of power to regulate the price of commodities solely because, and whenever, they cross State lines.

The Stafford, Olsen and Tagg Cases.

The decisions in these cases are thoroughly consistent with the view that the purpose of the Commerce Clause is to keep commerce free, and that it does not empower the Congress to fix the price at which commodities may move in interstate commerce.

Stafford v. *Wallace,* 258 U. S. 495, and *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, sustained the validity of the Packers & Stockyards Act of 1921. That Act provided for the Federal supervision of the business of the commissionmen, dealers and brokers (market agencies) in livestock at the great stockyards of the Nation, including Federal regulation of rates and charges for the services of such persons and for the use of the facilities of the stockyards and regulation of practices in connection with the passing of livestock through the yards.

By the statute there involved the Congress did not assume to regulate the price at which commodities may move in interstate commerce, or to regulate the price of commodities at all. It sought only to regulate the price for personal services rendered in the course of the flow of interstate commerce from the farms of the West through the stockyards to the consuming centers of the East. As pointed out in the *Tagg Bros.* case, the persons affected by the price regulations enjoyed a substantial monopoly in the performance of those services (280 U. S. 438, 439); and there was

no claim of any authority to regulate the wage or charge for those services merely because they occurred in the course of a flow of commerce, but on the contrary, the statute was based, was defended, and was sustained as one whose purpose was to prevent excessive charges for these "monopolistic personal services" which would constitute "an undue burden upon, and obstruction of [interstate] commerce" (280 U. S. 438, 439).

In addition to the purpose to prevent monopoly, the cases are also based upon the prevention of deceptive practices and fraudulent charges against the interstate shipper which constituted "an undue burden on the commerce which the stockyards are intended to facilitate" (258 U. S. 514, 515). The statute was the outgrowth of the decision in *Swift & Co.* v. *United States,* 196 U. S. 375, in which the great meat packers had been found guilty of a combination to monopolize interstate commerce in meat products in violation of the Sherman Act. The Packers & Stockyards Act was intended to make the decree in the *Swift* case more effective (258 U. S. 520), and thereby to promote "the free and unburdened flow of livestock" in interstate commerce (p. 514),—the very antithesis of the purpose and effect of the statute now at bar. The packers, whose combination had been enjoined in the *Swift* case, had come into the possession of the stockyards constituting both the receiving depots for the movement of livestock in interstate commerce and the markets at which it was sold. They controlled such markets and had a whip hand over the commissionmen, acting as intermediaries in the sale of livestock. Not only, therefore, were the elements of monopoly present both in respect of the use of the facilities and the services of the commissionmen, dealers and brokers, but it ap-

peared that exorbitant charges, duplication of commissions, and deceptive practices in respect of prices were all made possible by collusion between the packers and the commissionmen and the packers and the dealers (258 U. S. 515).

The statute is very clearly an anti-trust act of specialized application, and has since been explained on that ground.[1]

Chicago Board of Trade v. *Olsen,* 262 U. S. 1, sustained the validity of the Grain Futures Act of 1922. The statute dealt with regulation of the business of the members of the Chicago Board of Trade, the greatest grain market in the world, upon which the grain of the western and northern States is sold. This grain is shipped from the western and northern States to a temporary storage in Chicago, but after sale it is shipped in large part to eastern States and foreign countries. The Act does not attempt to regulate either the price of any commodity or the price of any service. It prescribes rules to be observed by the members of the Board in their market dealings, the requirements providing for the keeping of records of all sales; the prevention of dissemination of misleading prices; the prevention of manipulation of prices or the cornering of grain; and the requirement that cooperative associations of producers shall be admitted as members to the Board.

It was ruled that the case involved a current or flow of interstate commerce just as in *Stafford* v. *Wallace,* 258 U. S. 495; and the regulations were sustained as appropriate measures to prevent direct burdening of the normal flow of interstate commerce in grain by manipulation of

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[1]*Atlantic Coast Line Railroad Co.* v. *Standard Oil,* 275 U. S. 257, 272.

grain futures for speculative profit which was found to result in "abnormal and disturbing temporary fluctuations of prices that are not responsive to actual supply and demand" and disturb "the normal flow of actual consignments" of grain (p. 39).

The purpose of the Act, therefore, was not to suppress or do away with competition or to fix prices. On the contrary it was to remove obstructions occurring in the course of a flow of interstate commerce which prevented the normal operation of competitive price adjustment.

Attempts by States to prohibit interstate purchase and sale of commodities or to fix the price or otherwise directly to regulate the conditions upon which they may be made.

The *West, Pennsylvania, Foster, Baldwin, Lemke* and *Shafer* cases.

"Buying and selling and the transportation incidental thereto constitute commerce" (*Kidd* v. *Pearson,* 128 U. S. 1, 20); and such buying and selling constitute interstate commerce where the contemplated incidental transportation is interstate, whether the transaction be one of purchase for transportation, or of transportation for sale in the receiving State (*Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 283, 291). This rule has been applied to contracts for the sale of coal f. o. b. mines which contemplate transportation to ultimate purchasers in other States,—at least where the seller takes the bills of lading in the buyer's name and consigns the coal to the buyer's customers in other States (*Flanagan* v. *Federal Coal Co.,* 267 U. S. 222).

Since the doing of interstate business is a right protected by the Constitution, a State statute which "imposes

a direct burden upon the plaintiff's right to engage in interstate commerce * * * is in violation of its constitutional rights" (*International Text Book Co.* v. *Pigg,* 217 U. S. 91, 112). Thus, State statutes attempting to deny to foreign corporations the right to enter into contracts of interstate purchase and sale except upon complying with the statutory requirements for doing an intrastate business (*Dahnke-Walker Co.* v. *Bondurant*) or denying an individual the right to enter into such contract without taking out a dealer's license under local law (*Flanagan* v. *Federal Coal Co.*) are unconstitutional as constituting direct burdens upon interstate commerce.

Putting to one side cases of incidental restraint involved in the enforcement of local pure food or game laws,[1] there are six leading cases in which States have attempted to prohibit interstate contracts of purchase and sale of ordinary wholesome commodities or to fix the price at which such commodities may be sold in interstate commerce, or otherwise directly to govern such transactions. In each of these cases the State statute has been held to be violative of the Commerce Clause, as constituting a direct burden upon the free flow of interstate commerce in ordinary wholesome commodities.

In *West* v. *Kansas Natural Gas Co.,* 221 U. S. 229, the Court held invalid an Oklahoma statute prohibiting the transportation to points in other States of natural gas acquired in that State. The statute was not one regulating the production of natural gas to prevent physical waste,

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[1]*Crossman* v. *Lurman,* 192 U. S. 189; *Savage* v. *Jones,* 225 U. S. 501; *Price* v. *Illinois,* 238 U. S. 446; *Plumley* v. *Massachusetts,* 155 U. S. 461; *Asbell* v. *Kansas,* 209 U. S. 251; *Hebe Co.* v. *Shaw,* 248 U. S. 297; *Mintz* v. *Baldwin,* 289 U. S. 346; *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497; *Silz* v. *Hesterberg,* 211 U. S. 31; See *Baldwin* v. *Seelig,* 294 U. S. 511, 525.

but was one limiting its use to intrastate commerce upon the plea that such gas was the only practical usable fuel available in Oklahoma; that its supply was exhaustible and rapidly being exhausted, and that it was necessary to retain it for the use of the people of the State. As the Court pointed out, "the purpose of its conservation is in a sense commercial—the business welfare of the State, as coal might be, or timber" (p. 255). After pointing out that the result of the acceptance of such a view of State power would permit each State to keep its products of whatever kind and retaliate embargo with embargo, with the result of halting commerce at State lines, the Court ruled that in matters of interstate commerce there are no State lines; that:

> "In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of 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. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court" (pp. 255, 256).

The opinion may be searched in vain for any suggestion that it was within the power of the Congress under the Commerce Clause to enact the measure thus held to be put beyond State power by the Commerce Clause.

In *Pennsylvania* v. *West Virginia*, 262 U. S. 553, this Court, on the authority of the *West* case, held unconstitutional a West Virginia statute requiring producers of

natural gas in that State to give preference in the sale and disposal of it to consumers of it in that State, the result being to withdraw from interstate commerce a large volume of gas theretofore moving therein from West Virginia wells. The Court said:

> "Natural gas is a lawful article of commerce and its transmission from one State to another for sale and consumption in the latter is interstate commerce. A state law, whether of the State where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce,—a prohibited interference. [Cases.] The West Virginia act is such a law. Its provisions and the conditions which must surround its operation are such that it necessarily and directly will compel the diversion to local consumers of a large and increasing part of the gas heretofore and now going to consumers in the complainant States, and therefore will work a serious interference with that commerce" (pp. 596-597).

The opinion contains no intimation that the Federal Government could enact the statute thus held to be beyond the power of the State.[2]

In *Foster Packing Co.* v. *Haydel,* 278 U. S. 1, a Louisiana statute prohibited the exportation of shrimp from the State unless the heads and hulls were removed and

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[2]The general statement in the opinion that the act of the State is an assumption of "power to regulate interstate commerce" which "power is lodged elsewhere" (p. 598) cannot be regarded as a suggestion that a prohibition upon the interstate movement of gas would be a regulation of interstate commerce within the power of the Congress, especially in view of the fact that the Court quoted with approval the language of the *West* case given in the text above to the effect that the States, by joining the Union, have divided their resources with all the other States.

conserved for use as fertilizer and chicken feed. After noting with approval the rule of the *West* and *Pennsylvania* cases and noting the exception in favor of the State's right to conserve its wild game for the benefit of the people, the Court found that the stated purpose of conservation was feigned and that the real purpose of the statute, as shown by its terms and by the evidence, was to prevent the interstate movement of raw shrimp to the packing and canning industries in Mississippi, thus by commercial necessity forcing the removal of those industries to Louisiana. It was therefore ruled that the statute constituted a direct obstruction and burden upon interstate commerce and was invalid.

In this third case of an attempt by a State to favor its business interests and economic position by a prohibition upon interstate commerce, the Court struck the State statute down, and its opinion contains not the slightest suggestion that the power there denied the State could be exercised by the Federal Government as a regulation of interstate commerce.

The same result was reached when a receiving State sought to regulate the price at which an ordinary wholesome commodity imported from other States might be sold. In *Baldwin* v. *Seelig,* 294 U. S. 511, 521 *et seq.,* a receiving State sought to outlaw wholesome milk imported from other States "by prohibiting its sale thereafter if the price that has been paid for it to the farmers" of the State of origin were less than the farmers' price for the same commodity obtaining in the receiving State. The statute thus sought to regulate the price at which milk imported from other States might be sold, whether in the original package or after transfer to smaller receptacles.

The statute was held invalid in all its aspects, as a direct and unconstitutional burden upon interstate commerce. The Court overruled the contention that the statute was a sanitary measure, and characterized it as one to "neutralize advantages belonging to the place of origin" (p. 527); to "neutralize the economic consequences of free trade among the States" (p. 526); and as one in which the State had assumed "in order to promote the economic welfare of [New York] farmers [to] guard them against competition with the cheaper prices of Vermont" (p. 522).

Again the opinion contains no suggestion that the Federal Government is empowered by the interstate commerce clause to enact the measure thus held to be beyond the power of the State.

After adverting to the fact that the records of the Federal Convention show that one of the chief occasions for the commerce clause was "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation", the Court stated:

> "If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation" (p. 522).

In thus referring to "the power of the nation" over "commerce between the states", the Court clearly had reference to the power to maintain freedom of trade among the States, entrusted to the Federal Government by the Constitution. Clearly, it could not have been meant to suggest that the Federal Government could, by a price regulation

"neutralize the economic consequences of free trade among the states" (p. 526). It could not have been meant to intimate that the Federal Government "in order to promote the economic welfare of [New York] farmers, may guard them against competition with the cheaper prices of Vermont" (p. 522). Clearly, there was no purpose to rule by indirection that the commerce power of the Federal Government may be used to foster the interests of business or labor in any State or portion of the country, by regulating the prices at which commodities may cross State lines, "with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents" (p. 527). For what purpose did the Court refer to the "advantages belonging to the place of origin" and point out that the Commerce Clause forbade the receiving State "to neutralize" them (p. 527), if it is within the competence of the Federal Government to destroy those advantages by a "regulation" of interstate commerce? It is not to be thought that the Court intended to suggest that, by regulating the price at which commodities may be permitted to cross State lines, the Federal Government could itself set "a rampart of customs duties" at State lines, thereby accomplishing what the opinion states to have been "a chief purpose" of the Commerce Clause to prevent.

It appears from the four cases just reviewed that the Commerce Clause forbids any State to prohibit the purchase or sale of ordinary wholesome commodities in interstate commerce, or to fix the price at which such commodities may be purchased or sold in such commerce, with a view to the promotion of its own economic or business interests; and that such State statutes offend the Commerce

Clause whether they be those of a receiving State seeking to keep its own markets for its own products or those of a producing State seeking to keep its own products for its own markets. It further appears that the opinions of this Court in these cases contain no suggestion that the Federal Government, in disregard of the purpose of the commerce clause, can burden interstate commerce in the very manner which the States are thus forbidden to do. On the contrary, petitioner submits that the grounds upon which these decisions were placed necessarily require the ruling, if they do not in effect constitute a ruling, that the Federal Government is likewise without such power.

This conclusion becomes inescapable, we submit, when the remaining two cases are considered.

In *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50, it was held "that the delivery and sale of wheat by farmers to local grain elevators in North Dakota to be shipped to Minneapolis, when practically all the wheat purchased by such elevators was so shipped and the price was fixed by that in the Minneapolis market less profit and freight, constituted a course of business and determined the interstate character of the transaction. Accordingly a state statute which sought to regulate the price and profit of such sales[3] and was found to interfere with the free flow of interstate commerce, was declared invalid as a violation of the commerce clause."[4]

The State defended the statute upon the ground that it was "in the interest of the grain growers, and essential to protect them from *fraudulent purchases*" (pp. 60-61);

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[3]Other provisions of the Act in respect of grading, inspection and weighing were found to be inseparable, and fell for that reason. 258 U. S. at p. 60.

[4]*Stafford* v. *Wallace,* 258 U. S. 495, at 519.

and it was asserted that to strike down the law would leave "the farmers of North Dakota defenseless" against "persistent, palpable frauds" (p. 65). It was urged that under the conditions upon which the interstate purchase and sale of the grain was carried on the seller was at the mercy of the buyer and was being imposed upon in respect of price, weight, etc. (p. 63). It was in *that* connection that this Court made its first affirmative suggestion that the power of the Federal Government was adequate to deal with the matter although that of the States was not. Said the Court:

> "This may be true, but Congress is amply authorized to pass measures to *protect* interstate commerce if legislation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce placed by the Constitution under federal control" (258 U. S. at p. 61).

It thus appears that it is in connection with the existence of *fraud* in interstate commerce that the Court has suggested that the Federal power under the Commerce Clause is ample. No one doubts this. That power has been exercised under the Anti-Trust Acts for many years. The Court did *not* say that the Congress could prohibit the movement of ordinary wholesome commodities in interstate commerce, or that it could regulate the price at which they should be permitted to move. The only statement is that the Congress is empowered to keep interstate commerce in the purchase and sale of commodities free from fraud. The precise language of the above statement and the circumstances under which it was made are doubly significant in view of the fact that no similar suggestion was made by

the Court in the four cases previously reviewed, in which it held invalid State statutes prohibiting the purchase and sale, or attempting to fix the price of the purchase and sale, of commodities moving in interstate commerce, where done for the purpose of enhancing the commercial interests of a State and neutralizing the commercial advantages of another State.

The statement of the Court in the *Lemke* case, therefore, can in no view be regarded as recognizing an authority in the Congress to set the price of commodities merely because they cross State lines, or indeed to fix the prices of commodities for any reason. It is merely a reiteration of the long-established doctrine that it is for the Congress to enact appropriate legislation to remove burdens and restraints, whether those of States or of individuals, attempted to be imposed upon the free flow of interstate commerce.

A like statement was made by the Court in the remaining case, *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189. That case dealt with a later statute of North Dakota (North Dakota Grain Grading Act) "having the same general purpose" (p. 191) as the statute held invalid in the *Lemke* case. Outright fixing of the sale price was not attempted, but the State assumed through its agents "to supervise and regulate the marketing" of wheat in order to prevent "unjust discrimination, fraud and extortion in the marketing", and authorized a State supervisor to investigate and supervise the marketing "in a general way" "with a view to prevent unjust discrimination, unreasonable margins of profit, confiscation of valuable dockage,[5] fraud and other unlawful practices" (pp. 195, 196). The Act required the interstate buyers to buy by grade, to give bond for the purchase price

[5]A by-product.

unless they paid cash, to keep and submit records, and the like matters.

This statute, likewise, the Court condemned as a direct burden and restraint upon interstate commerce. But, since the object of the statute was the prevention of *fraud,*—not the enhancement of the economic position of the State at the expense of its neighbors—the Court took occasion again to point out that the power to keep interstate commerce free from fraud resided in the Congress—

> "If the evils suggested are real, the power of correction does not rest with North Dakota but with Congress, where the Constitution intends that it shall be exercised with impartial regard for the interests of the people of all the States that are affected" (p. 202).

Here, again, the direct suggestion of the existence of Federal power is made; and here, again, it is made in connection with the prevention of fraud. Here, too, the language used is apt to indicate the true scope and extent of the Federal power as one to remove burdens and restraints to the free flow of interstate commerce. There is no suggestion that the Federal Government may, for economic reasons or for any reason, prohibit the movement of ordinary wholesome commodities across State lines or fix the price at which such commodities may so move.

Consideration of these cases must make it clear, we submit, that the contention that the Federal Government must have a prohibitory or price fixing power in respect of the movement of ordinary wholesome commodities between the States because the States have no such power is utterly without merit. What the cases do establish, and all that they establish, is that the Federal power is competent to eradicate fraud in the interstate purchase and sale of commodities, thereby keeping that commerce free.

The cases do not suggest that the Federal power extends to prohibiting altogether the interstate sales of such commodities or the fixing of the price at which they may be made. The cases do make clear that if, in some extraordinary circumstance, the fixing of prices of commodities in interstate sales should be necessary in order to prevent fraud, destruction of competition, or monopoly, and to keep commerce free, the power exercised would not be a power to fix the price at which commodities may be sold solely because they move in interstate commerce, but would be the use of price fixing as a means to remove those familiar burdens from interstate commerce. We do not mean to suggest or admit that price fixing of commodities by the Federal Government can ever be justified, even as a means of removing burdens. We have been unable to suppose a case in which price fixing of commodities would be necessary or appropriate for such an end.[6] But, at the very least, it is clear that the absolute power claimed by the Government to fix the prices of commodities upon the sole ground that they move in interstate commerce, finds no support whatever in the cases.

Regulation of Rates of Instrumentalities of Interstate Commerce.

The conceded authority of the Congress under the Commerce Clause over the instrumentalities of interstate

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[6]This Court has repeatedly held that state price-fixing statutes cannot be supported upon the theory that they prevent "fraud, extortion, or collusive arrangements" (*Tyson* v. *Banton,* 273 U. S. 418, 442, 443) or upon the ground that they prevent attempted destruction of competition and erection of monopoly (*Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 1, 10), pointing out that price-fixing statutes which necessarily include the innocent as well as the guilty cannot be regarded as having any substantial relation to the suppression of such evils. See, also, *Adams* v. *Tanner,* 244 U. S. 590, 594.

commerce[1], including the authority to regulate rates in order to prohibit unjust charges, discriminations or preferences[2] and for the purpose of providing transportation systems adequate to the needs of the country[3], of course affords no support for the view that the Commerce Clause includes a power to fix the price at which commodities may be permitted to be sold across State lines.

A railroad rate is not the price of a commodity; it is the price for transportation. In regulating the rates for such transportation in interstate commerce the Congress is but taking care that these agencies or instrumentalities of interstate commerce "shall not be used in such manner as to cripple, retard or destroy it"; that they shall not "obstruct the freedom of movement of interstate traffic over their lines".[4]

In order to keep free not merely the channels of interstate commerce but the very instruments in which commerce is carried in those channels, the power of the Congress has been deemed to extend to the prohibition of discriminations through the subterfuge of the carriers acting as both seller and carrier[5] and to the regulation of the intrastate activities of carriers which discriminate or impose burdens upon interstate traffic.[6]

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[1]*The Daniel Ball,* 10 Wall. 557, 565.

[2]*Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 472.

[3]*Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.,* 257 U. S. 563, 589.

[4]*Houston & Texas Ry.* v. *United States,* 234 U. S. 342, 351, 355.

[5]*United States* v. *Delaware & Hudson Co.,* 213 U. S. 366; *New Haven R. R. Co.* v. *I. C. C.,* 200 U. S. 361.

[6]*Houston & Texas Ry. Co.* v. *United States,* 234 U. S. 342; *R. R. Com. of Wisconsin* v. *C. B. & Q. R. R.,* 257 U. S. 563; *Colorado* v. *United States,* 271 U. S. 153.

Rates for Interstate Sale and Transmission of Gas and Electricity.

Interstate sale and transmission of electric energy and gas involve both the sale of a commodity and the rendering of an exclusive transportation service in interstate commerce. Both as to commodity and as to transportation service such businesses, ordinarily, are at least geographically monopolistic of markets. Should it be determined, when the question is presented,[1] that rates for such sale and service are subject to federal regulation as are the rates of instrumentalities such as railroads, telegraph or telephone companies, it would seem clear that in view of its special grounds, as above stated, such a conclusion would leave untouched the contention here under consideration.

The Nebbia Case.

Nebbia v. *New York,* 291 U. S. 502, heavily relied upon by the Government in support of, and by the court below in sustaining, the price fixing provisions of the present Act (R. 1192-1193), obviously has no bearing on the issue as to the scope of the Federal power over interstate commerce. The State statute there involved made no pretense of regulating commerce, intrastate or otherwise, but was frankly labeled what it was, *i.e.,* a statute to regulate the milk industry within the State of New York by price fixing, as "a temporary expedient to redress an injurious economic condition" (*Borden's Farms Products Co.* v. *Ten Eyck,* decided Feb. 10, 1936, p. 5). The only question decided was whether the State statute—an exercise of the States' reserved power to provide, in any manner not prohibited

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[1]See *Public Utility Commission of R. I.* v. *Attleboro Steam & Electric Co.,* 273 U. S. 83; *Peoples Gas Co.* v. *Public Service Commission,* 270 U. S. 550.

to it, for the general welfare of its people[2]—was violative of the guaranties of liberty and equal protection contained in the Fourteenth Amendment.

The fallacy of relying upon decisions respecting constitutional restrictions upon the broad reserved powers of the States as any criteria for determining the scope of the granted powers of the United States has too pointedly and recently been reiterated by this Court to bear restatement.[3] The impropriety of any such test is especially clear in the present instance, where the State statute purports to regulate an industry, and the Federal statute, we are told, regulates interstate commerce.

CONCLUSION AS TO GOVERNMENT'S PRIMARY ARGUMENT IN SUPPORT OF THE PRICE REGULATIONS

The argument is that, solely because bituminous coal is sold for consumption in other than the State of production, and therefore necessarily crosses State lines, the Congress may regulate the price at which it may be sold. We have seen that this would result in placing "customs barriers" between States; that its effect is to outlaw and prohibit the interstate sale and transportation of coal except at Federally fixed prices; that it would "neutralize the economic consequences of free trade among the States", if not destroy that trade; and that it would place the prosperity, the continued growth, the very existence of the economic life of the States, and the prosperity of their

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[2] *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398.

[3] *Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 347, 367, 368; *United States* v. *Butler,* decided Jan. 6, 1936, p. 6; *cf. Baldwin* v. *Seelig,* 294 U. S. 511.

peoples, within the unfettered control of the Federal Government, without even any provision for uniformity in the exercise of that vast power.

We submit that every teaching of the documentary history of the formation, adoption and ratification of the Constitution and of its contemporaneous construction repels the suggestion that the power over interstate commerce was ever intended as conferring so vast an authority upon the central Government, and that on the contrary that history discloses that such authority was intended to be reserved to the States and to the people.

No recorded judgment of this Court supports the view that the Federal Government possesses this power, but on the contrary the decisions to which we have referred and which we have discussed in the preceding sections of this brief disclose the want of any such power.

We submit, finally, upon this point, that had anyone expressly proposed in the Constitutional Convention that the Federal Government be given the power to determine the price at which sales of commodities might be made across State lines, he would have received the same answer from all quarters as did Hamilton's brilliant speech in that Convention in support of a National as opposed to a Federal form of government, that is to say, it would have been recorded that: "though he has been praised by every body, he has been supported by none",[1] or, as more quaintly recorded in the notes of another Convention member:

> "The Gentleman from NYk is praised by every gentleman, but supported by no gentleman—He goes directly to ye abolition of the State Governts. and the erection of a Genl. Govt."[2]

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[1]Yates, I Farrand 363, reporting Dr. Johnson's speech.
[2]King, I Farrand 366, do.

POINT VI.

THE PRICE FIXING PROVISIONS CANNOT BE SUSTAINED AS A MEANS FOR CARRYING INTO EXECUTION THE POWER TO REGULATE COMMERCE.

1. The question here presented is whether the price fixing provisions are means naturally and reasonably adapted to accomplish ends within the scope of the commerce power.

The ultimate findings of the court below appear to indicate that its decision sustaining the price fixing regulations may be based upon the ground that they are appropriate means for removing burdens and restraints upon interstate commerce[1]; and this was the second ground upon which the Government sought to support these regulations in the court below.[2] The contention here is not that the price provisions are authorized by the commerce clause upon the sole ground that the coal moves in interstate commerce, but that regulation of the price of coal is an appropriate means under the necessary and proper clause[3] to carry out the object of the commerce grant by removing direct burdens and obstructions upon interstate commerce. This necessarily presents the questions as to the objects and

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[1]FF. 176-185; R. 209-212. Compare opinion, R. 1181-1195, and see footnote 4, p. 133, *ante*.

[2]See footnote 1, p. 133, and pp. 23, 28 *ante*.

[3]Constitution, Art. I, Sec. 8, Cl. 18. As pointed out in *Ruppert* v. *Caffey*, 251 U. S. 264, 299-301, the power of the Congress to regulate the rates of interstate carriers (*American Express Co.* v. *Caldwell*, 244 U. S. 617) is bottomed upon the necessary and proper clause, and it is necessary to bear in mind that this clause is in itself a distinct and express grant of power in order to "avoid confusion of thought".

scope of the interstate commerce power (examined in Point V, *ante*) and as to whether the price regulations are means reasonably related to the accomplishment of those objects.

The express, although general, grant of power in the necessary and proper clause,[4] authorizing the Congress to select the means by which it shall execute its express but specific powers, "vests in Congress a wide range of discretion as to the means by which the powers granted are to be carried into execution,"[5] and it is not the province of the Court to declare such means inexpedient or unwise.[6]

However, the means employed in the statute must be germane to the execution of the specific powers granted to the Congress. The general legislative power under the necessary and proper clause must always be exercised in subjection to the paramount rule that the *end* of the statute must be "within the scope" of the specific power sought to be executed, and that the means chosen must be such as are "naturally and reasonably adapted" to the accomplishment of *that* "legitimate" end.[7] Otherwise the door is open to the exercise of authority not granted by the Constitution, and there is an end of the doctrine of enumerated powers, for the exercise of the general power will have rendered nugatory the enumeration of specific powers.

The governing principles, therefore, to be applied in considering this second argument in support of the price

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[4] *Ruppert* v. *Caffey*, *supra*, at p. 300; *Legal Tender Cases*, 12 Wall. 457, 550.

[5] *Fairbank* v. *U. S.*, 181 U. S. 283, 287; *Northern Securities Co.* v. *U. S.*, 193 U. S. 197, 343.

[6] *Logan* v. *U. S.*, 144 U. S. 263.

[7] *M'Cullough* v. *Maryland*, 4 Wheat. 316, 421, 423; *Linder* v. *United States*, 268 U. S. 5, 17. See *U. S.* v. *Dewitt*, 9 Wall. 41; *Keller* v. *U. S.*, 213 U. S. 138; *Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, *U. S.* v. *Butler* (decided Jan. 6, 1936).

fixing provisions are: (a) that the *end* of the statute must be the accomplishment of an object within the *scope* of the commerce power, and (b) that the *means* selected by the statute must be naturally and reasonably adapted to the accomplishment of *that* end.

As pointed out in Point II, *ante,* the regulatory provisions of the statute and of the Code, as a whole, constitute a patent attempt purposefully to accomplish an unconstitutional end, *i.e.,* the regulation of production, not of interstate commerce. A particular consideration of the avowed ends of the price regulations, considered alone, confirms this view and discloses that they are means "plainly inappropriate and unnecessary" to accomplishment of the *objects*[8] of the commerce power.

The "burdens" and "obstructions" which the price regulations are said to be intended to remove, as disclosed in the ultimate findings of the court below, are treated in pertinent respects in the sections which follow.[8a]

2. "Shifts", "dislocations" and "diversions" of the "normal" flow of interstate commerce in coal.

The court below has found that "small variations" in mine price may cause "large variations" in shipments as between producing areas and States, and as between mines, to points of consumption in the same or other States (Finding 176, R. 209), and that cutting of wage rates has "permitted disparities in price" which have "in turn" "shifted, diverted and dislocated the normal flow of coal in interstate commerce" (Finding 182, R. 211). In view of the extreme

[8]*Linder* v. *United States,* 268 U. S. 5, 18.

[8a]See also Statement, pp. 6-9, *ante;* Review of Evidence, pp. 28-62, *ante;* and Point II, at pp. 103-112, *ante.*

ambiguity, complexity and impracticability of the provisions of the Code for the coordination of prices, it is open to serious question whether the price fixing provisions are reasonably adapted to prevent shifts and diversions of interstate commerce in coal, or whether they will not on the contrary operate to cause such shifts and diversions.[1] In *Borden's Farm Products Co.* v. *Ten Eyck* and *Mayflower Farms, Inc.* v. *Ten Eyck* (decided February 10, 1936), relating to State price fixing in the milk industry within New York, the Court had occasion to note the difficulty of avoiding "dislocations" and discriminations in attempting to substitute price control for competitive effort. As the Court stated in the *Borden's* case:

> "The present case affords an excellent example of the difficulties and complexities which confront the legislator who essays to interfere in sweeping terms with the natural laws of trade or industry. The danger in such efforts always is that unintended dislocations will bring hardships to groups whose situation the broad rules fail to fit."

It can hardly be supposed that the complicated and yet vague price fixing and coordination provisions of the present statute in the infinitely more complicated matter of fixing a nation-wide series of prices in the bituminous coal industry will result in preventing dislocations, diversions or shifts of business as between areas, States or mines.

Assuming, however, that the price-fixing provisions are reasonably adapted to "freeze" the existing distribution of markets as between producing States, areas and mines (*if* the present competitive distribution is what is meant by "normal"), nevertheless, the accomplishment of that end

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[1]See pp. 17-18, *ante*.

is not within the objects and purposes for which the power to regulate commerce was granted to the Congress. This has been fully discussed in the preceding Point. If, therefore, the price fixing provisions be regarded as reasonably related to the accomplishment of the end of freezing the existing distribution of markets between States and producers, yet that end is not within the scope of the commerce power.

3. Sales below cost of production.

The next finding in respect of the price provisions is that price cutting has existed in the coal industry for many years, with the result that the average price realized by producers of bituminous coal has in recent years been less than average cost of production (FF. 179, R. 210). The evidentiary findings and the evidence itself will be searched in vain for any suggestion that the "price cutting" here referred to by the Court was for the purpose of destroying competition or creating a monopoly. On the contrary, as already pointed out in the Summary Statement, *ante,* it is not disputed that there is no possibility of monopoly in the bituminous coal business, that there has been no attempt at it, and, similarly, that the existing over-production and the potential capacity of existing as well as of undeveloped mines is such that the destruction of competition in this business is impossible. What is meant by price cutting is, therefore, clear, *i.e.,* a lowering of prices in order to secure business in a highly competitive market. It does not appear to be contended that the price fixing provisions may be supported with the sole object of preventing such competitive price adjustments, but the finding appears to say that price fixing can be resorted to to prevent price cutting because such price cutting causes financial loss to coal pro-

ducers. One of the true purposes of the price provision is thus disclosed, *i.e.,* to better the financial condition of those engaged in coal production, not to regulate interstate commerce.

It is further found that price cutting also has caused "dislocations to and diversions of the normal flow of interstate commerce" (FF. 180, R. 210). As pointed out above (pp. 219-221), the prevention of shifts in interstate business is not a proper function of the Federal Government under the interstate commerce clause and nothing is added when it is said that such shifts occur by reason of lowering of prices in an active competitive market. There is no finding, ultimate or evidentiary, and no evidence, that price cutting has ever resulted in monopoly or in the destruction of competition in the bituminous coal industry, or that it has ever resulted in the shipment of less coal, in the scarcity of coal, or in the increasing of prices thereof to the consumer.

4. Unfair competitive practices.

The court found that price competition has occasioned unfair practices (FF. 181, R. 210). The practices referred to are those mentioned in Section 4, Part II(i) of the Statute (Appendix, pp. *18-21,* fols. 68-79).[9] It is ap-

[9]The only material on this subject in the record is a stipulation of counsel (R. 1177) to the effect that witnesses for the Government would testify if called that the practices listed in that section of the Statute "existed throughout the bituminous coal industry prior to 1933 and now exist (although not the general practice in that industry) * * * that they were in part caused by the competitive pressure in the bituminous coal industry, and that they have been a factor in the downward trend of prices", and that witnesses for the plaintiff would testify that "instances of the said practices occurred prior to 1933 but that they were not engaged in by the reputable firms in the industry and the said practices were not general."

parent that the forbidding of these practices was done for the purpose of enforcing the price regulations of this Code, not that the price regulations were enacted for the purpose of preventing these practices.

In respect of those of such practices which might properly be prohibited by the Federal Government when carried on in interstate commerce (*i.e.,* the prohibition of false advertising or unauthorized use of trade names, etc.) it is sufficient to say that it is apparent that price fixing is plainly inappropriate and unnecessary to the prevention of such practices. They may be prevented by direct prohibition to the extent that they occur in interstate commerce. There is no evidence, and no finding, that the Carter Coal Company has ever engaged in any such practices. If it must submit to Federal regulation of its *prices,* because some of those in the business may engage in such unfair methods of competition, then the Court will have approved the use of means so "inappropriate and unnecessary"[10] to prevention of unfair practices burdening interstate commerce, as to sanction price regulation of commodities in all businesses involving sales across State lines, for it is stipulated of record that Government witnesses would testify "that similar practices existed in other industries".[11]

Applying the rule which requires the Court to inquire into the real effect of any statute and to declare it invalid when without substantial relation to some evil within the power of the Government to suppress, the Court has, on more than one occasion, held that all-inclusive price fixing statutes, which apply alike to the innocent as well as to the

[10]*Linder* v. *U. S.,* 268 U. S. 5, 18.
[11]R. 1177.

guilty, cannot be regarded as reasonably adapted either to suppress fraud[12] or to prevent the destruction of competition and the establishment of monopoly.[13] "It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrong-doers also may be caught."[14]

If the argument is that raising of prices will induce producers to deal honestly and fairly, it is at one with the argument advanced in the *Schechter* case in support of the wage regulations there involved, as tending to promote general prosperity and thus indirectly to promote interstate commerce (See discussions, p. 100 *et seq., ante*); and is even more remotely connected with a regulation of commerce than the pension system sought to be supported upon a like argument in *Retirement Board* v. *Alton R. Co.*[15] It is apparent that use of price fixing as a means for reforming these trade practices can in no just sense be regarded as a regulation of interstate commerce.

5. Raising of wages—Resulting prevention of shifts, strikes, price fluctuations, interruptions and stoppages of interstate commerce, insolvency of producers and waste of coal.

The remaining ultimate findings (FF. 182-185, R. 211-212) are all bottomed upon the view that price cutting leads to wage cutting, which would be stopped by price fixing. This discloses the other real purpose of the

[12] *Tyson* v. *Banton,* 273 U. S. 418, 442, 443.

[13] *Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 1, 10.

[14] *Tyson* v. *Banton,* 273 U. S. 418, 442, 443. See *Adams* v. *Tanner,* 244 U. S. 590, 594; *Wolff* v. *Industrial Court,* 262 U. S. 522, 537; *Adkins* v. *Children's Hospital,* 261 U. S. 525.

[15] 295 U. S. 330, 367, 368.

price provisions, *i.e.,* the raising of wages of miners engaged in producing coal. Assuming that price fixing is a means reasonably adapted to that object, any suggestion that the accomplishment of that object is an end for which the commerce power was given to the Congress plainly will not bear serious discussion.

The findings, however, do not stop there, but suggest that the object of the price regulation is not wage increase *per se,* but the removal of burdens and obstructions upon interstate commerce which are caused by wage cutting.

The first of these suggestions is (FF. 182, R. 211) that wage cutting results in price cutting, which in turn has shifted, diverted and dislocated the normal flow of interstate commerce, and given producers who cut wages an undue competitive advantage in that commerce.[1] This is but another way of saying that price differentials between producing States, areas and mines in a highly competitive market govern the distribution of business as between producers. The argument that the commerce clause confers upon the Federal Government the power to allocate the amount of business to be enjoyed by the several producing States, respectively, has already been treated heretofore herein.

The other theory suggested by the findings (FF. 184-185, R. 211-212) as to the remaining end to the accomplishment of which price fixing is sought to be used as a means, is based upon the following chain of relationships:

[1]"Such disparities in wage rates have permitted disparities in price which have in turn directly shifted, diverted and dislocated the normal flow of bituminous coal in interstate commerce to such an extent as to substantially burden, obstruct and restrain the same and to give to producers employing such competitive methods an undue advantage in interstate commerce over producers of bituminous coal not employing the same." (R. 211)

(1) that the fixing of prices will prevent wage cutting; (2) that the prevention of wage cutting will prevent strikes; and (3) that the prevention of strikes will prevent burdens upon interstate commerce resulting from strikes, *i.e.*, (a) price fluctuations, (b) interruptions and obstructions of interstate commerce in bituminous coal, (c) dislocations and diversions of the normal flow of interstate commerce in coal, (d) insolvency of coal producers, and (e) waste of coal resources.

If, contrary to plain fact, we assume that the prevention of these ultimate consequences is the real object and purpose of the price fixing provisions, this does not help the Government's case. The object of preventing insolvency of coal producers must be put aside as not an end for which the commerce power was granted. So too must the object of preventing waste of coal resources, for the prevention of waste of natural resources is a function of the State governments and not of the national government.[2]

With respect to the prevention of price fluctuations, interruptions and stoppages, and dislocations and diversions, resulting from strikes, it will be observed that before we can consider them we must first make the assumption that the prevention of these burdens upon interstate commerce rather than the raising of miners' wages is the end of the price fixing provisions; and we must then make the further assumption that there were proper reasons making it "necessary and proper" to use this tortuous means for prevent-

[2]*Ohio Oil Co.* v. *Indiana,* 177 U. S. 190; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61; *Walls* v. *Midland Carbon Co.,* 254 U. S. 300, 324; *Bandini Petroleum Co.* v. *Superior Court,* 284 U. S. 8; *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210, 233, 234.

ing those burdens instead of the simple means of regulating them directly. Having made these assumptions, we would still be faced with the problem whether the attaining of these objects is an end within the scope of the commerce power.

It will be observed that the finding relates only to such of these as have been caused by strikes. (FF. 184, R. 211-212.) No doubt strikes may cause some or all of these results. (*Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295.) But the shutting down of a productive industry within a State for any valid reason, such as lack of financial resources, would likewise produce the same effects upon interstate commerce. In order to preserve, on the one hand, the hegemony of the Federal Government in respect of interstate commerce and its necessary authority to prevent intended obstructions of that commerce, and to preserve, on the other hand, local rights and authority in respect of production, it has become thoroughly settled that the power of the Congress under the necessary and proper clause[3] to protect interstate commerce by the removal of burdens and restraints thereto is limited to the removal of *direct* burdens and restraints and not those which are merely indirect and remote, no matter how substantial.[4]

The Congress has already, in a previous statute aimed directly at the prevention of the burdening and obstructing of interstate commerce through strikes in productive industry, exercised "all the power it possessed" to that end (*Atlantic Cleaners & Dyers* v. *U. S.,* 286 U. S. 427, 435), and in *United Leather Workers* v. *Herkert,* 265 U. S. 457, 471, the Court pointed out, after reviewing the decisions under

[3]*Ruppert* v. *Caffey,* 251 U. S. 299-300; *American Express Co.* v. *Caldwell,* 244 U. S. 617.

[4]*Schechter Corp.* v. *U. S.,* 295 U. S. 495, 546.

that statute and under other regulations of interstate commerce:

> "This review of the cases makes it clear that the mere reduction in the supply of an article to be shipped in interstate commerce, by the illegal or tortious prevention of its manufacture, is ordinarily an indirect and remote obstruction to that commerce. It is only when the intent or necessary effect upon such commerce in the article is to enable those preventing the manufacturer to monopolize the supply, control its price or discriminate as between its would-be purchasers, that the unlawful interference with its manufacture can be said directly to burden interstate commerce."

In cases relating to strikes in this very industry the Court has pointed out that some such strikes upon proper proof may be regarded as resulting in direct burdens upon interstate commerce (*Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295, 310), while others may not (*United Leather Workers* v. *Herkert,* 265 U. S. 457; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344).

The Court has also pointed out that the observance of the "necessary and well-established distinction between direct and indirect effects" is a *constitutional* and not a merely *statutory* requirement (*Schechter Corp.* v. *U. S.,* (295 U. S. at 548); that a view of the scope of the commerce clause which would permit the Federal Government to regulate matters having only "an indirect effect upon interstate commerce" would be to construe it so broadly as to make it reach "all enterprises and transactions" "practically all of the activities of the people", and the necessary effect of this would be that the "authority of the State over its domestic concerns would exist only by

sufferance of the Federal Government", and "even the development of the State's *commercial facilities* would be subject to Federal control" (*Id.* at p. 546).

If, therefore, a statute directly aimed at prohibiting obstructions of interstate commerce through strikes in productive activity can constitutionally be applied only discriminately and in respect of those strikes that result in something more than "the mere reduction of the supply of an article to be shipped in interstate commerce" (*Herkert* case, *supra*), how is it possible to support a general regulation of the prices of all coal producers in the hope thereby of avoiding strikes and their resulting effects, direct and indirect, upon interstate commerce? How is it possible, consistently with the constitutional requirement of direct effect, to apply such a price regulation on such a theory to a Company in respect of which the findings show that it has had only two strikes in twenty-four years, one lasting two days and the other two weeks, without any finding or evidence that those strikes caused any direct burden upon interstate commerce or even any substantial burden upon it? (FF. 32, R. 124-125.)

6. The purpose of the price fixing provisions is not the regulation of commerce, but increase of the wage of the miner and the return to the coal operator.

The tortured reasoning necessary in order to establish any connection between the price regulations and the removal of the so-called "burdens and obstructions" to interstate commerce confirms the conclusion as to the real purpose and object of this statute as pointed out in Point II, *ante*.

Most of the specific ends which the findings themselves say the price provisions were intended to accomplish are clearly not within the Federal authority under any clause of the Constitution; and, in respect of ends which under some circumstances it may be within the Federal power to accomplish, the utter lack of the necessity and propriety of price regulation for the accomplishment of those ends is apparent.

Adding this to consideration of the title of the Act and its terms;[1] of the Committee reports in respect of it, both majority and minority;[2] of its wide coverage of the whole of the bituminous coal industry,—irrespective of any connection of particular shipments, particular producers or particular mines with interstate commerce;[3] the conclusion is inescapable that the purpose is regulation of the wage of the miner and of the amount of business and return to the coal producer, attempted to be accomplished under the pretext of an exertion of the commerce power.

7. This case is completely lacking in the factual foundation necessary to support the price fixing provisions as a regulation of interstate commerce, even assuming Congress may exercise such power in any case.

Unless the power is absolute it must rest upon some factual foundation bringing its exercise within the Federal sphere. Neither inadequacy of wages or profits in a given industry is sufficient for this purpose. Otherwise the power of Congress to determine what are adequate wages

[1]See pp. 81-85 *et seq., ante.*
[2]See pp. 85-86, *ante.*
[3]See p. 87 *et seq., ante.*

and what are adequate profits would be plenary and could be exercised in respect of all industries. Clearly also the price fixing power, if it exists at all, may not be exercised for the purpose of promoting social security or for the correction of social evils within the States. If the power exists at all, it may be exercised only for the purpose of removing burdens or restraints upon interstate commerce or obstructions thereto.

As pointed out above (p. 104 *et seq., ante*), whether such burdens, restraints or obstructions exist, within a constitutional sense, is primarily a question of law for which, however, there must be a factual foundation. Neither a declaration by Congress to that effect, nor an ultimate finding of fact by a trial court, is or can be conclusive as to the existence or non-existence of the necessary factual foundation. In this case, as appears both from the evidentiary findings and from the evidence itself, the necessary factual foundation is wholly lacking. Both the evidence and the evidentiary findings disclose complete absence of "burdens", "restrictions" or "obstructions" (see pp. 103-112, *ante*). The Act, so far from having for its purpose the removal of any such, has the contrary purpose viz., the imposition by Congress of an artificial restraint upon the free movement of articles in interstate commerce for the promotion of the economic well being of those engaged in the industry, or some of them.

POINT VII

SINCE THE STATUTORY SCHEME IS MADE APPLICABLE TO ALL BITUMINOUS COAL PRODUCERS AND IN RESPECT OF ALL BITUMINOUS COAL PRODUCED, IT IS INVALID IN ITS ENTIRETY.

As previously pointed out, the regulatory provisions of the Code and the compulsory "tax" are expressly made applicable by the statute to all bituminous coal producers and in respect of all bituminous coal produced. To the extent that the statute is thus made applicable to wholly intrastate activities within the bituminous coal industry (shown by this record to constitute at least 42% of all bituminous coal sales) it is clearly outside the commerce power. As pointed out in *Trade-Mark Cases,* 100 U. S. 82, 96-97 relating to a statute punishing *all* fraudulent use of registered trade-marks, although the power of the Congress in that regard extended only to trade-marks used in interstate or foreign commerce:

> "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, 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."

Similarly, a liability act made applicable "to *all* common carriers engaged in interstate commerce * * * without quali-

fication or restriction as to the business in which the carriers or their employés may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce", and is *pro tanto* unconstitutional.[1]

Again, a Federal statute attempting to regulate transactions not constituting interstate commerce and not imposing a direct obstruction upon such commerce is to that extent invalid.[2]

This being so, it becomes necessary to inquire whether the statute is invalid as an entirety because of its coverage, and without regard to the question whether a different statute limited to producers selling across State lines and to production that moves across State lines would be within the power of the Congress. The applicable general rule is that when the Congress enacts a statute which is comprehensive and nation-wide in its coverage, and thereby exceeds its constitutional authority, the Court will not assume to remake the law so as to be only partial in its coverage, but it will hold that the statute is invalid in its entirety. This rule has been applied consistently.[3] In applying it to hold the whole statute invalid in the *Trade-Mark Cases, supra,* the Court said:

> "If we should, in the case before us, undertake to make by judicial construction a law which Congress

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[1]*Howard* v. *Illinois Central R. Co.,* 207 U. S. 463, 498.

[2]*Hill* v. *Wallace,* 259 U. S. 44, 68.

[3]*Trade-Mark Cases,* 100 U. S. 82, 99; *Howard* v. *Illinois Central R. Co.,* 207 U. S. 463, 502, 504; *Butts* v. *Merchants Transportation Co.,* 230 U. S. 126, 133-138; *United States* v. *Reese,* 92 U. S. 214; *United States* v. *Harris,* 106 U. S. 629, 641; *Baldwin* v. *Franks,* 120 U. S. 678, 685; *James* v. *Bowman,* 190 U. S. 127, 140; *United States* v. *Ju Toy,* 198 U. S. 253, 262; *Illinois Central R. R. Co.* v. *McKendree,* 203 U. S. 514, 529, 530.

> did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under State law. Cooley, Const. Lim. 178, 179; *Commonwealth* v. *Hitchings,* 5 Gray (Mass.), 482" (p. 99).

Upon precisely the same ground the whole statute in *Howard* v. *Illinois Central R. Co., supra,* was held invalid because of its too broad coverage. Applying the same general rule in *Butts* v. *Merchants Transportation Co.,*[4] the Court refused to apply to territories within the exclusive jurisdiction of the United States a statute which had been enacted to be applicable within the States as well, in that it was unconstitutional in the latter aspect. In holding the statute inseparable, the Court inquired:

> "But how can the manifest purpose to establish an uniform law for the entire jurisdiction of the United States be converted into a purpose to create a law for only a small fraction of that jurisdiction?" (p. 133).

The separability clause in the instant statute does not destroy this general rule. As shown in Point IV *ante,* the separability clause of this statute is the standard clause, and it is thoroughly settled that that has only a limited effect and operates merely to reverse the usual presumption that any invalid provision of any character makes the whole statute bad. See *Williams* v. *Standard Oil Co.,* 278 U. S. 235, 241, 242. In *Hill* v. *Wallace, supra,* as already noted, the statute purported to regulate all the specified activities

[4] 230 U. S. 126, 133 *et seq.*

of the board of trade whether constituting or directly obstructing interstate commerce or not, and, although that statute contained a separability clause in the same language as that in the instant statute, the Court held the whole of the regulatory provisions bad, stating that the separability clause "did not intend the Court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court" (p. 70).

That the present statute cannot stand if limited to sales of bituminous coal across State lines is clear. Both the taxing section and the regulatory sections disclose a purpose to govern all sales. The court below has concluded that prices of coal sold in interstate commerce are "inextricably intermingled with interstate prices" (R. 214), and the parties have stipulated that the competitive situation is such that price regulation in respect of sales across State lines would be unfair unless wholly intrastate sales were also subjected to such Federal price regulation (R. 376). What the parties and the court below have really said, we submit, is that unless the Congress be permitted (and it cannot constitutionally be permitted) to fix the price of all wholly intrastate sales of bituminous coal, it cannot fairly, and will not, regulate the price at which such coal is sold across State lines, even assuming that it has the power to do so (which we deny).

Whatever conclusion may be reached as to the separability of the various *sections* of the Code (and we believe them to be inseparable) we submit that, in respect of the *coverage,* the statute was intended to be applicable to all coal producers and to all coal produced, or to no coal producers and to no coal produced. It cannot constitutionally be applicable to all. It must fall in its entirety.

POINT VIII

THE MINIMUM PRICE FIXING PROVISIONS OF THE STATUTE AND CODE ARE VOID BECAUSE INDEFINITE AND ARBITRARY AND BECAUSE CONSTITUTING AN UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY.

Examined in the light of familiar rules (*Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *Schechter Corp.* v. *United States,* 295 U. S. 495), the minimum price fixing formula of the Guffey Act clearly includes unlawful delegation of legislative authority, constituting it a grant of arbitrary power of indefinite scope, unlimited by any ascertainable standard.

The basis of the scheme[1] is two-fold: *first,* the establishment of minimum prices locally, within each of the various districts (of which there are 23); and, *second,* the coordination of all the local prices on a nation-wide basis. Looking at these two major steps in turn, and then considering the formula as a whole, it appears:

1. Local price establishment — arbitrary and unlimited power of "classification."

Within each district there will be set up a district board, to be composed of not less than 3 nor more than 17 members, all but one of whom shall be elected by produc-

[1]The provisions in question are Act, Sec. 4, Part II (a) and (b), Appendix, pp. *10-16,* fols. 35-57; Code, Part II, Secs. 4-5, R. 61-65. An outline of them will be found in the synopsis of the statute *ante* at pp. 14-18.

ers, the one exception being designated by the mine workers' union (Appendix, pp. *7-8,* fols. 24-27). It is this district board which initially "establishes" the minimum prices for the producers within the district.

The first step in the process is the determination of the weighted average of total costs of ascertainable tonnage produced within each district in 1934, and, on the basis of this, the weighted average of total costs for each minimum price area (of which there are 9).

The next step, chronologically, will be the "classification" by each district of "coals and price variations as to mines and consuming market areas as it [the district board] *may deem necessary and proper"* (Appendix, p. *11,* fols. 37-38). No definition of "classification", of "price variation" or of "consuming market areas" is given; nor is any standard prescribed other than *"as it may deem necessary and proper".* The importance of this cannot be over-emphasized, since the classification of a producer's various kinds, qualities and sizes of coal in any practicable price-fixing system will of necessity be the determining factor as to the price to be allotted, and price in turn may make or ruin a mine financially (FF. 47, R. 132; FF. 155, R. 201). Hence the complete lack of criterion for "classification" at the outset of the price formula is in itself sufficient to invalidate the entire scheme. But there are further grounds.

The next step in the process is the establishment by the district board of minimum prices f.o.b. mine "for kinds, qualities, and sizes of coal" produced in the district (Appendix, p. *11,* fol. 37). What is meant by "kinds, qualities, and sizes" is not explained further, but presumably this

is the result of "classification" upon such basis as the board "may deem necessary and proper". Such prices are to be established "so as to yield" (presumably in the aggregate) "a return per net ton for each district in a minimum price area * * * equal as nearly as may be to the weighted average" of total costs in the minimum price area (Appendix, p. *11,* fols. 38-39). How the various prices shall be apportioned mine by mine and size by size is left completely to the discretion of each board, except that the prices "shall reflect, as nearly as possible, the relative market values of the various kinds, qualities and sizes of coal, shall be just and equitable as between producers within the district, and shall have due regard to the interests of the consuming public" (Appendix, p. *12,* fols. 43-44). The statute is completely silent, however, as to the date as of which "relative market values" shall be determined. The record is replete with evidence of how this factor varies from time to time—FF. 36, R. 127; FF. 56, R. 136; FF. 73, R. 145; FF. 96, R. 161; FF. 119-123a, R. 179-183; FF. 126, R. 185. With this background of fact, how can the Congressional silence as to the date as of which relative market values shall be determined be construed as other than an abdication of legislative function?

The final step in this preliminary local price establishment is the submission by each district board to the Commission of its price schedule, to be approved, disapproved or modified (Appendix, pp. *12-13,* fols. 44-46). The Commission is limited by the mandate "That all minimum prices established * * * shall be just and equitable as between producers within the district" (Appendix, p. *13,* fol. 45). But as of when? Here again the Act is silent.

2. Coordination.

Prices having been "established" in all districts they are then to be coordinated "in common consuming market areas upon a fair competitive basis", taking into account "*among other factors, but without limitation,* * * * the various kinds, qualities, and sizes of coal, and transportation charges upon coal" (Appendix, p. *14,* fol. 51). What are the "other factors"? That, clearly, is a matter for the *discretion* of the price-fixing agencies, except only that prices are to be "just and equitable, and not unduly prejudicial or preferential, as between and among districts, and shall reflect, as nearly as possible, the relative market values * * *: to the end of affording the producers in the several districts substantially the same opportunity to dispose of their coals *upon a competitive basis as has heretofore existed*" (Appendix, pp. *14-15,* fols. 52-53).

Here again there is a complete silence as to the period meant by "heretofore". Shall it be the period 1923-1933, when, Government witnesses complained, the Southern mines took large pieces of business from the Northern, in the stress of unrestrained competitive warfare? (FF. 119, R. 179-180). The Southern producers would like that. Or shall it be the NRA period when free competition was restrained by imposition of a Federal code which fixed prices, and the Northern mines recovered their markets from the Southern mines? (R. 1069, 1070). That would please the Northern mines.

It seems clear that a choice of such magnitude, having such significance to individual operators in various sections of the Nation, can be made, if it can validly be made at all, only by the Congress. Being delegated, as it has

been in this Act, to an administrative agency or agencies, the power to make the choice cannot be validly exercised.

It is further provided, however, that should the Commission find, either on petition of any district board or party in interest, *or on its own motion,* that "the foregoing method of fixing minimum prices under subsection (a) is prejudicial to any district" and "that the prejudice cannot be removed through the coordination of minimum prices as provided for in this subsection (b) then the Commission may establish *a different basis* for determining minimum prices in such district, to the end that fair and competitive prices shall prevail in the marketing of the coal produced in such district" (Appendix, pp. *15-16,* fol. 56). In this respect the Commission is without *any standard whatsoever* except that the prices established shall yield a return, per net ton, not less than weighted average cost of the district. In other words, the Commission at any time, *on its own motion,* as to any district or districts may disregard the whole price-fixing formula set up in the Act and *establish one of its own choosing.*

3. The provisions are void for lack of standard, and because delegating arbitrary and indefinite power.

Viewed as a whole, the process just reviewed is clearly so vague and indefinite as to be void on that account alone. Especially in respect of the key provisions respecting classification and coordination is the lack of any guiding standard apparent. Manifestly the whole price-fixing scheme is to be administered with the "discretion" of the price-fixing agencies as the sole ultimate standard. It may be said that this is true of every case where power is conferred upon an

administrative body, but it is familiar law that administrative discretion to be wholesome must not be arbitrary, and whether or not it is arbitrary is judged in the light of its relation to the standard established by the statute. We know of no statute in which administrative agencies have validly been vested with such power to take such action as they "may deem necessary and proper", as is involved in the power conferred by this statute to make classifications of coals and price variations mine by mine such as in their judgment may produce a result manifestly unascertainable in advance.

No producer is interested in "the weighted average of the total costs, per net ton" either in the district or minimum price area in which he is located. He is interested solely in the price at which he may sell in consuming market areas the several classes of coal which he mines. His ability to sell in competition with others depends upon the classification placed upon his coal and the relation, in common consuming markets, between the price fixed therefor at his mine as compared with that of competitors either in the same, but more particularly in other, districts. The classification of his coal is as important to him as the price itself, because the price is to be varied according to such classification. Classification constitutes the first step in the fixing of minimum prices. There were recognized under the NRA over 27,000 sizes, varieties and prices of coal in Minimum Price Area No. 1, and there are possibly 40,000 in the entire United States (R. 266, 268). No standard whatever is prescribed for the making of this classification. It rests solely within the uncontrolled discretion of the district board, subject perhaps (although as to classification it is not plain) to review by the Commission.

The respective district boards having classified coal at each mine in such manner as they "deem necessary and proper", and the weighted average cost for each minimum price area and for each district therein having been ascertained, the prices are then to be coordinated by districts for the purpose "of affording the producers in the several districts substantially the same opportunity to dispose of their coals upon a competitive basis as has heretofore existed". This is the only standard prescribed for such coordination. The statute does not provide as of what period such heretofore existing "opportunity" shall be determined, whether as of the date of the passage of the Act, the NRA period or as of any other date.

The determination of the period is thus left to the price-fixing agencies. Yet upon the period chosen and upon the manner in which coordination provisions are administered depends the ability of each mine to sell upon a competitive basis in consuming areas in which it meets the competition of other mines and other districts. Since out of the coordinated prices so fixed mine by mine the weighted average cost for each minimum price area is sought to be realized and since there are wide variations in individual costs among mines and districts, it is evident that the coordinated minimum prices fixed for the several mines must in some instances be higher and in other instances lower than the respective costs of production at such mines. Otherwise the weighted average required by the statute to be maintained could not be maintained. The coordinated price at each mine, therefore, for sale of coal in competing markets, rests in the last analysis in the uncontrolled discretion of the price-fixing agencies. The fact that a producer dissatisfied with his coordinated price may have the same

reviewed by the Commission does not alter the fact that no standard for its determination is prescribed, either as to the period as to which the "opportunity" sought to be preserved is to be determined, as to the manner in which the coordinated price at each mine is to be fixed, or as to the bases upon which the "classification" is to be made, upon which the coordinated price is to be based.

Until recently, no such arbitrary and unrestrained power over the essential activities of any class of persons has ever been conferred upon any administrative body in this country; and no such power has ever validly been so conferred. See *Panama Refining Co.* v. *Ryan* and *Schechter Corp.* v. *U. S., supra.* Congress doubtless realized that the power intended to be conferred was so broad that it could not prescribe a standard for its exercise. But this is no justification either for delegation of legislative authority or for placing within the hands of price-fixing agencies (composed for the most part of producers engaged in competition with all the other producers in the district represented by them) power to determine without guide, other than the exercise of their own judgment, *first,* the classification of coals produced at each mine, and, *second,* the price at which they shall be sold.

The price-fixing provisions of the statute are clearly void as a delegation of legislative power and because arbitrary and indefinite.

POINT IX.

THE STATUTE AND THE CODE ARE REPUGNANT TO THE FIFTH AMENDMENT.

1. The statute and code destroy all the fundamental rights of economic freedom heretofore regarded as protected by the Fifth Amendment.

It is familiar history that the adoption of the first ten amendments to the Federal Constitution was in effect a condition to the ratification of that instrument. Chief Justice Marshall tells us in *Barron* v. *Baltimore,*[1] a case involving the Fifth Amendment, that "it is a part of the history of the day" that the Constitution was not effected "without immense opposition"; that "serious fears were extensively entertained" that the powers of the Federal Government "might be exercised in a manner dangerous to liberty". "In almost every convention by which the Constitution was adopted", he adds, "amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government * * *."[2]

The liberty thus safeguarded by the Fifth Amendment against Federal encroachment, and subsequently against State encroachment by the Fourteenth Amendment, is not confined to mere liberty of the person, but was intended also to guard the *economic liberty* of the citizen against Government encroachment, tc secure to him the right to

[1]7 Pet. 243, 250.
[2]Id.

earn a livelihood where he will and in the occupation of his choice, and to contract about his own affairs, whether as employer or employee.[3]

As stated in the *Allgeyer* case:

> "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned" (p. 589).

In considering the constitutional validity of the statute at bar, some effect, at least, must be given to this express guaranty against encroachment by Government upon the economic liberty of the citizen.

While the economic liberty thus guaranteed is not absolute,[4] "freedom of contract is, nevertheless, the general rule and restraint the exception."[5] A few basic rights, the heritage of all free men in a free society, whether employers or employees, have been regarded as indispensable require-

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[3]*Allgeyer* v. *Louisiana,* 165 U. S. 578, 589; *Adkins* v. *Children's Hospital,* 261 U. S. 525, 545; *New York Life Insurance Co.* v. *Dodge,* 246 U. S. 357, 373, 374; *Coppage* v. *Kansas,* 236 U. S. 1, 10; *Adair* v. *United States,* 208 U. S. 161, 174, 175.

[4]*Adkins* v. *Children's Hospital,* 261 U. S. 525, 546; *Near* v. *Minnesota,* 283 U. S. 697, 707-708.

[5]*Adkins* v. *Children's Hospital, supra.*

ments of the economic liberty guaranteed by the Constitution, as follows:

> (a) The right of employers and employees, respectively, to determine the wages which they shall pay or for which they shall work.[6] The statute and Code here involved destroy this right and require that employers and employees alike accept wages determined by others, or give up their business and employment altogether.
>
> (b) The right of the owner to fix the price at which his property shall be sold or used.[7] This right the present statute completely abrogates.
>
> (c) The right of the workman to choose his employer, and of the employer to choose his employees,[8] and the right of the business man to choose his customers and business associates.[9] The provisions of the instant statute for collective bargaining[10] and majority rule[11] completely destroy the correlative rights of employees to choose their own employers and of employers to choose their own employees; and the control of markets exercised under the price fixing provisions seriously restricts, if it does not wholly destroy, the right of the operator to select his own customers.

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[6] *Adkins* v. *Children's Hospital,* 261 U. S. 525; *Wolff* v. *Industrial Court,* 262 U. S. 522.

[7] *Tyson* v. *Banton,* 273 U. S. 418; *Ribnik* v. *McBride,* 277 U. S. 350; *Williams* v. *Standard Oil Co.,* 278 U. S. 235.

[8] *Adair* v. *U. S.,* 208 U. S. 161; *Coppage* v. *Kansas,* 236 U. S. 1.

[9] *Grenada Lumber Co.* v. *Mississippi,* 217 U. S. 433; *Federal Trade Commission* v. *Raymond Co.,* 263 U. S. 565; *United States* v. *Colgate & Co.,* 250 U. S. 300.

[10] Sec. 4, Part III (a), (b) and (e); Appendix, pp. *22-24,* fols. 81-83, 88-89.

[11] Sec. 4, Part III (g); Appendix, p. *24,* fols. 91-93.

(d) The right of every citizen to determine for himself what trade or business he will engage in.[12] While the instant statute does not by express provision deny this right, it does so in effect by means of the control of production and employment by the price and wage fixing powers assumed, as heretofore pointed out.

While statutes restrictive of one or another of these fundamental rights of economic liberty have been sustained for limited periods and under special circumstances in a few instances,[13] these cases have generally been regarded as going to the "borderline" of the law.[14]

By the *instant* statute, for the first time in our history, there is an attempt to destroy each and all of these fundamental economic liberties of the people at one fell swoop. How can that statute be sustained consistently with giving *any* effect to the guaranty of the Fifth Amendment that the economic liberty of the people shall be secure from "encroachments of the general government"?[15]

Upon this point, as upon other points, it is no answer to suggest that economic conditions have changed since this guaranty was written, and to urge that the inequality of bargaining power of employer and employee now justifies the ending of individual liberty in respect of the most vital elements of the business of earning a livelihood. Opinions may well differ as to the extent or existence of this sup-

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[12] *New State Ice Co.* v. *Liebmann,* 285 U. S. 262.

[13] *Wilson* v. *New,* 243 U. S. 332; *Nebbia* v. *New York,* 291 U. S 502; *cf. T. & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548.

[14] *Wolff* v. *Industrial Court,* 262 U. S. 522, 544; *Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 369.

[15] See *Barron* v. *Baltimore, supra.*

posed inequality of bargaining power. But, if it exists, it cannot justify the restraint of *all* the fundamentals of economic liberty as this statute attempts to do. The wide and all-inclusive coverage of this statute from the standpoint of the restraints it imposes upon the economic liberty of the citizen, is another proof, if any were needed, of the fact that this is a statute providing for a "planned economy" in industry, by which is meant the regimentation of all individual effort and the control of all important economic and business matters by an omnipotent central government. Assume that such regimentation may work, and work justly, under an upright and honorable Administration, but how would it work under a corrupt one?

The dilemma is no new one. An absolute government, when justly and wisely administered, may be the most economically efficient, but the tyranny of absolute government in respect of the economic lives as well as the freedom of person of the people has an ancient and infamous history which was well-known to the framers of the Constitution.[16]

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[16]The debates in the Constitutional Convention indicate that it was not the intention that the power given the Federal Government to regulate trade should include the power to grant monopoly of trade (II Farrand 615-616). The guaranty of the individual economic liberty of the citizen in the Fifth Amendment removes any doubt on the subject. Many restraints had in the past been placed by absolute governments upon the right of individuals to earn a livelihood, and the framers of the Constitution were familiar with these. An illustration is found in the *Case of Monopolies,* Trin. 44, Eliz., 11 Co. Rep. 84b (77 Eng. Rep. 1260). In that case the Queen "intending that her subjects being able men to exercise husbandry, should apply themselves thereunto and that they should not employ themselves in making playing cards", granted a monopoly in the whole trade traffic and merchandise of all playing cards to one, Bowes. The Attorney General defended the grant upon the ground *inter alia* that playing cards are "the occasion of loss of time, and decrease of the substance of many, the loss of the service and work of servants, causes of want, which is the mother of woe and destruction, and therefore it belongs to the Queen (who is *parens patriae, et pater familias totius regni,* and as it is said in 20 H. 7, fol. 4 *Capitalis Justiciarius*

Knowing the alternatives, the choice was made for economic freedom, and the guaranty of it was written into the Fifth Amendment. Grant that that freedom is far from complete, yet *here* is a statute which divests the citizen of *each and all* of the basic rights of economic freedom which have been regarded as indispensable to the preservation of our free society during all of the years of its existence. Such a statute cannot be sustained without the destruction of the fundamental principles upon which our system of government is based.

Angliae) to take away the great abuse, and to take order for the moderate and convenient use of them." The Chief Justice and the full court, however, ruled that the grant was a monopoly and utterly void as against the common law. It was pointed out that it was not the purpose of the grant to prevent the playing of cards as an evil, but to grant a monopoly of the business and labor of making and selling the cards themselves; that the purpose of the act was "not to maintain and increase the labours of the poor card makers within the realm" "but to utterly take away and destroy their labours."

The opinion refers to the earlier case of *Davenant and Hurdis*, Trin. 41 Eliz. Rot. 92, where a rule of the Merchant Taylors of London, requiring members to have at least half of their cloth dressed by cloth workers who were members of the company, was held void as against the common law because "against the liberty of the subject" "for every subject, by the law, has freedom and liberty to put his cloth to be dressed by what clothworker he pleases, and cannot be restrained to certain persons, for that in effect would be a monopoly". To the suggestion that "provisions and cautions" might be added to abate the danger of monopolies, the Court answered "it is mere folly to think that there is any measure in mischief or wickedness". There were said to be "three inseparable incidents to every monopoly against the Commonwealth", (1) "the price of the same commodity will be raised, for he who has the sole selling of any commodity, may and will make the price as he pleases"; (2) "After the monopoly is granted, the commodity is not so good and merchantable as it was before: for the patentee having the sole trade," regards only his private benefit, and not the Commonwealth; and (3) That it "tends to the impoverishment of divers artificers and others, who before, by the labour of their hands in their art or trade, had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary" and that "every man's trade maintains his life, and therefore he ought not to be deprived or dispossessed of it, no more than of his life."

2. The Fifth Amendment requires that statutes enacted under the commerce power shall have a real and substantial relation to the regulation of interstate commerce, and that they shall not be arbitrary, capricious or confiscatory.

It is thoroughly established that the Fifth Amendment requires that statutes enacted under the commerce power, as under other powers, shall not be unreasonable, arbitrary, capricious or confiscatory and that they shall have a real and substantial relation to the accomplishment of the objects of the granted power.[1] The Fourteenth Amendment places the same limitations upon State statutes, enacted under the reserved powers of the States.[2]

These constitutional requirements of due process are applicable "in the execution of any power, no matter what it is, [of] Government, Federal or state" (*Chicago B. & Q. Ry. Co.* v. *Drainage Commrs.,* 200 U. S. 561, 593). They apply "in every case of the exercise of governmental power" (*id.*). As pointed out in the case just cited:

> "If the means employed have no real, substantial relation to public objects which government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the

[1] *Adair* v. *U. S.,* 208 U. S. 161, 178; *Blodgett* v. *Holden,* 275 U. S. 142, 147; *Chicago, R. I. & P. Ry.* v. *U. S.,* 284 U. S. 80, 97; *Monongahela Navigation Co.* v. *U. S.,* 148 U. S. 312, 336; *Untermyer* v. *Anderson,* 276 U. S. 440, 445; *U. S.* v. *C. M. St. P. & P. R. Co.,* 282 U. S. 311, 327; *Heiner* v. *Donnan,* 285 U. S. 312, 330; *Interstate Commerce Comm.* v. *Oregon-Wash. R. & N. Co.,* 288 U. S. 14, 39.

[2] *Triegle* v. *Acme Homestead Association* (decided February 3, 1936); *Nebbia* v. *New York,* 291 U. S. 502, 525; *C. B. & Q.* v. *Drainage Commrs.,* 200 U. S. 561, 593; *Railroad Commission Cases,* 116 U. S. 307, 331; *Reagan* v. *Farmer's Loan & Trust Co.,* 154 U. S. 362, 398.

judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt. *Minnesota* v. *Barber,* 136 U. S. 313, 320. Upon the general subject there is no real conflict among the adjudged cases."

These principles have had frequent restatement. In *Adair* v. *United States,* 208 U. S. 161, 178, the Court said:

> "Manifestly any rule prescribed for the conduct of interstate commerce, in order to be within the 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 *Nebbia* v. *New York,* 291 U. S. 502, 525, it was reiterated that the guaranty of due process contained in both the Fifth and the Fourteenth Amendments requires:

> "that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

In *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 336, the Court pointed out that

> "But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment, * * *"

These requirements have had pertinent application in railroad cases, those involving Federal regulation of them

as instrumentalities of interstate commerce, as well as those involving their regulation by the States as common carriers in intrastate commerce. Such regulations, either Federal or State, must have a real and substantial relation to the accomplishment of a power of the Government, and must not be arbitrary and capricious. *Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 347, 348. And, in such cases, the power to regulate may not be exercised to confiscate or to destroy. "This power to regulate", the Court has pointed out, "is not a power to destroy, and limitation is not the equivalent of confiscation." (*Railroad Commission Cases,* 116 U. S. 307, 331; *Reagan* v. *Farmers Loan & Trust Co.,* 154 U. S. 362, 398); and again "broad as is the power of regulation, the State does not enjoy the freedom of an owner" (*Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, 595).

Not only has the Court emphasized that in undertaking to *regulate* the interstate commerce of the carriers "in no proper sense is the public a general manager" of their business (*Interstate Commerce Commission* v. *Chicago G. W. Ry. Co.,* 209 U. S. 108, 119), but it has repeatedly prevented arbitrary or confiscatory action in respect of them under the commerce power. As stated by the Court in *Chicago, R. I. & P. Ry. Co.* v. *United States,* 284 U. S. 80, 97:

> "The use of railroad property is subject to public regulation, but a regulation which is so arbitrary and unreasonable as to become an infringement upon the right of ownership constitutes a violation of the due process of law clause of the Fifth Amendment."

Applying this rule in *United States* v. *C. M. St. P. & P. R. Co.,* 282 U. S. 311, 327, the Court held the Interstate

Commerce Commission without power to impound the funds established by private contract in a railroad reorganization for the payment of reorganization managers and protective committees, since it would amount to an infringement both of liberty of contract and of the right of property. In respect of the limitation of the Fifth Amendment upon the commerce power of the Federal Government in that case this Court said:

> "The power to regulate commerce is not absolute, but is subject to the limitations and guarantees of the Constitution, among which are those providing that private property shall not be taken for public use without just compensation and that no person shall be deprived of life, liberty or property without due process of law. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 336; *United States* v. *Joint Traffic Association,* 171 U. S. 505, 571-572; *Adair* v. *United States,* 208 U. S. 161, 180."

As recently as *Interstate Commerce Commission* v. *Oregon-Washington R. & N. Co.,* 288 U. S. 14, 41, where an order of the Commission requiring a railroad to build a line to highly unremunerative territory was held violative of the Fifth Amendment, the Court, after pointing out that the order required service which went beyond the undertaking of the carrier to the public, said: "The railroads, though dedicated to a public use, remain the private property of their owners, and their assets may not be taken without just compensation."

These principles clearly must also be applied in respect of the present novel attempt to regulate the coal business (assuming the Federal Government can regulate it at all, which we deny).

3. The statute and the Code have no real and substantial relation to the regulation of interstate commerce.

As previously pointed out, the real basis of this statute and of all the arguments in its support is an assertion of the power in the Congress under the Commerce Clause absolutely to control the movement of commodities across State lines by prohibitive or price fixing legislation, and to do so for any reason or for none (see Point V, *ante*). Since this position is indefensible and is the real basis of the statutes and of the arguments in its support, the whole statute must fall, without more.

If, however, the statute be assumed, *arguendo,* to be one directed to the removal of "burdens" and "restraints" from interstate commerce, and as not intended to transgress the limitations put upon the Federal power by the Fifth Amendment, it is equally bad under the cases cited in the preceding sub-section, which establish that it is a requirement of due process that the statute have a real and substantial relation to the regulation of interstate commerce. As previously pointed out (*ante,* pp. 6-9, 62, 103-112, 219-231) the record is barren of any evidence showing burdens, restraints or obstructions of interstate commerce, and the ultimate findings in this respect are erroneous in point of law.

The question of reasonable relation would, of course, be quite different if the Federal Government possessed and was here exercising a power to legislate for the *national* general welfare, similar to the broad general power which the States severally possess to legislate for the economic and social welfare of *their* citizens.[1] Were the Federal Government possessed of a power to regulate business and industry

[1]Recent examples of the exercise of such broad general welfare power by the States include *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 428; *Nebbia* v. *New York,* 291 U. S. 502; and *Borden's Farm Products Co.* v. *Ten Eyck* (decided February 10, 1936).

for the national general welfare as the States are empowered to regulate business and industry for local general welfare, the primary due process question here would be whether national conditions reasonably might be said to justify price control and the proration of markets in order to benefit particular producers and perhaps the industry as a whole, and whether the wage regulations were reasonably related to the general welfare of the nation as a whole through improvement of the economic and social welfare of the miners. But *national* general welfare, and *State* welfare, may be and sometimes are antithetical; and, whether so or not, the Federal Government possesses no such power but only the power to regulate commerce, the objects and scope of which have already been discussed herein (Point V, *ante*). This statute violates the Fifth Amendment because its regulations bear no real or substantial relation to the accomplishment of those objects.

It will be sufficient to demonstrate this in respect of the price and wage provisions, which are the heart of the scheme and without either of which the statute and Code must fall.[2]

Prices. But four bases for the price regulations may be discovered by close examination of the statute, the "findings" of the court below, and the arguments advanced by the Government. These are (a) that the Federal Government possesses the absolute power to prohibit the movement of commodities across State lines or to fix the price of commodities so moving; (b) that it may equalize prices between producing States and districts for the purpose of freezing or allocating competition and production; (c) that it may legislate to increase the earnings of coal operators, or

[2]See Points IV and VII *ante;* see *Schechter Corp.* v. *U. S.,* 295 U. S. 495, 548, 555.

some of them; and (d) that the price fixing provisions form a base for the wage fixing provisions. The discussion under the Commerce Clause (Point V and VI, *ante*) has disclosed that objects (a) (b) and (c) are not within the Federal power to accomplish under the Commerce Clause. The validity of object (d) must obviously depend upon the validity of the wage fixing regulations themselves.

Wages. The disclosed objects of the wage regulations establish that they also bear no real or substantial relation to the regulation of interstate commerce.

(a) The first excuse for the wage regulations is that the fixing of wages will prevent price differentials between the several producing States and districts and thereby prevent the shifting of markets and business between States and districts. This is but to urge that the commerce power includes authority to freeze or allocate markets or production, which, as already pointed out, it does not.

(b) The next argument is, in effect, that the wage fixing provision will foster a contented mind on the part of mine workers with the result that they will not strike and hence will not stop the shipment of coal in interstate commerce. On this explanation, the object of the wage provisions is not the regulation of interstate commerce but the improvement of the social welfare of the miner. A like contention, presented in *Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 368, in support of the pension plan for railroad workers there involved, was disposed of by the Court as follows:

> "The question at once presents itself whether the fostering of a contented mind on the part of an employee by legislation of this type, is in any just sense a regulation of interstate transportation.

> If that question be answered in the affirmative, obviously there is no limit to the field of so-called regulation. The catalogue of means and actions which might be imposed upon an employer in any business, tending to the satisfaction and comfort of his employees, seems endless. Provision for free medical attendance and nursing, for clothing, for food, for housing, for the education of children, and a hundred other matters, might with equal propriety be proposed as tending to relieve the employee of mental strain and worry. Can it fairly be said that the power of Congress to regulate interstate commerce extends to the prescription of any or all of these things? Is it not apparent that they are really and essentially related solely to the social welfare of the worker, and therefore remote from any regulation of commerce as such? We think the answer is plain. These matters obviously lie outside the orbit of Congressional power. The answer of the petitioners is that not all such means of promoting contentment have such a close relation to interstate commerce as pensions. This is in truth no answer, for we must deal with the principle involved and not the means adopted. If contentment of the employee were an object for the attainment of which the regulatory power could be exerted, the courts could not question the wisdom of methods adopted for its advancement."

What was there said has complete application to the argument now presented in support of the wage regulations of this statute as a means for preventing strikes and the resulting interruption and burdens upon interstate commerce. And in this case the relation of the regulation to interstate commerce is even more remote and unsubstantial, for if a regulation to foster a contented mind in railroad

workers, employed in operating instrumentalities of interstate commerce, has no real relation to the regulation of interstate commerce, *a fortiori*, a regulation to promote a contented mind upon the part of miners engaged in the local productive activity of mining coal has no such relation.

(c) The remaining argument for wage regulation comes merely to this,—that it tends to provide a more abundant life for the miners, in other words, that it is a provision for the economic and social betterment of the miners. The lack of any power upon the part of the Federal Government to regulate for the general welfare or for the welfare of particular classes has already been pointed out in previous discussion.

4. The statute and the code are arbitrary, capricious and confiscatory.

Limitations of time and space require that this discussion be restricted to a few of the more arrogant and obnoxious of the arbitrary, unreasonable and confiscatory provisions of this statute:

(a) *Confiscation.* The statute takes away from the the producer any control whatever over his labor costs, which are shown by the record to comprise 60% to 65% of his costs (FF. 64, R. 140). It also fixes minimum prices beyond his power to vary, and the record shows that these minima will in practice be the maxima in view of the overproduction and over-capacity in the industry (FF. 57-58, R. 137-138; R. 261-262; R. 388). The statute, therefore, regiments the producer into a rigid scheme for the distribution of markets and production, and utterly destroys his power of management over the most vital elements of his

business, to-wit, the prices which he shall charge his customers, the markets in which he may sell, and the amount of his principal item of costs. The functions left to the operator whose prices, markets, customers and wages are thus put beyond his control, are thereby reduced to little more than that of the actual mining of coal, and bookkeeping. The Congress would have exerted little more control if it had taken over his property and business by exercise of the power of eminent domain, but in that event it would have had to pay just compensation for it.

Here, although the statute is in form regulatory, it is in fact confiscatory. By controlling prices, markets, customers and wages, Carter Coal Company is deprived of any opportunity to earn a return upon the business skill or sagacity of its officers and directors, upon the economy and efficiency with which the business is operated, or upon the advantages due to natural conditions which advantages, in the absence of a showing to the contrary, must be assumed to have been an element in the price which it paid for its coal lands. The findings of the court below show that the coal lands of the Carter Coal Company are located in a region which has natural competitive advantages in respect of the accessibility and quality of its coals (FF. 18, R. 119; FF. 74, R. 145-146). The findings further show that its business has been increasing in recent years (FF. 36, R. 127), that it has a valuable goodwill, registered trade-names, customers and contracts, and that its goodwill and going-concern value are of substantial nature (FF. 37, 39, R. 127-128). It is also found that labor costs and prices are among the most important elements requiring business skill and judgment in the successful operation and management of a coal producing and selling corporation, and

that such matters represent an important function of the management of the Company (FF. 38, R. 127).

All this is wiped away by the present statute. This statute is not the exercise of a power to regulate, but of a power to confiscate and destroy, and is accordingly violative of the Fifth Amendment under the decisions of this Court discussed in subsection 2 *ante*.[1]

(b) *Arbitrary Power Given Competitors.* The findings show that there are 12 members of the district board in District No. 7 under this Act, which board has the duty of fixing prices for the coals of the Carter Coal Company; and that of these 12 members, 11 are either active competitors of the Carter Coal Company with mines in the same producing area, or are representatives of such competitors, and that the remaining member is a labor representative (FF. 10, R. 114-115). It is these men whom the statute directs and empowers to fix minimum prices for the coals of the Carter Coal Company and of other producers in that producing district, and the statute gives "full authority, in establishing such minimum prices, to make such classification of coals and price variations as to mines and consuming market areas as it [the district board] may deem necessary and proper".

It is pointed out elsewhere herein that the unlimited and unqualified power thus given to the district boards composed of competitors of the Company, with no statutory standard for a guide, is an unlawful delegation of legisla-

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[1]*Railroad Commission Cases,* 116 U. S. 307, 331; *Reagan* v. *Farmers Loan & Trust Co.,* 154 U. S. 362, 398; *Monongahela Navigation Co.* v. *U. S.,* 148 U. S. 312, 336; *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, 595; *U. S.* v. *C. M. St. P. & P. R. Co.,* 282 U. S. 311, 327; *I. C. C.* v. *Oregon-Washington R. & N. Co.,* 288 U. S. 14, 39.

tive power (p. 236, *et seq.*). It needs no argument to disclose that such a delegation of authority to the competitors of a business is also arbitrary and unreasonable in the extreme. Possessed of this power under the broad wording of the statute just quoted, it would be possible, in the present competitive conditions in this industry as disclosed by the record, for the board to throttle the business of an individual producer by "classification of coals" and by "price variations as to mines and consuming markets", with no protection to the producer other than the right to appeal to the Commission and ultimately to the courts through a machinery which in practice could never provide timely and adequate relief and which would require him to sustain a burden of proof which in many cases it would be difficult if not impossible to satisfy, no matter how plain the discrimination in actual result.

(c) *Discrimination in Favor of Other Fuels.* By the present statute and the arguments in its support, we learn that the Federal Government: (*i*) undertakes price fixing of commodities; (*ii*) denies that it is exerting an absolute power; (*iii*) but does assume to destroy competition and reward for initiative in the business of producing and marketing that commodity; and (*iv*) does not propose to pay any compensation for the taking of the rights of property and liberty thereby involved.

If that can all be done, the Government must at least be prepared to show that it exercises that power equally and fairly—not by caprice, haphazard or according to whim. It must necessarily be prepared to show, in order to satisfy the requirements of due process, not merely that there is a public object in what it has done, but that it is

not discriminating as between competing commodities in exercising the power. Otherwise, there is nothing whatever left of the doctrine that the Fifth Amendment protects private property rights against arbitrary action.

How stands the present statute from this aspect? The record shows (R. 61-65, 326, 351, 369, 390), and the committee reports establish,[2] that the purpose and effect of this Act will be to raise the prices of bituminous coal. The record (FF. 53-55, R. 134-136; FF. 76, R. 146-147), and a prior decision of this Court[3] establish that coal is already losing markets to oil, natural gas and water power, and through greater efficiency of consumers in the use of coal. The inevitable result of this statute, therefore, will be the increased loss of business to coal producers.

It is hard to understand how it is proposed to justify an Act intended to eliminate competition in a particular commodity and to destroy many of the property rights of persons engaged in producing and selling that commodity, and profoundly to modify others, and to pay no compensation, and yet take no steps to preserve the markets of that commodity from competing commodities which are allowed to go unregulated. This is but another example of the injustice, the discrimination and, in short, the arbitrary

[2]"It is generally conceded that this bill, if it should become the law (even for the short period which will necessarily elapse before it can be passed upon by the Supreme Court), will substantially raise the price of bituminous coal to the ultimate consumer, who has been given scant consideration in its preparation." (Minority Report, Ways and Means Committee House Report No. 1800, 74th Cong., 1st Sess., p. 48.) In a supplemental minority report by Congressman Knutson, it is stated: "The obvious intent of the bill is to raise the prices of bituminous coal" (*ib.*, p. 60).

[3]As the Court pointed out in *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 361: "Coal has been losing markets to oil, natural gas and water power and has also been losing ground due to greater efficiency in the use of coal."

character, of the power that is necessarily exercised when government forsakes the channels committed to its care by the Constitution and seeks to change our whole system (*cf. Borden's Farm Products Co.* v. *Ten Eyck,* decided February 10, 1936, pp. 5-6).

(d) *As Attempted to be Enforced, the Statutory Scheme is High-handed and Arbitrary.* The Code was promulgated on October 9, 1935 (R. 58). Under the terms of the statute it became obligatory upon coal producers either to accept that Code and comply with it on and after November 1, 1935, or to pay a pecuniary penalty greater than the net profits which any coal company makes (FF. 41, R. 128, R. 393, R. 366) and designedly high enough to drive dissenting producers out of business (FF. 41, R. 128-129).

The statute, therefore, required the operator to make a choice whether to subject himself to a ruinous pecuniary penalty which would drive him out of business, or, on the other hand, to submit to unconstitutional regulation which would be detrimental to his business (FF. 15, R. 117-118; FF. 169, R. 208). Not only would adherence to the Code be detrimental to the business of the operator but it would require him to cancel all his outstanding contracts, and further require him to enter a price fixing agreement with his competitors which would subject him and his associates in the operation of the business to the pecuniary and criminal penalties of the State and Federal anti-trust laws, if the Code and Act were unconstitutional.[4] Thus, if the

[4]Such a price fixing agreement would clearly be illegal under the anti-trust laws (*U. S.* v. *Trenton Potteries Co.,* 273 U. S. 392) and the crime would be complete upon the making of the agreement without consummation of the design or doing of a single overt act (*Nash* v. *United States,* 229 U. S. 373, 378; *United States* v. *Kissel,* 218 U. S. 601, 608).

Code and Act were unconstitutional, the operator by accepting the Code, would render himself liable to pay damages for breach of contract with his customers, and to criminal and financial penalties from the State and Federal governments. The statute would afford no protection to the Code members, for as said in *Norton* v. *Shelby County,* 118 U. S. 425, 442:

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."[5]

The court below, although refusing a permanent injunction against the statute or the Code, has recognized these arbitrary features of the law, and, according the petitioner and his Company the elements of due process, as required by *Ex parte Young* and the many cases following it as listed in the margin,[6] has forever enjoined the collection of the penalties accrued up to the date of the decree in the court below. But the Government, pursuing the arbitrary intention either of the statute or of the Administration, has appealed to this Court from that part of the decree, and now demands that, if this statute should be

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[5]The provision relieving Code members from anti-trust acts, which might have afforded protection even if the rest of the statute were unconstitutional, was struck from the Guffey bill in the Senate (79 Cong. Rec. 14409, 74th Cong., 1st Sess).

[6]*Ex parte Young,* 209 U. S. 123, 147-148; *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331, 336-337; *Chesepeake & Ohio Ry.* v. *Conley,* 230 U. S. 513, 521; *St. Louis, I. Mt. & So. Ry. Co.* v. *Williams,* 251 U. S. 63, 64-65; *Pacific Mail S. S. Co.* v. *Schmidt,* 241 U. S. 245, 250; *Missouri Pacific Ry.* v. *Tucker,* 230 U. S. 340, 349-350; *Wadley Southern Ry.* v. *Georgia,* 235 U. S. 651, 666.

determined to be constitutional in its regulatory features, the petitioner shall be penalized in the sum of $1,500 a day from November 1 last, for having dared to come to court to find out whether or not these novel and arbitrary provisions of this statute are within the power of the Government to impose upon him. This arbitrary feature in respect of enforcement is characteristic of the statutory scheme as a whole.

POINT X

IF EITHER THE LABOR OR THE PRICE FIXING PROVISIONS BE INVALID, PETITIONER IS ENTITLED TO INJUNCTIONS AS PRAYED, IRRESPECTIVE OF THE QUESTION OF SEPARABILITY.

Even if this Court should conclude that the trial court was correct in its rulings that (1) the regulatory provisions of the Act, other than those with respect to wages, hours and collective bargaining (*i.e.,* the labor provisions) are valid, (2) the labor provisions are invalid, and (3) the valid provisions are separable from the invalid; nevertheless, so much of the decree as dismisses the bill and refuses the injunctive relief requested, would still be erroneous. This would likewise be true if the price provisions were held invalid and all other provisions valid.

The petitioner is here in order that he be afforded protection against his Company's submitting to, or the officers of the Government enforcing, an invalid statute. If the statute is invalid in part only, he seeks, and is entitled to, protection with respect to that invalid part, and this even if, in order to afford petitioner such protection, it is necessary to grant him relief which in effect will forbid enforcement of the entire Act.

The specific relief requested by the petitioner is that his Company and the officers and directors thereof be perpetually enjoined from filing an acceptance of that particular Code which has been promulgated by the Bituminous Coal Commission (R. 14-15, 58-77); and that the defendant Government officers, their agents, assistants, deputies or employees, be perpetually enjoined from assessing or

collecting from said Company the penalty tax imposed by the Act, and from taking any other steps, legal or otherwise, to induce, coerce or compel said Company or its officers or directors to file an acceptance of said Code (R. 15-16).

Pursuant to the dictates of the statute (Sec. 4, Appendix, p. *7,* fol. 23), the Code which has been promulgated by the Commission, and which contains provisions both for regulation of prices (R. 61-70) and for regulation of labor relations (R. 70-71), has been formulated and prescribed as a "working *agreement*" (R. 58). The "drawback in the form of a credit" under Section 3 of the Act is allowed only to producers who have filed acceptance of the Code "in such form of *agreement* as the Commission may prescribe" (Act, Sec. 3, Appendix, p. *7,* fol. 22). The form of Acceptance of Membership which has been prepared and supplied to coal producers (pursuant to Section 5(a) of the Act (Appendix, p. *25,* fol. 94)) states that the signing producer *"hereby accepts* the Bituminous Coal Code formulated and prescribed October 9, 1935 by the National Bituminous Coal Commission" (R. 76).

It is clear that if the petitioner's requests for relief are denied, and his petition is dismissed, his Company will be compelled, under the duress of the penalty tax imposed by Section 3, to file with the Commission an acceptance of the October 9, 1935 Code, which acceptance must be in the form prescribed by the Commission. An examination of such Form of Acceptance (R. 76-77) shows that it constitutes an unequivocal acceptance of the Code *in toto,* and, in fact, the Commission would not be qualified to prescribe a "form of agreement" not in substantially such form. Therefore, any acceptance of the Code in part, as, for instance,

of Parts I and II, but not Part III (with respect to labor relations) would not be an acceptance in the form prescribed by the Commission, and thus would not entitle a producer to a drawback upon the 15% tax (Sec. 3, Appendix, pp. *6-7*, fols. 20-21).

Since the Code is a "working *agreement*" (Act, Sec. 4, Appendix, p. *7*, fol. 23; R. 58), any producer accepting it will thereby have *agreed* to abide by all of its provisions, including those for regulation of prices and those for regulation of labor relations. Should he not abide by any one of these provisions, therefore, he will thereby have violated an agreement, thus laying himself open to the penalties therefor, both those found in the statute, and those found outside the statute, as, for instance, in the law of contracts.

It is, of course, with respect to the particular Code which has been promulgated (*i.e.,* that formulated and prescribed October 9, 1935) that the petition for relief in this case is concerned. As stated above, *that* Code provides for *both* regulation of prices *and* regulation of labor relations in respect of those producers agreeing to it. It is difficult to understand, therefore, how this Court, if it should be constrained to rule *either* the regulation of labor relations *or* the regulation of prices pursuant to the Act to be invalid, could sustain the action of the court below in having dismissed the complaint. For it seems inevitably to follow that, if the complaint be dismissed, the petitioner will be completely without remedy because, as said before, his Company will then be forced to accept the Code and hence *agree* to subject itself to *the very regulation which has been ruled to be invalid.* Such a result would be most unjust and undesirable.

If the Code should be regarded as not creating a contractual relationship, it still remains as the embodiment of

regulations (including *all* those in Sec. 4 of the statute) which the Company must accept and with which it must comply in order to avoid the penalty tax, if the bill be allowed to stand dismissed (Act, Sec. 3, Appendix, pp. *6-7,* fols. 18-22).

Courts do not operate directly upon statutes. They do not review and annul them on the ground that they are unconstitutional. Their power is one to adjudicate the rights of parties and, in doing so, to determine the law applicable to the controversy and to render judgment or decree accordingly, the unconstitutional statute notwithstanding (*Massachusetts* v. *Mellon,* 262 U. S. 447, 488). As pointed out in that case, "if a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding" (p. 488).

The court below apparently felt that its *opinion* protected the petitioner and the Company from the enforcement of the provisions of the Act and of the Code found to be unconstitutional. Only upon such theory can dismissal of the bill be explained. The fallacy of this view is demonstrated by the case just cited and by consideration of the further fact that the theory of this suit, as of all suits to enjoin Government officers from enforcing a statute alleged to be unconstitutional, is that the officers, in their respective individual capacities, are perpetrating or threatening a trespass upon the rights of the plaintiff under color of a void law and, accordingly, should be enjoined.[1]

Application of the correct and settled theory, as exemplified in the cases cited, requires that injunctions issue as prayed, if either the labor or price fixing provisions of the Code be invalid, and this is so irrespective of the question of separability.

[1]*Ex parte Young,* 209 U. S. 123; *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 619-620, and cases there collected.

POINT XI.

THE RIGHT TO EQUITABLE RELIEF IN THIS PROCEEDING IS CLEAR.

Petitioner is the owner of 50% of the common stock and of approximately 28% of the Class A preferred stock of respondent Carter Coal Company. Common and Class A preferred have equal voting rights, share for share (R. 629, 251).[1] Petitioner and every other shareholder and director of the Company believe that the Guffey Act is unconstitutional and economically unsound, that acceptance of and compliance with the Code by the Company would seriously damage it and might result in its bankruptcy, and that, on the other hand, defiance thereof would subject the Company to a pecuniary penalty which would ruin it financially and promptly drive it out of business. These facts are indisputable. They were pleaded and proved, and have been found by the court below (R. 7-9, FF. 15, R. 117-118; FF. 40-41, R. 128-129, R. 249-253, 259-261, 619-629).

The majority of the directors and of the shareholders refused petitioner's demand for resistance to the statute, being motivated solely by fear of the effect of the penalty tax. Petitioner did all in his power to protect his rights and those of the Company through corporate action and, when unsuccessful, elected to fight and brought this bill. These facts are indisputable, are proved by the evidence, and have been found by the court below (FF. 15, R. 117-118).

On these facts, the right of the petitioner to maintain this stockholder's bill, both in his own right and as a deriva-

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[1]All outstanding Class B common stock, which is non-voting, is held by the receiver of another coal company (R. 251). There is no other class of stock outstanding.

tive suit, and both against the Company and its officers and directors, and against the Government officials charged with enforcement of the statute, is established by an unbroken line of precedent in this Court.[2]

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[2]Suits against the corporation and officers and directors thereof: *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429; *Hyde* v. *Continental Trust Co.,* 157 U. S. 654; *Brushaber* v. *Union Pacific R. R. Co.,* 240 U. S. 1; *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103; *Smith* v. *Kansas City Title Co.,* 255 U. S. 180.

Suits against both the corporation and the Government officers:

Hill v. *Wallace,* 259 U. S. 44
(holding the Future Trading Act of 1921 unconstitutional and enjoining the United States Collector of Internal Revenue and District Attorney from enforcing it);

Smyth v. *Ames,* 169 U. S. 466
(holding state rate making statute unconstitutional and establishing important principles of valuation and public utility law, and enjoining the railroad corporation defendants from complying with, and the Attorney General, Secretary of State, State Auditor, State Treasurer and Commissioner of Public Lands and Buildings from enforcing, an unconstitutional state statute);

Ex parte Young, 209 U. S. 123
(affirming an order committing the Attorney General of Minnesota for contempt for attempting to enforce an unconstitutional state law in violation of an injunction issued by the Federal court for the District of Minnesota in the case of *Shepard* v. *Northern Pacific Ry. Co.,* 184 Fed. 765, which latter case arose on a stockholder's bill to enjoin the corporation from obeying rate orders from a state regulatory commission and to enjoin the commission and the Attorney General from enforcing them);

Cotting v. *Kansas City Stock Yards Co.,* 183 U. S. 79 (holding unconstitutional a Kansas statute regulating stock yards and enjoining the corporation from complying therewith);*

Dodge v. *Woolsey,* 18 How. 331.
(holding state taxes unconstitutional in a stockholder's suit and enjoining the state tax collector from collecting them);

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*In this case, which was decided before the case of *Ex parte Young* (209 U. S. 123) had established that a suit against the Attorney General would not be a suit against the State, the Court found it unnecessary to issue an injunction against the Attorney General, and hence unnecessary to decide that question.

As shown by these cases, statutes which have "imposed a burden upon the corporation and penalties for failure to discharge it" (concurring opinion, *Ashwander* v. *Tennessee Valley Authority,* p. 7) have in the past proved adequate to coerce directors and majority shareholders into submission to unconstitutional statutes, to the detriment of the interests of the corporation and of minority shareholders therein.[3] As pointed out in *Ashwander* v.

Heisler v. *Thomas Colliery Co.,* 260 U. S. 245, 253
(sustaining jurisdiction in a stockholder's suit to enjoin a coal mining and distributing company from paying state taxes on coal when mined and ready for market and enjoining the Auditor and Treasurer of the State of Pennsylvania from enforcing this tax act, but holding that the tax was not a burden upon interstate commerce but cnly a tax upon mining coal and preparing it for market and therefore refusing injunctions);

City of Chicago v. *Mills,* 204 U. S. 321
(holding invalid a gas rate-making ordinance of the City of Chicago and enjoining the corporation and the City from enforcing it); and

Ashwander v. *Tennessee Valley Authority*
(sustaining jurisdiction on a preferred stockholder's bill to enjoin the corporation and the Government authority from performing an alleged illegal contract).

[3]The grounds given by directors or shareholders in previous cases, where they thought the statute unconstitutional but declined to fight, were of the following nature: "because they feared to antagonize the public officials whose duty it was to construe and enforce the act" (*Hill* v. *Wallace,* 259 U. S. 44, 61); or where the refusal is based upon "consideration of the many obstacles in the way of testing the law" (*Dodge* v. *Woolsey,* 18 How. 331, 340); or upon the ground that the assertion of the rights of the corporation "is accompanied with so many embarrassments that they decline to attempt it" (*Greenwood* v. *Freight Co.,* 105 U. S. 13, 15); or upon the ground that "failure to comply with the provisions of the income-tax law would subject the company to litigation with the United States, and the risk of incurring penalties, and of clouding the title of all the real estate held by it on its own behalf and in its fiduciary capacity"* (*Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429);

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*Quotation taken from resolution of board of directors of Farmers Loan & Trust Company, not set out in the opinion, but appearing in the record as Exhibit B to the Bill of Complaint in *Pollock* v. *Farmers' Loan & Trust Co.*

Tennessee Valley Authority (decided February 17, 1936), the fact of such coerced acquiescence "has not been deemed an adequate ground for denying to the stockholders an opportunity to contest the validity of the governmental requirements to which the directors were submitting" (p. 5).

In contrast with its position in *Ashwander* v. *Tennessee Valley Authority,* we do not understand that the Government is now asserting that the petitioner has no standing in this suit to challenge the validity of the Guffey Act. On the undisputed facts, on the findings of the court, and on the unbroken line of authority, we do not perceive how the standing of the petitioner in equity in this proceeding can well be challenged.

In deference, however, to the fears, recently expressed by the concurring Justices in the *Ashwander* case, that stockholders' bills may be made the means of evoking unnecessary decisions upon constitutional questions without proper showing of threatened injury or other ground of equitable jurisdiction, petitioner, out of abundance of caution, ventures to impose upon the Court's time to summarize the facts proven and found in this case which establish that this is no mere case of formal compliance with the technicalities of a mode of procedure, but that, on the

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or upon the ground that "this company does not feel at liberty to disregard [the Federal tax law provisions] and to incur thereby the heavy penalties which might result from this disregard"** (*Brushaber* v. *Union Pacific R. R. Co.,* 240 U. S. 1); or on the ground that they were submitting to the statute "not because they at any time believed said act to be valid * * * [but] solely by the fear of incurring a multitude of liabilities under the terms and conditions of the said act"*** (*Smyth* v. *Ames,* 169 U. S. 466).

**Quotation from Exhibit B to Bill of Complaint in record in *Brushaber* v. *Union Pacific R. R. Co.*

***Quotation from the answer of the defendant corporations appearing in the record in *Smyth* v. *Ames.*

contrary, equitable relief is imperatively required for the protection from destruction of rights of the most substantial character which are in immediate danger of ruin.

1. Business judgment.

No question of "business judgment"[1] is involved. The action voted by the directors and shareholders was taken solely under coercion of the ruinous pecuniary penalties imposed by the statute (FF. 15, R. 117-118, R. 8-9, 250, 620-629).

2. Petitioner's substantial pecuniary interest.

The petitioner is not, as in *Ashwander,* the holder of merely a small amount of preferred stock.[2] He is the holder of one-half the common stock and 28% of the preferred stock. In addition, he is the President and managing head of the business, and not only are his personal finances seriously involved, but his civil and criminal liabilities as President of this Company are directly involved, as will appear.

3. Ultra vires.

The laws of the State of Delaware require that the business of the respondent, Carter Coal Company, "shall be managed by a board of directors",[3] and, in conformity

[1]Cf. concurring opinion of Mr. Justice Brandeis in *Hill* v. *Wallace,* 259 U. S. 44, 72-75.

[2]The concurring opinion in the *Ashwander* case points out that the plaintiffs there own less than 1% of the preferred stock and claimed to represent only about 1/9th of such stock.

[3]Laws of Delaware, 1929, Chap. 135, Sec. 4 (R. 5, 629, 630).

therewith, the By-laws of that Company provide that "The property, affairs and business of the corporation shall be managed by the Board of Directors".[1] The court below has found that:

> "38. Labor costs and prices are among the most important elements requiring business skill and judgment in the successful operation and management of a coal producing and selling corporation (R. 55). More than 60% of the production costs of Carter Coal Company are attributable to mine labor costs, and the right and duty to negotiate and contract with its miners in respect of the establishment of hours and wages is an important function of management of the Company" (R. 127).

This finding is supported by the extensive evidence in the record already referred to throughout this brief, disclosing the competitive situation in this industry.

It is clear that the surrender of control and management of the most vital elements of the business, *i.e.,* wages and prices, as required by the Code, is *ultra vires* the Company, its officers, and its directors. A long line of cases attests the rule that contracts which constitute attempts to deprive a board of directors of the exercise of their free judgment in the business of a corporation are *ultra vires,* illegal and void as against public policy.[2]

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[1]By-laws, Art. V, Sec. 1 (R. 5, 613).

[2]*Ames* v. *Goldfield Merger Mines Company,* 227 Fed. 292; *Manson* v. *Curtis,* 223 N. Y. 313; *Rosenthal* v. *Light,* 173 N. Y. Supp. 743; *Fensterer* v. *Pressure Lighting Company,* 149 N. Y. Supp. 49; *Hanssen* v. *Pusey & Jones Company,* 276 Fed. 296 (aff'd 279 Fed. 488; reversed on other grounds, 261 U. S. 491); *Metropolitan T. & T. Co.* v. *Domestic T. & T. Co.,* 44 N. J. Eq. 568, 14 Atl. 908; *Commercial Wood and Cement Co.* v. *Northampton Portland Cement Co.,* 190 N. Y. 1; *First Natl. Bank* v. *Commercial Travelers Assn.,* 95 N. Y. Supp. 454; aff'd 185 N. Y. 575.

This is also the rule in Delaware. Thus in *Hanssen* v. *Pusey & Jones Company,* 276 Fed. 296 (D. C. Del. 1921)[3] a Delaware corporation engaged in the building of ships had entered into a contract with United States Shipping Board Emergency Fleet Corporation, which provided, *inter alia,* that a nominee of the Emergency Fleet Corporation should hold the office of treasurer of the company. The Court ruled that such contract was *ultra vires* since it constituted "a practical nullification of the Delaware statute requiring that a Delaware corporation shall be managed by a board of directors."

In the court below the petitioner pleaded, as an independent ground of equity jurisdiction, that acquiescence in the Code would be *ultra vires* the Company, its officers and directors (R. 5, 7, 56). The evidence, findings, and authorities, referred to above, establish this claim.

Equity jurisdiction of this suit exists, therefore, to enjoin threatened action which would be *ultra vires;* and the right to the relief prayed against the corporation and its officers and directors exists wholly irrespective of any showing of injury to the minority stockholder, or even as against the claim that the threatened action would be to his advantage and to the advantage of the corporation. The well settled rule is that where the minority stockholder sues to enjoin the corporation or its officers or directors upon the ground that the threatened action is *ultra vires,* no injury need be shown, and the right to equitable relief is established upon proof, without more, that the act is *ultra vires.*[4] The grounds and scope of this established

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[3]Affirmed 279 Fed. 488, reversed on other grounds 261 U. S. 491.

[4]*Byrne* v. *Schuyler Electric Manufacturing Co.,* 65 Conn. 336; *Central R. R. Co.* v. *Collins,* 40 Ga. 582, 617; *Davis* v. *Congregation Beth Tephila Israel,* 40 App. Div. 424, 427; *Beman* v. *Rufford,* 1 Sim. N. S. 550; Fletcher, *Cyc. Corporations,* Sec. 5823, 5948.