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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

NO. 636

JAMES WALTER CARTER, Petitioner,

v.

CARTER COAL COMPANY, GEORGE L. CARTER AS VICE-PRESIDENT AND A DIRECTOR OF SAID COMPANY, ET AL.

BRIEF OF COUNSEL AS AMICI CURIAE AT THE INSTANCE OF MEMBERS OF THE BITUMINOUS COAL CODE.

The producers at whose instance counsel as *amici curiae* present this brief in support of the constitutionality of the Bituminous Coal Conservation Act of 1935, have accepted membership in the Bituminous Coal Code, formulated by the National Bituminous Coal Commission, in accordance with the provisions of that Act. The names of these producers and the tonnage produced by each, during the calendar year 1935, are in the appendix attached hereto.

During the year 1935 they produced in the aggregate 100,377,880 tons of coal and employed in the aggregate 129,559 employees. Each of these producers has authorized the filing of this brief, and has thus thereby evidenced the interest of each such producer in supporting the constitutionality of the Act.

Preliminary to discussion of legal principles, counsel wish to present pertinent facts with relation to the bituminous coal industry generally and the conditions showing the necessity for the Bituminous Coal Conservation Act of 1935.

STATEMENT.

The Facts Relating to the Bituminous Coal Industry.

(a)

THE VITAL IMPORTANCE OF THE INDUSTRY.

Bituminous coal is the principal source of energy in the United States. (R. 129) The flow of interstate commerce is dependent upon its continuous production, and the sale and distribution of it to industry and to households in every State of the Union constitute, predominantly, interstate commerce. (R. 287) The importance of bituminous coal in interstate commerce and to the needs of the public will be apparent from the development of the facts.

In 1933, bituminous coal supplied 83.6% of all the energy used by the railroads for locomotive power. (R. 288) In 1929, bituminous coal supplied 75% of all primary energy used in manufacturing industries. (R. 288) In 1934, bituminous coal supplied 76% of all the fuel used by public utilities. (R. 288) Nearly one-half of all mechanical energy in the United States is derived from bituminous coal, which is consumed in every State in the Union to generate energy for the production of light, heat and power. (R. 130) Its use for such purposes is indispensable to the industrial and economic life of the country, and no substitutes exist in sufficient quantity to replace it. (R. 289)

In 1933, the industry employed 419,000 men (R. 166) and produced 334,000,000 tons of coal. (R. 161)

The direct impact of conditions in the bituminous coal industry upon interstate commerce, and the relation of the industry to the vital economic needs of the country, appear from a recital of facts in the recent history of the industry.

(b)

RECENT HISTORY OF THE INDUSTRY.

The opening of mines in the United States continued in a normal way until the World War, although there was generally a surplus of mine capacity. This surplus capacity was due in part to the richness of the natural resources and in part to the desire of the mine owners to put tax-burdened properties to the only use for which they were adapted. Once mines were opened, the pressure of overhead costs forced operators to continue producing even when markets were poor and production resulted in loss. (R. 292) It was cheaper to produce at a loss than to abandon the mines, or to close them temporarily while paying taxes, charges for pumping, repairs, supervision and, in many instances, minimum royalties. (R. 138) In this characteristic of the industry lies one of the most potent reasons for overproduction.

One reason for overcapacity was the expansion of the railroad systems. Another reason was the development of new mines in new fields when production shifted from one field to another due to a cause other than the exhaustion of mines.

Finally, war demands and large scale suspensions in organized fields induced the opening of new mines and further increased the overcapacity already existing. (R. 292) Overcapacity caused keen competition and consequent lowering of prices. (R. 137)

In the bituminous coal industry wages of labor represent between 60% and 65% of costs of production. (R. 140) Reduction in prices inevitably leads to reduction in wages, (R. 141) which in turn leads to recurring strikes, lockouts and suspensions. These are generated directly by the conditions in the industry, and have interfered with the steady production of bituminous coal. These labor disturbances have directly affected and have obstructed interstate commerce. (R. 292 et seq.)

Prior to the World War there were two strikes in 1902, two in 1903, two in 1904, one in 1912, two in 1913, and one, the Ludlow strike, in 1914. The number of miners involved in these strikes ranged from 3,000 to 18,000 in a single strike. The number of days lost ranged from 23 to 247 in a single strike, the latter loss having occurred in the Ludlow strike. These strikes not only involved thousands of men and their families and months of lost time, but also resulted in violence and bloodshed. The strike of 1912-1913 in the Paint Creek and Cabin Creek District of West Virginia was not only accompanied by bloodshed, but resulted in a declaration of martial law, and in an investigation by the United States Senate (63rd Congress, 1st Session, pursuant to S. Res. 37). (R. 150) Similarly, in the Colorado strike in 1913-1914, bloodshed and the calling out of the state militia and federal troops occurred; and a congressional investigation (H. R. 387) followed. In 1916, a bituminous coal shortage occurred, due not to a lack of capacity to produce, but to a congestion of railway transportation facilities. More than 1,000 new mines opened, stimulated by high prices caused by transportation shortage. Each of these mines demanded its share of business and of railway facilities. (R. 151)

During the World War prices soared and Congress passed the Lever Act, authorizing the President to fix prices of coal and to distribute the available supply. The Fuel Administration thereupon took over the problem of distribution. Consuming markets were zoned and distribution districts were budgeted, so that the tonnage to be supplied by each district to each zone was fixed. The regulation proved effective, production increased and on Armistice Day consumers had reserve stocks of 63,000,000 tons of coal.

The next acute shortage of coal occurred in 1919 when a general strike of union miners began on November 1st and lasted until November 16th. The number of men on strike, 415,000, far exceeded those involved in any former strike. The territory involved covered twenty-two States. The result of this widespread interference with the production and distribution of coal was to deplete consumers' stocks to dangerously low levels. (R. 152) This shortage was accentuated by the strike of railway switchmen in the early part of 1920, which congested railway terminals and left mines with an insufficient supply of cars. Another factor contributing to the shortage was the limitation placed by the British government upon exports of coal, creating an active demand for American coal. Prices soared to such unprecedented heights that the Federal government again interfered and fixed maximum prices for coal and regulated its distribution. (R. 153) The powers of the Interstate Commerce Commission were also invoked under the Transportation Act to declare priorities for the movement of coal. (R. 304)

As a result of this strike and the shortage of coal, factories on the eastern seaboard and schools in New York were closed. (R. 302)

The next acute shortage occurred in 1922. This was due to a suspension resulting from failure to renew the agreement between the union operators and the miners on the basis of prevailing wages, because of competition from non-union operators who paid lower wages. This suspension involved almost a half million men and at one time 73% of the productive capacity of bituminous coal fields was shut down. To add to the demoralization of the industry anthracite miners and railway shopmen struck in the same year. (R. 303) These conditions led to intervention by the Federal government, and also by the individual states, in order to protect consumers. The President of the United States attempted to effect a settlement of the strike. The priority powers of the Interstate Commerce Commission were again utilized and a Presidential Fuel Distribution Committee was created. (R. 304)

In September, 1922, Congress passed an act creating the office of Federal Fuel Distributor for a period of one year, and the United States Coal Commission was created to make an investigation of the coal industry. (R. 305) The Commission found that coal mining is an indispensable public service, that a coal division should be established in the Interstate Commerce Commission, and that shippers of coal in interstate commerce should be required to take out a federal license. It further found that continuous fact-finding on the basis of compulsory submission of reports was advisable. (R. 155)

In 1922, due to the shortage of coal, buyers were frequently compelled to accept impure coal or coal from unaccustomed sources not suited to their requirements. Numerous locomotive failures on the railroads occurred as a result of inferior coal they were compelled to use. (R. 303)

Between 1923 and 1933 the demoralization of the coal industry reached its most acute stage. (R. 159) Between those years the annual production of bituminous coal decreased from 565,000,000 tons to 334,000,000 tons. In 1923, capacity was 73% in excess of production; in 1933, the excess was 84%. (R. 161)

In 1924, the great excess of mine capacity began to exert its full pressure upon the market, resulting in destructive competition. (R. 159) Between 1923 and 1930, 3,400 mines out of a total of 9,331, each having a production of more than 1,000 tons a year, closed. In all, 4,800 industrial mines were forced out of business from 1923 to 1930.

Of the mines shut down since 1923, large numbers are idle, but have not been finally abandoned. The presence of such mines, closed but not abandoned, is an element of potential competition, as their annual capacity, when formerly operated, is estimated at 130,000,000 tons. (R. 160) After 1923, prices for coal dropped substantially and average sales realization was below cost of production. There was a slight temporary recovery in 1926 when spot coal prices increased, due primarily to the anthracite strike, the British strike and heavy domestic purchases in anticipation of a possible strike at the time of the termination in 1927 of the Jacksonville wage agreement. Thereafter the trend was steadily downward. (R. 161-162)

During the period from 1923 to 1929, when practically all other industries showed profits, the coal industry as a whole showed deficits. Many producers were forced into bankruptcy or receivership. (R. 165)

The decade following the year 1923 saw the almost entire breakdown of wage agreements between producers and miners as a method of fixing and correlating wages. In 1923, approximately 70% of the total capacity of the industry was covered by collective wage agreements. (R. 166) Attempts had been made to unionize the rest of the industry, but these attempts had been met with injunctions, "yellow dog" contracts, violence and bloodshed. (R. 167)

During the period of the Jacksonville wage agreement, 1924 to 1927, operators in non-union areas began to cut their prices and their wage rates. This resulted in large losses to the operators in unionized areas, and exposed them to a competition which threatened their economic existence. Beginning in 1924, producers were forced to abrogate their wage agreements and continued to do so throughout the period of the Jacksonville agreement. A series of strikes followed, many of which were prolonged and resulted in the closing of mines, and this substantially affected the distribution of coal in interstate commerce. (R. 168-169) In one instance a railroad bridge was blown up. (R. 385)

The expiration of the Jacksonville agreement was followed by a protracted strike, the closing down of many mines and an investigation by the Committee on Interstate Commerce of the Senate of the United States (70th Congress, 1st Session, 1928). This strike affecting mines in many states, substantially interfered with the distribution of bituminous coal in interstate commerce. (R. 169)

After this strike most of the operators in Pennsylvania, and in Ohio, and in part of Indiana, reopened their mines on an open-shop basis at lower wage rates, in order to meet competition in the unorganized districts. Further strikes occurred in the few remaining unionized areas in 1929 and 1932. By 1933, the total tonnage covered by collective agreements had shrunk to 20%

of the national output as against 70% ten years before. (R. 170)

As the area covered by collective bargaining contracted, wages declined and workers were discharged. (R. 172) With the collapse of collective bargaining, uniformity in wage scales disappeared, and, in the persistent competition which followed, one wage cut forced another, until price cutting and wage cutting obtained not only between different coal areas, but within the same field. The prices in the southern fields were so much lower generally than in the northern fields that the earlier part of the decade 1923-1933 saw a large shift from the latter to the former in the volume of coal shipments. (R. 179) The southern fields retained a large part of the percentage gains so made, for the remainder of the decade. (R. 181)

Another general suspension occurred October 1, 1935, lasted one week, and involved 90% of the miners in the industry. (R. 190)

These strikes have resulted in the closing of mines and have substantially dislocated and diverted the normal flow of interstate commerce in bituminous coal. (R. 211-212)

In mining communities, during strikes and during low wage periods, there have been excessive undernourishment and impoverishment. (R. 193)

The above recited competitive conditions existing within the industry led to a policy of price cutting which became increasingly destructive, and such price cutting was carried to such an extent that continuously since the year 1924, with the exception of the year 1934 under the National Industrial Recovery Act, and possibly of the year 1926, the average price realized by producers of bituminous coal throughout the United States has been less than the average cost of production. (R. 210)

(c)

Attempts to Find Solution.

As early as 1925, operators began to search for a method of controlling the downward trend of prices with consequent wage cuts and low standards of living. (R. 195) A plan for creating a central sales agency was considered; a plan for merging all operating companies in the smokeless fields was proposed.

Investigations and studies were made by the operators; the Governors of several states met in an effort to stabilize conditions in the coal industry; the Governor of West Virginia asked the National Coal Association to study the question. As a result Appalachian Coals, Inc., was organized. (R. 196) This and similar selling agencies did not accomplish the anticipated results, because a substantial part of the industry remaining outside the group could prevent the maintenance of any fair price structure. (R. 388)

With the enactment of the National Industrial Recovery Act in 1933, and the adoption of the Bituminous Coal Code, the industry for the first time in a decade was able to pay fair wages to labor and to obtain cost and a small profit for its product. (R. 197)

After the first year of operations under the National Industrial Recovery Act, many producers, believing the Act to be unconstitutional, commenced to disregard the Code, and conditions after the early part of 1935 grew worse. Prices declined (R. 200), and left producers facing continued loss, and, in many instances, bankruptcy.

The Bituminous Coal Conservation Act of 1935 was enacted by Congress. It was approved on August 30, 1935.

(d)

BITUMINOUS COAL CONSERVATION ACT OF 1935.

The Act states its findings and purposes as follows:

"That it is hereby recognized and declared that the mining of bituminous coal and its distribution by the producers thereof in and throughout the United States are affected with a national public interest; that the service of bituminous coal in relation to the industrial activities, the transportation facilities, the health and comfort of the people of the United States; the conservation of bituminous coal deposits in the United States by controlled production and economical mining and marketing; the maintenance of just and rational relations between the public, owners, producers, and employees; the right of the public to constant and ample supplies of coal at reasonable prices; and the general welfare of the Nation require that the bituminous coal industry be regulated as herein provided."

The Act then goes on to state that:

"It is further recognized and declared that all production of bituminous coal and distribution by the producers thereof bear upon and directly affect its interstate commerce and render regulation of all such production and distribution imperative for the protection of such commerce and the national public service of bituminous coal and the normal governmental revenues derivable from such industry; that the "excessive facilities for the production of bituminous coal and the overexpansion of the industry have led to practices and methods of production, distribution, and marketing of such coal that waste such coal resources of the Nation, disorganize the interstate commerce in such coal and portend the destruction of the industry itself, and burden and obstruct the interstate commerce in such coal, to the end that control of such production and regulation of the prices realized by the producers thereof are necessary to promote its interstate commerce, remove burdens and obstructions therefrom, and protect the national public interest therein;

"that practices prevailing in the production of bituminous coal directly affect its interstate commerce and require regulation for the protection of that commerce, and that

"the right of mine workers to organize and collectively bargain for wages, hours of labor, and conditions of employment should be guaranteed in order to prevent constant wage cutting and the establishment of disparate labor costs detrimental to fair competition in the interstate marketing of bituminous coal, and in order to avoid those obstructions to its interstate commerce that recur in the industrial disputes over labor relations at the mines."

The first paragraph of the declaration of policy, above quoted, recites a requirement that the bituminous coal industry be regulated "by controlled production". It is to be observed that Congress has stated that "control of such production" is necessary to promote interstate commerce of coal and to remove burdens and obstructions therefrom. However, it will be found in analyzing the Act that production control has not become a part of the legislation in its adopted form. Apparently, references to production control reflect earlier proposed legislation which was not enacted, such as S. 1417 introduced in the 1st Session of the 74th Congress, in which may be found under PART I of Section 4 the subhead PRODUCTION, wherein an elaborate scheme was set up for allocation or allotment of coal production to districts and to mines lying within districts, with tonnage quotas.

In the body of the bill that became the law the only reference to the subject appears in Section 16 which prescribes "Other Duties of the Commission". Among them is the requirement that

> "(5) The Commission shall, as soon as reasonably possible after its appointment, investigate the necessity for the control of production of bituminous coal and methods of such control, including allotment of output to districts and producers within such districts, and shall hold hearings thereon, * * *."

Section 21 of the Act provides:

> "Sec. 21. This Act shall cease to be in effect and any agencies established thereunder shall cease to exist on and after four years from the date of the approval of this Act."

ARGUMENT.

I.

The Sale, Marketing and Distribution of Bituminous Coal Within the United States Are Predominantly Interstate in Character.

(a)

There is, we submit, no serious denial of the fact that both in the industry as a whole and in the business of Carter Company, the sale, marketing and distribution of bituminous coal are interstate in character.

Using figures for the year 1929 as illustrative (this being the only year for which complete figures as to distribution are available) 50% of all bituminous coal mined in the United States was shipped to consumers, other than railroads, in states other than the state of production, or to consumers in foreign countries.

Of the remaining 50%, 23.8% of all bituminous coal produced in the United States was sold to railroads subject to the jurisdiction of the Interstate Commerce Commission for fuel, 69.1% of which railroad fuel was delivered direct to the purchasing railroad companies at the mouth of the mine, no freight being paid thereon. (R. 131)

These figures clearly indicate the large proportion of bituminous coal mined in the United States which moves directly in interstate commerce.

In the case now at the bar of this Court, the predominant interstate character of the shipments of coal mined by the Carter Coal Company is even more marked. As found by the learned court below, substantially all of the coal mined by the Carter Coal Company is sold f. o. b. mines and substantially all of it is transported into states other than those in which produced, to fill orders obtained by the Carter Coal Company from purchasers in other states.

In the year 1934, the total production of the Carter Coal Company was 2,125,046 tons, of which only 50,000 tons were sold in the state in which it was mined.

The lower court also found that approximately 60% of the coal produced by the Carter Coal Company moves into the "Inland Western Market" (comprising Illinois, Indiana, Ohio, Wisconsin and Michigan) and to the ports of the Great Lakes. Approximately 20% moves to tidewater ports on the Atlantic seaboard, at which particular points it is transferred into vessels for transshipment. Approximately 20% moves into the southeastern states and into the north Atlantic states, including Virginia, West Virginia, North Carolina and South Carolina, Pennsylvania, New Jersey, Delaware, Maryland and the District of Columbia. (R. 121)

That sales f. o. b. are sales in interstate commerce is admitted upon the Record at pages 380-381, wherein the following appears:

(By Mr. Whitney)

" 'There is one point, I am happy to say, that we are really agreed upon, and that is that f. o. b. sales are sales in interstate commerce. We do not make any suggestion that if we resort to unfair competitive practices in our f. o. b. sales, unfair methods of competition, we are not subject to regulation today by the Federal Trade Commission. * * *

" '*Mr. Critchlow*: The question has to do with f. o. b. sales, whether or not in this industry the business is carried on in a way so that sales which have been referred to here as f. o. b. sales are sales in interstate commerce. That is one of the issues, the course of business in that respect.

"'*The Court*: I understood it would be admitted by Mr. Whitney that this would refer to that, that they would be sales in interstate commerce.

"'*Mr. Critchlow*: If that is admitted I will not ask the witness to answer the question.

"'*Mr. Whitney*: I have not changed my mind since I admitted it, so I will not repeat it.'"

Indeed, that the sale and distribution of bituminous coal so moving in interstate commerce are part of such interstate commerce cannot be seriously disputed. *United States v. Knight*, 156 U. S. 1; *Addyston Pipe and Steel Company v. United States*, 175 U. S. 211; *Pennsylvania Railroad Co. v. Clark Bros. Min. Co.*, 238 U. S. 456, 465, 468.

As this Honorable Court has said:

"The coal company sold its coal f. o. b. cars at the mines, and when the cars were loaded the coal was promptly forwarded to the purchasers at points within and without the state—largely to points in other states. This was well understood by both companies—by the coal company when it asked for cars and by the railroad company when it supplied them. *Cars were not requested or furnished merely to be used in holding or storing coal, but always to be employed in its immediate transportation*† * * *. It is plain that supplying the requisite cars was an essential step in the intended movement of the coal and a part of the commerce—whether interstate or intrastate, to which that

†Italics are ours, unless otherwise stated.

movement belonged. It was expressly so held in *Pennsylvania R. R. Co. v. Clark Coal Co.,* 238 U. S. 456, 465-468. We there said of the sale and delivery of coal f. o. b. at the mine for transportation to purchasers in other states: 'The movement thus initiated is an interstate movement and the facilities required are facilities in interstate commerce'. Here the state court ruled that, as the coal was sold f. o. b. at the mine, the commerce involved was intrastate, even though the coal was going to purchasers out side the state. This was error, * * *."

Pennsylvania Railroad Co. v. Sonman Shaft Coal Co., 242 U. S. 120, 122.

To quote another case:

"For if he was engaged in interstate commerce he could not be impeded because he was a dealer any more than if he was selling from his own mine. It was understood between the parties that these dealings were steps in sending coal from the mines to purchasers in other states. Very likely the Federal Coal Company might have stopped the coal at Tracy City, in Tennessee, but it had no thought of doing so, and Flanagan understood the course of business in which he was expected to cooperate and did cooperate. Therefore in this matter the parties were engaged in interstate commerce and the state law even if valid as attacked could not invalidate their contract."

Flanagan v. Federal Coal Co., 267 U. S. 222, 225.

(b)

It is well settled that transit or transportation is but one element of interstate commerce. Sale for shipment in interstate commerce is regarded as an integral part of it, the consequence of which is that Congress has the power to regulate such sale. Extracts from a few of the cases that bear upon the point are here assembled:

> "When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical constantly recurring course, the current thus existing is a current of commerce among the states, *and the purchase of the cattle is a part and incident of such commerce.* What we say is true at least of such a purchase by residents in another state from that of the seller and of the cattle. And we need not trouble ourselves at this time as to whether the statute could be escaped by any arrangement as to the place where the sale in point of law is consummated."
>
> *Swift & Co. v. United States,* 196 U. S. 375, 398-399.

> "The commerce clause of the Constitution, Art. I, Sec. 8, cl. 3, expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the latter. Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. *Where goods in one state are transported into another for pur-*

poses of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. Brown v. Maryland, 12 Wheat. 419, 446, 447; *American Steel & Wire Co. v. Speed,* 192 U. S. 500, 519. *On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. American Express Co. v. Iowa,* 196 U. S. 133, 143. *This has been recognized in many decisions construing the commerce clause.* Thus it was said in *Welton v. Missouri,* 91 U. S. 275, 280: 'Commerce' is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities. In *Kidd v. Pearson,* 128 U. S. 1, 20, it was tersely said: 'Buying and selling and the transportation incidental thereto constitute commerce.' In *United States v. E. C. Knight Co.,* 156 U. S. 1, 13, 'contracts to buy, sell, or exchange goods to be transported among the several states' were declared 'part of interstate trade or commerce.' And in *Addyston Pipe and Steel Co. v. United States,* 175 U. S. 211, 241, the court referred to the prior decisions as establishing that 'interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities.' In no case has the court made any distinction between buying and selling, or between buying for transportation to another state and transporting for sale in another state. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling, it was not material whether it came first or last."

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 290-291.

See also

Lemke v. Farmers' Grain Co., 258 U. S. 50, 53-55.

Stafford v. Wallace, 258 U. S. 495, 515-516.

"Interstate commerce includes the interstate purchase, sale, lease, and exchange of commodities, and any combination or conspiracy which unreasonably restrains such purchase, sale, lease, or exchange is within the terms of the Anti-Trust Act, denouncing as illegal every contract, combination, or conspiracy 'in restraint of trade or commerce among the several states.' "

Binderup v. Pathe Exchange, 263 U. S. 291, 311.

" 'Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.' *Swift & Co. v. United States,* 196 U. S. 375, 398. And what is or is not interstate commerce is to be determined upon a broad consideration of the substance of the whole transaction. *Dozier v. Alabama,* 218 U. S. 124, 128. Such commerce is not confined to transportation, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. And it includes the buying and selling of commodities for shipment from one State to another. *Dahnke-Walker Co. v. Bondur-*

ant, 257 U. S. 282, 290; *Lemke v. Farmers' Grain Co.,* 258 U. S. 50, 55. The absence of contractual relation between the manufacturer and retailer does not matter. *The sale by the wholesaler to the retailer is the initial step in the business completed by the interstate transportation and delivery of the paper. Presumably the seller has then determined whether his source of supply is a mill within or one without the state. If the contract of sale provided for shipment to the purchaser from a mill outside the state, then undoubtedly it would be an essential part of commerce among the states. Sonneborn Bros. v. Cureton,* 262 U. S. 506, 515. Clearly the absence of such a provision does not affect the substance of the matter when in fact such a shipment was contemplated and made."

Federal Trade Commission v. Pacific States P. T. Ass'n., 273 U. S. 52, 64.

"The ordering and shipment of the goods constituted interstate commerce, and the obligation to pay and the right to recover the amount due, according to the contract pursuant to which the goods were sent, arose in the course of that commerce. In *International Text-Book Co. v. Pigg,* 217 U. S. 91, 107, this court quoted with approval the language of the circuit court of appeals for the eighth circuit, speaking by Judge Sanborn, in *Butler Bros. Shoe Co. v. United States Rubber Co.,* 156 Fed. 1, 17, a case of consignments to a factor, that 'all interstate commerce is not sales of goods. Importation into one State from another is the indispensable element, the test, of interstate commerce; *and every negotiation, contract, trade, and dealing between citizens of different States,* which contemplates and

causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce.' Such commerce comprehends all the component parts of commercial intercourse between different States, and, according to established principle, any State statute which obstructs or lays a direct burden on the exercise of the privilege of engaging in interstate commerce is void under the commerce clause."

Furst v. Brewster, 282 U. S. 493, 497-498.

It is submitted that the business of selling, marketing and distributing bituminous coal is predominantly interstate in character.

II.

In Order Effectively to Regulate Interstate Commerce It Is Necessary to Regulate Transactions In Intrastate Commerce Which Directly Affect Interstate Commerce.

It is apparent from a study of the Act that Congress intended therein to regulate interstate commerce in coal and also to regulate all transactions in intrastate commerce in coal which directly affect interstate commerce in coal. Indeed, it is so stated in the second paragraph of Section 4 of the Act, which provides:

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

As we have seen under the discussion of our first point, commerce in bituminous coal is predominantly interstate in character. This is true both of the industry as a whole, and in the instant case where in excess of 97% of all coal produced by the Carter Coal Company goes directly into interstate commerce.

The question which we are here considering is whether or not the sale, marketing and distribution of bituminous coal within the states of its origin so directly affect the interstate commerce in bituminous coal as to make it necessary for Congress to regulate such intrastate commerce in order effectively to regulate interstate commerce.

The Court below found that there was such an inter-relation between interstate and intrastate commerce as to require, in protecting interstate commerce, the regulation of intrastate commerce in the sale, marketing and distribution of bituminous coal.

The lower court's 175th finding (R. 209) is as follows:

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

This finding is fully supported by findings of evidentiary facts Nos. 42 (R. 129), 47 (R. 131) and 52 (R. 134). The Court found as evidentiary facts: That in 1933 bituminous coal supplied approximately 83%

of all energy used by railroads for locomotive power (finding 42); that bituminous coal mined in every state competes in the consuming markets with bituminous coal mined in other states, and bituminous coal in substantial quantities is received in interstate commerce from other states by every state which produces bituminous coal; that in every state producing bituminous coal intrastate shipments from the mines of that state meet active competition from interstate shipments (finding 47); that if coal produced and sold for use in the state of production was sold at lower mine prices resulting in delivered prices lower than comparable coal produced outside the state, shipments of such coal into the state would be diminished and intrastate shipments of coal within the state would be increased (finding 52).

The Court's finding of ultimate fact 176 (R. 209) is as follows:

> "Small variations in the mine price of bituminous coal as between mines in different producing areas and states may cause large variations in the shipments in interstate commerce of coal from such producing areas and states, and small variations in the mine prices of bituminous coal as between mines in the same state may cause large variations in the shipments of coal from such mines to points of consumption in the same state or in other states."

The finding is clearly supported by finding of evidentiary facts Nos. 47 (R. 131) and 123-a (R. 183). The Court found as evidentiary facts: That a change of a few cents per ton in the price at which coal is offered for sale may materially affect the decisions of consumers as to whether or not to buy coal from a particular producer, from a particular mine, or from a particular producing area (finding 47); that with respect to diversions of shipments of coal in interstate commerce as found in evidentiary finding of facts Nos. 118 to 123-a (R. 179-183), inclusive, there is a close correlation between the spread in f. o. b. mine prices and diversion of shipments and that a relatively small change in price differential affects a relatively large shift in tonnage (finding 123-a).

Moreover, evidentiary fact No. 63-a (R. 140) establishes that railroad freight charges are comparatively rigid and inflexible, and that such transportation charges are not reduced as delivered prices are reduced, so that substantially the full burden of competition is reflected in the price received by the mine operator f. o. b. mine.

In addition, the testimony, (R. 376) states the situation of the coal industry as follows:

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

This Court in a number of cases has permitted intrastate regulation where it was necessary effectively to control interstate regulation. In the *Minnesota Rate Cases,* 230 U. S. 352, at page 399, the Court said:

> "The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects com-

> mitted to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter."

It is well settled that the Interstate Commerce Commission may fix intrastate rates as an incident to the effecive control of the interstate system. *Wisconsin R. R. Commission v. Chicago, Burlington and Quincy R. R. Co.,* 257 U. S. 563; *The Shreveport Case,* 234 U. S. 342; *Second Employers' Liability Cases,* 223 U. S. 1; *Louisiana Public Service Commission v. Texas N. O. R. Company,* 284 U. S. 125; *State of Ohio v. United States,* 292 U. S. 498.

In *Florida v. United States,* 282 U. S. 194, at page 210, the Court said:

> "To hold, as some of the appellants urge, that there can be no adjustment of intrastate rates by the Interstate Commerce Commission so far as may be needed to protect interstate commerce until the State itself has first 'sat in judgment on the issue of the lawfulness of those intrastate rates' would be to impose a limitation not required by the terms of the statute and repugnant to the grant of authority."

In addition to regulating intrastate rates, Congress may make rules to govern liability for injuries to employees of railroads engaged in interstate commerce, even though those rules violate state rules. Mr. Justice Van Devanter said in the *Second Employers' Liability Cases,* 223 U. S. 1, at page 51:

> "The second objection proceeds upon the theory that, even although Congress has power to regulate the liability of a carrier for injuries sustained by one employe through the negligence of another where all are engaged in interstate commerce, that power does not embrace instances where the negligent employe is engaged in intrastate commerce. But this is a mistaken theory, in that it treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power. As was said in *Southern Railway Co. v. United States,* 222 U. S. 20, 27, that power is plenary and competently may be exerted to secure the safety of interstate transportation and of those who are employed therein, no matter what the source of the dangers which threaten it. The present act, unlike the one condemned in *Employers' Liability Cases,* 207 U. S. 463, deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employes while engaged in such commerce. And this being so, it is not a valid objection that the act embraces instances where the causal negligence is that of an employe engaged in intrastate commerce; for such negligence, when operating injuriously upon an employe engaged in interstate commerce, has the same effect upon that commerce as if the negligent employe were also engaged therein."

The Safety Appliance Acts of Congress provided for penalties unless certain safe appliances were used. In *Southern Ry. Co. v. United States,* 222 U. S. 20, the defendant objected to a penalty assessed upon the hauling of three cars in intrastate traffic. The Court held the Act was intended to apply to all cars of carriers engaged in interstate commerce, even if the particular cars were used wholly intrastate, and that nevertheless the Act was constitutional, stating at page 26:

> "And this is so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce."

The Court also said, at page 27:

> "Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent, for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train but to others."

It has also been held that Congress may limit the hours of employees engaged in interstate commerce and the fact that the employee is also engaged in intrastate commerce does not defeat the right of Congress to make a regulation limiting the total number of hours which a man may work. In *Baltimore & Ohio R. R. Co. v. Int. Commerce Commission,* 221 U. S. 612, this Court said, at page 618:

> "But the argument, undoubtedly, involves the consideration that the interstate and intrastate operations of interstate carriers are so interwoven that it is utterly impracticable for them to divide their employes in such manner that the duties of those who are engaged in connection with interstate commerce shall be confined to that commerce exclusively. And thus, many employes who have to do with the movement of trains in interstate transportation are, by virtue of practical necessity, also employed in intrastate transportation.
>
> "This consideration, however, lends no support to the contention that the statute is invalid. For there cannot be denied to Congress the effective exercise of its constitutional authority."

Similarly, the prices of coal in interstate commerce are so interwoven with intrastate prices, that it is "utterly impracticable" to divide the coal to be marketed in interstate commerce from the coal destined to be marketed in intrastate commerce.

We, therefore, respectfully submit that the National Bituminous Coal Commission in order to accomplish the purposes of the Act will be required to fix not only prices for shipments in interstate commerce, but also for shipments in intrastate commerce, which directly affect interstate Commerce.

Unless Congress has the power to protect interstate commerce by regulating, to the extent necessary, intrastate commerce, Congress will be thwarted in carrying out its Constitutional right to regulate interstate commerce.

III.

The Power of Congress to Regulate Interstate Commerce in Bituminous Coal Includes the Power to Forbid Unfair Methods of Competition in That Industry.

The learned Chancellor found, as his 186th finding of ultimate fact, that the business of selling and distributing bituminous coal in interstate commerce was of such importance that Congress may forbid unfair competitive practices. (R. 212)

That Congress has the right to regulate unfair methods of competition in interstate commerce is no longer open to question.

Under the Sherman Act, the Clayton Act and the Federal Trade Commission Act the power of Congress to forbid unfair methods of competition and unfair trade practices has been recognized and upheld for many years.

Unfair practices are set out definitely and precisely in the Act under sub-section (i) of PART II—MARKETING, of Section 4 of the Bituminous Coal Code under the caption "Unfair Methods of Competition." In sustaining these provisions, therefore, the Court does not have the difficulties which confronted it in considering the Federal Trade Commission Act, in which the unfair trade practices are mentioned without being specified or described, leaving to the Commission in the first instance the determination of what are unfair practices within the intent of the Act. No such uncertainty exists in the Act now under discussion.

The practices which are branded unfair methods of competition by the Act are well known in the business of selling and distributing bituminous coal, and the need for legislation with respect thereto, is apparent from the reading of the record in this case. See *Appalachian Coals, Inc., v. United States,* 288 U. S. 344.

IV.

The Sale, Marketing and Distribution of Bituminous Coal Are Affected With a National Public Interest.

(a)

THE FINDINGS OF CONGRESS AND THE EFFECT THEREOF.

Congress, in adopting the Bituminous Coal Conservation Act, found in the preamble to the Act that the mining of bituminous coal and its distribution by the producers thereof, in and throughout the United States, are affected with a national public interest.

It will be noted that while Congress finds that the production of bituminous coal, as well as its distribution, is affected with a national public interest, the Act does not seek to regulate the mining of coal but confines itself, so far as the regulation of the industry is concerned, to regulation of the sale, marketing and distribution of bituminous coal.

Did Congress, in finding with respect to the distribution of coal that the industry is affected with a public interest, have a reasonable basis in fact for so doing?

This Court in *Jones v. City of Portland,* 245 U. S. 217, in discussing coal, together with other fuels in respect of a City Ordinance authorizing the establishment of a permanent wood, coal and fuel yard for sale to the inhabitants of the city of such commodities, and the appropriation of public funds to be devoted to such purposes, at page 223, cited with approval the statement of a court below that

> "When we speak of fuel, we are dealing not with ordinary articles of merchandise for which there may be many substitutes, but with an indispensable necessity of life, * * *."

This Court itself said, at page 225:

> "Heat is as indispensable to the health and comfort of the people as is light and water."

The rules for determining whether or not an industry is of vital public interest were but recently laid down by this Court in the case of *Nebbia v. New York,* 291 U. S. 502. Unless there is some difference between the power of the sovereign state to regulate an industry affected with the public interest and the power of Congress to do the same thing in the field within which it is paramount, the rules laid down in the *Nebbia* case compel a finding that the interstate commerce in coal is affected with the public interest.

The effect of a congressional finding as a basis of legislation has been before this Honorable Court many times.

In the *Nebbia* case, *supra,* at page 537, this Court says:

> "And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The

course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

These declarations of policy and purpose are the result of evidence before the Congress, its committees and sub-committees and are not lightly to be disregarded. This appears from the language of the Court in *Chicago Board of Trade v. Olsen,* 262 U. S. 1, 37:

"In the act we are considering, Congress has expressly declared that transactions and prices of grain in dealing in futures are susceptible to speculation, manipulation and control which are detrimental to the producer and consumer and persons handling grain in interstate commerce and render regulation imperative for the protection of such commerce and the national public interest therein.

"It is clear from the citations, in the statement of the case, of evidence before committees of investigation as to manipulations of the futures market and their effect, that we would be unwarranted in rejecting the finding of Congress as unreasonable, and that in our inquiry as to the validity of this legislation we must accept the view that such manipulation does work to the detriment of producers, comsumers, shippers, and legitimate dealers in interstate commerce in grain and that it is a real abuse."

The effect of the findings of the Congress is recognized later in the same opinion, page 40, in the following statement by the Court:

> "By reason and authority, therefore, in determining the validity of this act, *we are prevented from questioning the conclusion of Congress* that manipulation of the market for futures on the Chicago Board of Trade may, and from time to time does, directly burden and obstruct commerce between the states in grain, and that it recurs and is a constantly possible danger. For this reason, Congress has the power to provide the appropriate means adopted in this act by which this abuse may be restrained and avoided."

To the same effect is the case of *Stafford v. Wallace,* 258 U. S. 495, where the Court said, at page 521:

> "Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effects upon it are clearly non-existent."

In like manner the Court has recognized the part played by Congress in determining facts in the following extract from *Hill v. Wallace,* 259 U. S. 44, 69:

> "It follows that sales for future delivery on the Board of Trade are not in and of themselves interstate commerce. They cannot come within the regulatory power of Congress as such, *unless they are regarded by Congress, from the evidence be-*

fore it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon. * * * It was upon this principle that * * * we held it to be within the power of Congress to regulate business in the stockyards of the country, and include therein the regulation of commission men and of traders there, although they had to do only with sales completed and ended within the yards, *because Congress had concluded* that through exorbitant charges, dishonest practices and collusion they were likely, unless regulated, to impose a direct burden on the interstate commerce passing through."

(b)

THE FINDINGS OF THE COURT AND THE EFFECT THEREOF.

The findings of fact of the learned trial court and the evidence in support of such findings indicate clearly that Congress was confronted by conditions in the bituminous coal industry which demanded legislation of the regulatory character of the Bituminous Coal Conservation Act of 1935.

The Court below found in his 172nd finding (R. 208) of ultimate fact the following:

> "172. Bituminous coal is the nation's greatest and primary source of energy. Its use is vital to the public welfare. It is of the utmost importance to the industrial and economic life of the nation and to the health and comfort of its inhabitants that the distribution of bituminous coal in interstate commerce be regular, continuous and free from interruptions, obstructions, burdens and restraints."

This finding of ultimate fact is fully supported by findings of evidentiary facts Nos. 42, 43 and 45. (R. 129-131) The Court found as evidentiary facts: that bituminous coal is, and probably will continue to be, the principal source of energy in the United States; that nearly one-half of the mechanical energy is at present derived from bituminous coal, being 46.3% of the total energy consumed in 1934 (finding 42); that the use of bituminous coal to generate energy for the production of light, heat and power is vital to the public welfare, and that in view of the present importance of bituminous coal as a source of energy, it is of great importance to the public welfare that the distribution and marketing of bituminous coal both in interstate and intrastate commerce be not subjected to interruptions, dislocations, burdens, or restraints (finding 43).

The finding is amply supported by the testimony (R. 287):

> "American life is becoming absolutely dependent upon a continuous flow of energy. Without it we would not only freeze but starve.
>
> "All but a small part of this flow of energy comes from fuel and the largest part from bituminous coal." * * *

The Court's finding of ultimate fact 173 (R. 209) is as follows:

> "The production of bituminous coal in the United States at the present time is dependent upon the existence of adequate transportation facilities and the presence at the mine of sufficient railroad cars as the coal is produced. The operations of the existing railroads of the country are dependent upon the production and distribution of bituminous coal."

This finding is supported by findings of evidentiary facts Nos. 42 and 45. (R. 129, 131) Therein the Court found that in 1933 bituminous coal supplied approximately 83% of all energy used by railroads for locomotive power; (finding 42) that the railroads are primarily dependent upon bituminous coal for fuel and that between 1928 and 1934, 26.9% to 33.8% of the total freight tonnage carried by interstate railways consisted of bituminous coal, and that between 16.2% and 19.7% of the total freight revenue of interstate railroads was derived from the transportation of bituminous coal (finding 45).

The court's findings on questions of fact in a case where a jury has been waived are as conclusive in the reviewing court as if embodied in a jury's special verdict.

> *United States v. Jefferson Elec. Mfg. Co.,* 291 U. S. 386.

> "The trial judge states that he took the time necessary to read and examine this voluminous record, and from it in the course of his opinion he makes certain findings of fact. These findings are entitled to the presumption of correctness which is given to the conclusions of a chancellor reached upon consideration of conflicting evidence, * * *."
>
> *United Shoe Machine Corp. v. United States,* 258 U. S. 451, 455.

> "The Circuit Court of Appeals affirmed the findings, saying, by Circuit Judge Gilbert: '* * * The trial court made its findings after an evidently careful and painstaking investigation of the testimony and the exhibits, and after a personal inspection of the mining properties. We have examined the record sufficiently to see that the findings are all supported by the credible testimony of reputable

witnesses. Upon settled principles which this court has always recognized, findings so made upon conflicting testimony are conclusive upon this appeal.' And we said in *Lawson v. United States Min. Co., supra,* of the conclusion of the Circuit Court of Appeals in such case—and the concession is as great as the appellant is entitled to—'that if the testimony does not show that it (the conclusion of the court) is correct, it fails to show that it is wrong, and under those circumstances we are not justified in disturbing that conclusion. It is our duty to accept a finding of fact, unless clearly and manifestly wrong.' The findings accepted, the conclusion of law must be pronounced to be of necessary sequence."

Butte & S. Copper Co. v. Clark-Montana Realty Co., 249 U. S. 12, 30.

"This is a case in equity, and while in such a case questions of fact are always open to consideration by an appellate court, great respect is paid to the conclusions of the trial court in respect to them."

United States v. Detroit T. & L. Co., 200 U. S. 321, 329.

V.

The Regulation of Prices Is a Reasonable Exertion of Governmental Authority and Is Appropriately Related to the End in View.

(a)

Congress May Use Such Means of Regulation as Are Appropriate to Attain the End in View.

Congress has a large discretion as to the means to be employed to attain an end, and may employ those means which, in its judgment, are most advantageous, taking care only that they are not inconsistent with the limitations placed upon the general power by the Constitution.

In re Quarles, 158 U. S. 532.
Prigg v. Commonwealth, 16 Pet. 539, 619.
McCulloch v. Maryland, 4 Wheat. 316, 419.

It has frequently been held that Congress has a large discretion as to the means to be employed in the exercise of any power granted it. The cases include:

Northern Securities Co. v. United States, 193 U. S. 196.
Fairbank v. United States, 181 U. S. 283.
United States v. Sugar, 243 Fed. 423.
Story v. Perkins, 243 Fed. 997, affirmed in
Jones v. Perkins, 245 U. S. 390.
Logan v. United States, 144 U. S. 263.

(b)

The Fixing of Prices is an Appropriate Means of Regulation.

A recent instance in which the right to fix prices was upheld is:

Nebbia v. New York, supra.

The case developed from the conviction of Nebbia for violation of an order of the Milk Control Board of the State of New York fixing retail prices to be charged for milk by stores. The Board fixed nine cents as the price to be charged by a store for a quart of milk. Nebbia, a grocery store proprietor, sold two quarts and a five cent loaf of bread for eighteen cents. His conviction was sustained.

The similiarity in the underlying factual aspects of the *Nebbia* case and the case at bar is striking. In the former case investigations of the milk industry were made by the State of New York. They resulted in findings that the commodity was an essential one, that it could not be long stored, that the industry was a paramount one largely affecting the health of the people, and that destruction of the industry would result in serious economic loss. State investigators found overproduction, prevalence of unfair and destructive trade practices leading to a demoralization of prices, surplus burdens of milk in the market, and price cutting.

Voluntary unit action by producers was suggested as a remedy.

The Milk Control Act was passed regulating prices because it was concluded that the evils in the industry could not be expected to correct themselves through the ordinary play of the forces of supply and demand, owing to the peculiar and uncontrollable factors affecting the industry.

Every word used by Mr. Justice Roberts in describing the milk industry in New York, applies to the coal industry throughout the United States. Investigations made by Congress showed the same need for regulation.[1]

NOTE 1. Hearings before the Committee on Manufactures of the Senate on Shortage of Coal (65th Cong., 2nd Sess., 1918);

Hearings before the Committee on Interstate Commerce of the Senate on Increased Price of Coal (66th Cong., 1st Sess., 1919, 1920, 1921);

Hearings before the Committee on Reconstruction and Production of the Senate on Coal and Transportation (66th Cong., 3rd Sess., 1920, 1921);

Hearings before the Committee on Education and Labor of the Senate on Conditions in the West Virginia Coal Fields (67th Cong., 1st Sess., 1921, 1922);

Hearings before the Committee on Labor of the House of Representatives on Labor Conditions in the Coal Industry (67th Cong., 2nd Sess., 1922);

Report of the United States Coal Commission pursuant to the Act of September 22, 1922, published in 1925;

Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives on Coal Legislation (69th Cong., 1st Sess., 1926);

Hearings before the Committee on Interstate Commerce of the Senate on Conditions in the Coal Fields of Pennsylvania, West Virginia and Ohio (70th Cong., 1st Sess., 1928);

Hearings before the Committee on Interstate Commerce of the Senate on Proposed Bituminous Coal Legislation (70th Cong., 2nd Sess., 1929);

Hearings before the Committee on Mines and Mining of the Senate on the Creation of Bituminous Coal Commission (72nd Cong., 1st Sess., 1932);

Hearings before the Committee on Interstate Commerce of the Senate on Stabilization of the Bituminous Coal Mining Industry (74th Cong., 1st Sess., 1935);

Hearings before the Committee on Ways and Means of the House of Representatives on Stabilization of the Bituminous Coal Mining Industry (74th Cong., 1st Sess., 1935).

This Court in the *Nebbia* case, in sustaining the New York Statute, says, at pages 531, 532 and 537:

> "We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice. * * * *But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. * * * The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells,* and that, however able to regulate other elements of manufacture or trade, *with incidental effect upon price, the state is incapable of directly controlling the price itself.* This view was negatived many years ago. * * * *But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.*"

It is submitted that "the state" as used in the foregoing excerpt refers to legislative policy in its broader sense, and is not restricted in its application to the concept of a state in the popular sense; and that whether such interpretation of the language be accurate or the reverse, in any event the national government is similarly potent within its field of operations, in the instant case in the exertion of the power to regulate commerce committed to it by the Federal Constitution.

Indeed in the *Nebbia* case, Mr. Justice Roberts so states, at page 524:

> "Touching the matters committed to it by the Constitution, the United States possesses the power, as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the Federal Government, as shown by the quotations above given."

It would seem, therefore, that if control, reasonable and appropriate to regulate intrastate commerce by states, is permissible under our philosophy of government, similar control to regulate interstate commerce must reside in the Congress.

Counsel for the plaintiff argued that the power of Congress in the field of interstate commerce is negative only. But this argument has only the appearance of substance. Control of interstate commerce means doing whatever is necessary to remove the evils or obstructions which interfere. If a physical obstruction were placed at the boundary between two states, Congress could cause it to be removed. This would require both the negative power of prevention and the affirmative power of removal. It can hardly be said that the power of Congress is limited only to preventing a state or an individual from obstructing the channels of interstate commerce without the power affirmatively to impose obedience.

It is true, as argued by the plaintiff, that the power of Congress under the Federal Trade Commission Act, is to prevent unfair trade practices, but that is only because the object of the Statute is preventive, and not because the power is lacking in Congress to pass affirmative legislation. In fact the Grain Futures Act, the Packers and Stockyards Act, the Cotton Standards

Act, and numerous similar statutes, all impose affirmative regulation.

It would seem inescapable that Congress may fix prices and practices in the interstate commerce of coal when such regulation is a reasonable and appropriate method of correcting the evil aimed at and of attaining the end in view.

The right of Congress to fix prices under the Lever Act was challenged in *Highland v. Russell Car & Snow Plow Company,* 279 U. S. 253; and the position was upheld that Congress could fix prices. It therefore follows that the power exists if appropriate to the ends sought to be attained.

In the case of *Munn v. Illinois,* 94 U. S. 113, Chief Justice Waite, says, at page 125:

> "With the 5th Amendment in force, Congress, in 1820, conferred power upon the City of Washington 'to regulate * * * the rates of wharfage at private wharves, * * * the sweeping of chimneys, and to fix the rates of fees therefor, * * * and the weight and quality of bread;' *3 Stat.* 587, sec. 7; and, in 1848, 'to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers', 9 *id.,* 224, sec. 2."

Tagg Bros. v. United States, 280 U. S. 420, was concerned with the Packers and Stockyards Act of 1921, under which Congress authorized the Secretary of Agriculture to fix charges for market agents. These so-called agents were individuals who graded cattle in the stockyards. The Court held this Act, providing for the fixing of compensation for the agents, constitutional. See also *Stafford v. Wallace,* 258 U. S. 495.

In *Chicago Board of Trade v. Olsen,* 262 U. S. 1, the Court held that a statute passed by Congress providing for the fixing of standards and prices of grain in future sales was within its power.

Under the Interstate Commerce Act, Congress has provided for the regulation of rates through the Interstate Commerce Commission.

(c)

As the States Cannot Fix Prices of Commodities in Interstate Commerce, Congress Impliedly May.

By their denial that the states have a right to fix prices for commodities comprising interstate commerce, the adjudicated cases if not conclusively, at least impliedly, indicate the existence of such right in the Federal Government.

Such implication appears in *Baldwin v. Seelig,* 294 U. S. 511. This case turned upon the constitutionality of a feature of the New York Milk Control Act, making it unlawful to sell milk in New York, produced and purchased outside of the state at less than the minimum producer price established by the state for purchase of milk within the state. Plaintiff had bought milk in Vermont at less than the minimum New York producer price, and had shipped it to New York. This Court held that regulation of the price of milk comprising interstate commerce was outside the power of New York, entirely apart from the question whether the milk remained in the original container or otherwise.

In *Lemke v. Farmers' Grain Co.,* 258 U. S. 50, a North Dakota statute attempting to fix prices was found to be unconstitutional, because it resulted in fixing prices of grains bought and sold in interstate commerce. This, said the Court, a state could not do.

It seems clear, therefore, that the fixing of prices has been permitted by states in local matters and by Congress in matters affecting interstate commerce in all cases where the fixing of prices was an appropriate regulation.

(d)

THE EFFECT OF PRICES ON INTERSTATE COMMERCE IN COAL.

The Court's finding of ultimate fact 177 (R. 210) is as follows:

> "The f. o. b. mine price at which bituminous coal is sold in interstate commerce directly affects interstate commerce in bituminous coal."

The trial court found that the competitive cutting of prices f. o. b. mine between 1923 and 1933 occasioned a large shift or diversion of shipments of coal from the fields north of the Ohio and Potomac Rivers to the fields immediately south thereof (finding 118), and that the intense competition largely between coal producing areas from 1924 to 1927 chiefly expressed itself in price cutting and wage cutting (finding 118-a). The extent of the shift or diversion of business which took place from the northern group of fields to the southern group during this period is shown by the record of the total shipments originating in the States of Pennsylvania, Ohio, Illinois and Indiana, designated as Group A in defendants' Exhibit 31, and in the States of West Virginia, Kentucky and Virginia, designated as Group B, in said exhibit. This shift or diversion is shown in the table contained in the trial court's finding 119.[1]

The table indicates the shipments from each group in each calendar year expressed as a percentage of the combined shipments of the two groups. The measure of the actual tonnage involved in this shift of business is found by comparing shipments in 1923 and 1929, both years of active business. Between these years shipments from the northern group decreased 52,800,000 tons and shipments from the southern group increased 50,300,000 tons. These figures represent not the cumulative shift but only the comparison between the single years 1923 and 1929 (finding 121).

The Court also found that the shift or diversion of shipments after 1923 from the northern to the southern group of bituminous coal producers was primarily due to a more rapid reduction of the f. o. b. mine price in the South than in the North (finding 122); that throughout the period f. o. b. mine prices at the southern group mines were considerably lower in relation to 1923 than the f. o. b. mine price at the northern group mines, although the increase in the lake cargo freight differential in 1927 absorbed a part of the mine price differential on the tonnage shipped to the lakes by the two groups, which amounted to about 9% of their com-

Note 1.

Percent of shipments from	1923	1924	1925	1926	1927	1928	1929	1930	1931	1932	1933
Group A (North)	63.9	56.6	54.7	53.1	46.1	49.6	51.8	52.7	52.6	49.3	49.8
Group B (South)	36.1	40.4	45.3	47.0	53.9	50.4	48.2	47.3	47.5	50.7	50.2
Total	100.	100.	100.	100.	100.	100.	100.	100.	100.	100.	100.

bined total shipments (finding 123); that there is a close correlation between the spread in f. o. b. mine prices and these diversions of shipments, although some of the diversion was due to strikes in the years 1927, 1928 and 1932 (finding 123-a); and that between 1923 and 1933 the same causes resulted in a large shift and diversion of tonnage of coal loaded for shipment from a certain northern group of coal-originating interstate railroad carriers to a certain southern group of such carriers. The effect upon the individual interstate carrier railroads is shown in detail (finding 126).

We have already discussed in PART II hereof on pages 25 and 29, the necessity of regulating the prices of coal in intrastate commerce, in order effectively to regulate prices of coal in interstate commerce, and we refer to the argument there made.

VI.

In the Regulation by Congress of the Business of Selling and Distributing Bituminous Coal in Interstate Commerce, Congress May Use the Taxing Power as a Means of Such Regulation.

We respectfully submit that Section 3 of the Act, entitled "Tax on Bituminous Coal", is valid, whether the tax be

(a) considered in the popular sense of the word;

(b) regarded as classifying producers, or

(c) considered as a regulation of a subject within the sweep of the Congressional powers.

(a)

The imposition is denominated an "excise tax", and such it actually is. It applies equally to the sale or other disposal of all bituminous coal produced within the United States. The drawback, in the form of a credit, is available to all producers of bituminous coal accepting the code and complying with its provisions.

The excise tax thus laid is clearly a revenue measure. Bituminous coal production for 1934 was in excess of 350,000,000 tons. At an average price of $2.00 a ton at the mine, the minimum revenue derivable by the government would be in excess of $10,000,000 for that year. The universality of the tax is indicated by the fact that it is laid upon captive coal, that does not enter into the ordinary channels of commerce. The measure of such tax is set by the current market price for the comparable kind, quality and size of coal in the locality where the same is produced, as determined by the Commissioner of Internal Revenue.

Section 19 of the Act defines "captive coal" as

> "* * * all coal produced at a mine for consumption by the producer or by a subsidiary or affiliate thereof, or for use in the production of coke or other forms of manufactured fuel by such producer or subsidiary or affiliate."

(b)

While we do not believe that the tax does classify, yet if it be regarded as classifying producers, laying, as it does, an excise of 15% on the sale price of coal at the mine, or, in the case of captive coal, on its fair market value at the mine, with a drawback of 90% of such excise to those who accept the code, the classification is permissible and not exceptional. Congress has always differentiated taxes, duties, imposts and excises conformably to its views of public policy.

An outstanding instance of classifications is found in the *Yacht Cases*. Section 37 of the Tariff Act of 1909 imposed an excise tax on the use anywhere, by a citizen of this country, of a foreign-built yacht. Such tax did not apply to the use of yachts built in this country. The Court sustained the classification in *Billings v. United States,* 232 U. S. 261, 283-284, saying, in part:

> "Is there foundation for this claim under the 5th Amendment? is then the issue, and that of course requires a statement of the grievances which it is asserted result from upholding the tax. They all come to this,—that to impose a burden in the shape of a tax upon the use of a foreign-built yacht when a like tax is not imposed on the use of a domestic yacht under similar circumstances is so beyond the power of classification, so abhorrent to the sense of justice, and so repugnant to the conceptions of free government as to be void even in the absence of express constitutional limitation. We do not stop to point out the obvious unsoundness of the contentions, nor indeed to direct attention to the self-evident demonstration of their want of merit even from the point of view of the power to classify * * * because in any event we are of opinion the conclusion cannot be escaped that the propositions, each and all of them, whatever may be their form of expression, are in substance and effect but an assertion that the tax which the statute imposes is void because of a want of intrinsic uniformity, and therefore all the contentions

are adversely disposed of by the previous decisions of this court on that subject."

In *Fox v. Standard Oil Co.,* 294 U. S. 87, 99-101, the Court stated:

> "When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers. * * * A chain, as we have seen, is a distinctive business species, with its own capacities and functions. Broadly speaking, its opportunties and powers become greater with the number of the component links; and the greater they become, the more far reaching are the consequences, both social and economic. For that reason the state may tax the large chains more heavily than the small ones, and upon a graduated basis, as indeed we have already held, * * *. Not only may it do this, but it may make the tax so heavy as to discourage multiplication of the units to an extent believed to be inordinate, and by the incidence of the burden develop other forms of industry. * * * *'Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful powers are matters beyond the scope of judicial inquiry'.* * * * The tax now assailed may have its roots in an erroneous conception of the ills of the body politic or of the efficacy of such a measure to bring about a cure. We have no thought in anything we have written to declare it expedient or even just, or for that matter to declare the contrary. We deal with power only."

The drawback on the tax by those complying with code provisions is a device of taxation used in the first Customs Act and found in the present Customs Act. Credits on taxes allowed for certain conditions and contingencies are common. The credit device operates under the Federal Inheritance Tax Act. The power of taxation of the government includes the power of exemption, subject of course to constitutional limitations.

(c)

The tax is sustainable as a permissible measure of regulation over a subject matter within the constitutional power of Congress, namely, its right to regulate interstate commerce. Such conclusion has been reached by the courts in numerous instances.

Head Money Cases, 112 U. S. 580, were suits to recover sums collected as duties on immigrants arriving in the United States pursuant to the provisions of an Act to regulate immigration. The contention was that the Act was unconstitutional because it was an exercise of the taxing power not for the common defense and general welfare and not uniform. It was further contended that Congress in the exercise of such power could not derive support from any other grant of power. The Court stated, page 591:

> "That these statutes are regulations of commerce, of commerce with foreign Nations, is conceded in the argument in this case; and that they constitute a regulation of that class which belongs exclusively to Congress is held in all the cases in this court."

The Act there under consideration imposed on owners of steam or sailing vessels bringing passengers to the United States from foreign ports "a duty of 50¢ for each and every person, not a citizen of the United States." In the course of its opinion the Court said, at page 597:

> "We are clearly of opinion that, in the exercise of its power to regulate immigration and in the very act of exercising that power, it was competent for Congress to impose this contribution on the ship owner engaged in that business."

In *Board of Trustees v. United States,* 289 U. S. 48, the University of Illinois paid under protest customs duties on imported scientific apparatus. It contended that as a state instrumentality discharging a governmental function it was exempt from the duties. This Court held that the duties were a valid exercise of the power to regulate foreign commerce and that the tax was in aid of such regulation. At pages 57, 58, the Court said:

> "Appellant argues that the Tariff Act is a revenue measure; that it is not the less so because it is framed with a view, as its title states, of encouraging the industries of the United States (*Hampton & Co. v. United States,* 276 U. S. 394, 411, 412); that the duty is a tax, that the Act is not one for the regulation of commerce but is an exertion of the taxing power, and that, as such, it is subject to the constitutional limitation that the Congress, may not lay a tax so as to impose a direct burden upon an instrumentality of a State used in the performance of a governmental function.
>
> "It is true that the taxing power is a distinct power; that it is distinct from the power to regulate commerce. *Gibbons v. Ogden, supra,* p. 201. It is also true that the taxing power embraces the power to lay duties. Art. I, Sec. 8, par. 1. But because the taxing power is a distinct power and embraces the power to lay duties, *it does not follow that duties may not be imposed in the exercise of the power to regulate commerce. The contrary*

> *is well established. Gibbons v. Ogden, supra,* p. 202. 'Under the power to regulate foreign commerce Congress impose duties on importations, *give drawbacks,* pass embargo and non-intercourse laws, and make all other regulations necessary to navigation, to the safety of passengers, and the protection of property.' *Groves v. Slaughter,* 15 Pet. 449, 505. The laying of duties is 'a common means of executing the power.' *2 Story on the Const.,* Sec. 1088."

In *McCray v. United States,* 195 U. S. 27, the Court had under consideration a tax levied on oleomargarine, manufactured and sold without regard to its interstate commerce. The rate of tax was ¼¢ per pound if the oleomargarine was white and 10¢ per pound if it was colored to resemble butter. The Court said, at pages 60-61:

> "The proposition that where a tax is imposed which is within the grant of powers, and which does not conflict with any express constitutional limitation, the courts may hold the tax to be void because it is deemed that the tax is too high, is absolutely disposed of by the opinions in the cases hitherto cited, and which expressly hold, to repeat again the language of one of the cases (Spencer v. Merchant) that 'The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.'
>
> * * * * * * *
>
> "The right of Congress to tax within its delegated power being unrestrained, except as limited

by the Constitution, it was within the authority conferred on Congress to select the objects upon which an excise should be laid."

In *Magnano Co. v. Hamilton,* 292 U. S. 40, the Court upheld a state statute laying a tax of 15¢ per pound on all butter substitutes, including oleomargarine, sold within the State. The Court stated, at pages 44-45:

> "Except in rare and special instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution. * * * And no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment. * * * That clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property. * * * *Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry.* * * * Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses * * *, unless, indeed, as already indicated, its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power denied by the Federal Constitution

to the state. The present case does not furnish such a demonstration."

In *United States of America v. William M. Butler et al., Receivers of Hoosac Mills Corporation,* No. 401 October Term 1935, decided January 6, 1936, the Court took occasion to say, in holding that the Act involved (AAA) was one regulating agricultural production and beyond the powers committed to Congress,

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

And again:

> *"The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted.* But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible."

It is significant to note that the decision in the *Hoosac Mills* case did not turn upon the question of the power of Congress to regulate interstate commerce:

> "The third clause endows the Congress with power 'to regulate Commerce * * * among the several States'. Despite a reference in its first sec-

> tion to a burden upon, and an obstruction of the normal currents of commerce, the act under review does not purport to regulate transactions in interstate or foreign commerce. Its stated purpose is the control of agricultural production, a purely local activity, in an effort to raise the prices paid the farmer. Indeed, the Government does not attempt to uphold the validity of the act on the basis of the commerce clause, which, for the purpose of the present case, may be put aside as irrelevant."

In the case at bar, however, the power of Congress under the commerce clause is directly involved, because the distribution of coal by the defendant corporation is not a local activity, but admittedly almost entirely interstate. As Congress has found it expedient to regulate the interstate commerce in coal, it follows that it may use the taxing power in furtherance of such regulation. If it be contended that under the Act the taxing power is used not only in the furtherance of regulation of interstate commerce in coal, but in respect of intrastate commerce as well, the answer is that the object of Congress is regulation of an interstate activity and that the intrastate regulation is embraced in the statute because interstate regulation would be futile without it.

VII.

The Interstate Character of Wage Negotiations.

In his ultimate finding 183 (R. 211) the trial court stated:

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

That the Court had ample support for his finding is patent from the Record. A defense witness (R. 340) testified that the central competitive field, as constituted for wage-making purposes, included the States of Ohio, Indiana and Illinois and the Western District of Pennsylvania; that in that field prior to March 31, 1927, and for a continuous period as far back as 1898, wages were fixed by establishing a basic wage agreement as the result of a conference of miners and operators in those states; that, prior to the war period, the proportion of all coal produced in the United States that was produced in the central competitive field varied from 40% to 46%, constituting about 70% of the coal produced at unionized mines. He further said that up to 1922 the central competitive field wage scales as applied to mines within it and to the outlying unionized district had a direct influence upon wages in the non-union mines.

The theory of wage agreements by interstate negotiations rather than by local negotiations, according to the witness, was to maintain a proper competitive relationship between producers by establishing proper wage relationships over a large area directly, and also indirectly, upon areas outside. (R. 341) Each district made its own agreement on the basis of rates and conditions of labor in the basic agreement.

The same witness testified that the next wage agreement was made in the first quarter of 1924, effective from April 1, 1924 to March 31, 1927; and that the central competitive field was unable to enter into any agreement in 1927 at the expiration of the Jacksonville agreement. (R. 346) He further stated (R. 349) that during 1933 when wages had reached low levels, produced by a terrific price war, the mine workers and operators were assembled by the Administrator of the National Industrial Recovery Act, and that there was worked out what came to be known as the Appalachian Wage Agreement, effective on October 2, 1933, running until April 1, 1934, and covering the States of Pennsylvania, Ohio, West Virginia, and Virginia as well as eastern Kentucky and northeastern Tennessee.

It further appears from the testimony of the witness that the Agreement was extended for a year from April 1, 1934 with specified changes; that at its expiration a joint conference met on February 18, 1935, and failed to reach an agreement; that on April 1st the National Recovery Administration caused the agreement to be extended until June 16th; that later the President intervened, resulting in extension of the Agreement to July 1st; and that there were two or three other extensions brought about by government intervention; and an agreement was finally consummated after a five day strike in September. (R. 349, 350) It also appears from the witness that producers of more than two-thirds of the national tonnage for 1934 were signatories to the Appalachian Agreement.

Another witness corroborated the foregoing testimony as to the interstate character of the wage agreements, saying that the basis upon which the agreements were arrived at was usually predicated upon the fact that whatever agreement as to wages and hours was finally reached for the four states comprising the central competitive field, would finally be applied to all unionized districts not parties to that field's conference, the other districts being central Pennsylvania, Maryland, the outlying portions of West Virginia and Kentucky, the States of Iowa, Missouri, Arkansas, Oklahoma, Texas, Montana, Colorado, Wyoming and Washington. (R. 429)

To the same general effect is the stipulation to be found in the Record (R. 340), as follows:

> "It was then stipulated by Mr. Whitney that the traditional way in the industry in the central competitive field of fixing wages and hours is by collective bargaining in an interstate conference between associations of producers on the one hand and representatives of the men on the other, and that the other union areas, outside of the central competitive field, fix their wages and hours by collective bargaining on the basis of the agreements made in the central competitive field."

We have thought it not necessary to dwell upon the labor provisions of the Act. We assume that such provisions will be discussed by others. We have, however, deemed it advisable to call attention in this brief to the chaotic conditions within the industry which have resulted from failure or refusal to treat the problem of labor relations on a national basis.

VIII.

The Provisions of the Act Do Not Violate the Due Process Clause of the Fifth Amendment.

(a)

Principles, Standards and Procedure.

In *Nebbia v. New York, supra,* the Court stated, page 537:

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio.* 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' * * * And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have

said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

In construing a Federal taxing statute, and the application thereto of the "due process" clause of the Fifth Amendment, this Court said in *Burnet v. Wells,* 289 U. S. 670, at pages 679, 681:

"To overcome this statute the taxpayer must show that in attributing to him the ownership of the income of the trusts, or something fairly to be dealt with as equivalent to ownership, the lawmakers have done a wholly arbitrary thing, have found equivalence where there was none nor anything approaching it, and laid a burden unrelated to privilege or benefit. * * *

"The line of division between the rational and the arbitrary in legislation is not to be drawn with an eye to remote possibilities. What the law looks for in establishing its standards is a probability or tendency of general validity. If this is attained, the formula will serve, though there are imperfections here and there. The exceptional, if it arises, may have its special rule."

The foundation of the structure built by the Bituminous Coal Conservation Act of 1935 is the establishment of prices, minimum and maximum, with particular reference to the former. The keystone of the Code is its minimum price provisions. That every requirement of due process has been observed and that no producer can be harmed in the sale and distribution of his product, comprehensive measures are provided which dovetail into one another with almost mechanical precision. These include ascertainment of costs, determination of weighted average costs, establishment of minimum prices for districts by district boards, submission by them to National Bituminous Coal Commission, coordination of prices between districts by district boards, submission of them to the Commission, ultimate consideration by the Commission of both primary district prices and coordinated prices, with power in the Commission to approve, disapprove or modify prices. Always at hand there is a Consumers' Counsel to look after the interests of the public. The length to which Congress has gone to insure due process is indicated by the series of steps prescribed in the price-fixing program. The steps, in their actual and factual sequence, are shown in the subjoined digest, for brevity paraphrasing instead of quoting the text of the Act. The minimum price areas referred to are defined in the Minimum-Price-Area Table of sub-section (a) PART II of the Code. The districts over which the respective District Boards have authority and jurisdiction are shown in the "Schedule of Districts" comprising "Annex to Act."

Steps Under Bituminous Coal Conservation Act of 1935 for Establishing Minimum Prices.

I.

1. Each District Board shall determine the weighted average of total costs of the ascertainable tonnage produced in its district in 1934.

2. Each District Board shall adjust average costs so determined to give effect to changes in wage rates, hours of employment, or other factors substantially affecting costs, exclusive of seasonal changes, to reflect changes established since January 1, 1934.

3. The determination and computation on which costs are based shall be submitted to the Commission by each District Board in a minimum price area.

4. The Commission shall determine the weighted average of total cost of the tonnage for each minimum price area in 1934, adjusted, and shall transmit it to all District Boards in minimum price area.

5. Said weighted average of total costs shall be taken as the basis for establishment of minimum prices, effective until changed by the Commission.

6. On satisfactory proof by a District Board of a change exceeding two cents a net ton in the weighted average of total costs in a minimum price area, exclusive of seasonal changes, the Commission shall increase or decrease minimum prices accordingly.

7. Total cost shall include labor, supplies, power, taxes, insurance, workmen's compensation, royalties, depreciation, depletion, all other direct expenses of production, coal operators' association dues, District Board assessments levied, reasonable costs of selling and costs of administration.

II.

8. Each District Board from time to time, on its own motion or when directed by the Commission, shall establish minimum prices f. o. b. transportation facilities at mines.

9. Prices shall be established to yield a return per net ton for each District in a minimum price area, equal as nearly as may be to the weighted average of total cost of the tonnage of such minimum price area.

10. Minimum prices shall reflect as nearly as possible the relative market value of various kinds, qualities

and sizes of coal, shall be just and equitable between producers within the district, and shall have due regard to the interests of the consuming public.

11. Procedure to establish minimum prices shall be in accordance with rules and regulations to be approved by the Commission.

12. Schedules of minimum prices with the data on which they are computed shall be submitted by the District Board to the Commission which may approve, disapprove or modify them to conform to requirements of the subsection.

13. The Commission's action shall be binding upon all Code members within the district, subject to modification resulting from coordination.

14. All minimum prices of coal for shipment into any consuming market area shall be just and equitable as between producers within the district.

15. No minimum price shall be established that permits dumping.

III.

16. District Boards, under rules and regulations of the Commission, shall coordinate in common consuming market areas, on a fair competitive basis, minimum prices and the rules and regulations established by them.

17. Coordination shall take into account, but without limitation, the various kinds, qualities and sizes of coal and transportation charges upon coal.

18. Minimum prices for any kind, quality or size of coal for shipment into a consuming market area shall be just and equitable, and not unduly prejudicial or preferential as between and among districts, and shall re-

flect, as nearly as possible, relative market values, at points of delivery, in each common consuming market area, of the various kinds, qualities and sizes of coal produced in the various districts, to afford producers in the several districts substantially the same opportunity to dispose of their coals on a competitive basis as theretofore existed.

19. Minimum prices resulting from coordination shall not, as to any district, reduce or increase the return per net ton upon all coal produced therein below or above the minimum return prescribed, by an amount greater than necessary to accomplish coordination, so that the return per net ton on the entire tonnage of the minimum price area approximates and is not less than the weighted average of the total cost per net ton of the tonnage of such minimum area.

20. Such coordinated prices and rules and regulations, with data on which predicated, shall be submitted to the Commission, which may approve, disapprove or modify the same to establish and maintain such fair competitive relationship.

21. No minimum price shall be established that permits dumping.

22. On the petition of any District Board or other party in interest, or on its own motion, after notice to the District Boards, the Commission may at any time conduct hearings to determine whether the foregoing method of fixing minimum prices (prior to coordination) is prejudicial to any district with respect to its fair opportunity to market its coal.

23. If the Commission so finds and further finds that the prejudice cannot be removed through coordination of minimum prices, the Commission may establish a different basis to determine minimum prices in a dis-

trict, to the end that fair and competitive prices shall prevail in marketing coal produced in such district; provided,

24. That minimum prices so established as to any such district shall yield a return per net ton, not less than the weighted average of total costs, per net ton, of the tonnage of such district.

25. Any Code member or District Board, or any State or political subdivision thereof, dissatisfied with the coordination of prices or rules and regulations, or by failure to establish coordination of prices or rules and regulations * * * shall have the right, by petition, to complain to the Commission, and the Commission shall, under rules and regulations established by it, after notice and hearing, make such order as may be required to effectuate coordination * * * which order shall be binding on parties in interest.

26. Pending final disposition of a petition, on reasonable showing of necessity, the Commission may make a preliminary or temporary order as in its judgment may be appropriate.

Sub-section (j) of PART II gives further protection to those who are affected by the Code. It provides that the Commission shall hear and determine written complaints charging violation of the Code, shall make and publish rules and regulations for consideration and hearing of complaints, shall endeavor to adjust complaints and to compose the differences of the parties, and shall make such orders in the premises as the facts warrant, any such order being reviewable.

Due process is otherwise assured under Section 6 of the Act whereby rules, regulations, determinations and promulgations of a District Board are subject to review by the Commission on appeal by any producer; and by the provision thereof that a person aggrieved by an order of the Commission may obtain a review of the order in the Circuit Court of Appeals of the United States, or in the Court of Appeals for the District of Columbia, upon terms and conditions set forth in detail. It is further therein provided that the judgment and decree of the court affirming, modifying, enforcing or setting aside an order of the Commission shall be subject to review by the Supreme Court of the United States.

(b)

PLAINTIFF'S ALTERNATIVE.

Among the evidentiary findings of fact of the trial court is No. 40 in respect of the tax. (R. 128) It reads:

> "40. In the calendar year 1934, Carter Coal Company sold approximately 2,126,046 tons of bituminous coal, obtaining an aggregate sales price at the mine of $3,918,266, upon which it realized a net profit in the operation of its business of $323,998. Had a tax of 15% on the sales price at the mine been imposed, the tax payable would have been $587,740, and had a tax of 13½% been imposed it would have amounted to $528,966. The imposition of either of such tax rates would have completely wiped out all net profit from the operation of the business of the Company, the 15% tax creating a net loss of $263,752 and the 13½% tax creating a net loss of $204,968. Neither in the present year nor at any time during the past 8 years have the net profits of Carter Coal Company equalled 15% or 13½% of the total sales price received by the Company at the mine."

The plaintiff relies on this finding of fact in respect of payment of a tax of 13½% or 15%, as the case may be, inflicting a net loss upon Carter Coal Company on 1934 tonnage in excess of $200,000, as demonstrative of a lack of due process. Stress is also laid upon that part of the finding which states that at no time in eight years past have net profits of Carter Coal Company equalled 15% or 13½% of the total sales price received by the Company at the mine.

It is submitted that one who has voluntarily put himself in a position whereby losses may be inflicted on him is in no position to assert that thereby he is denied due process. It is not as if there were no alternative. Section 3 of the Act by its terms gives the coal producer full opportunity to secure a credit on the excise tax equivalent to 90% of the amount of that tax. If the producer elects not to avail himself of such alternative, in view of the considerations that we have already advanced, which we believe lead to the conclusion that the Act is constitutional, such producer is not one who should be heard to complain. By acceptance of the Code, whereby Carter Coal Company would be entitled to the 90% credit on the tax, the amount required to be paid on the 1934 sales realization would have been $58,773.99. Deducting that from the net profit realized as found by the Court, $323,998, there would have remained a net after excise taxes of $265,224.01.

By acceptance of the Code the producer would not have prejudiced his position, for the last sentence of Section 3 stipulates that

> "No producer shall by reason of his acceptance of the code provided for in section 4 or of the drawback of taxes provided in section 3 of this Act be held to be precluded or estopped from contesting

the constitutionality of any provision of said code, or its validity as applicable to such producer."

(c)

CONTRACTS.

The plaintiff has specified as part of his 36th assignment of error (R. 240) the refusal of the Court to find as an ultimate fact that, if Carter Coal Company should become a member of the Code and comply with its provisions, irreparable injury to that Company and the plaintiff would impend because of a "subjection to suits for damages under contracts, breached by the Company in compliance with the Code."

The evidence discloses that Carter Coal Company has covenanted to dispose of 230,000 net tons of coal contracted for since August 30, 1935, the date the Act was approved, the contracts providing for delivery for a period longer than thirty days from their dates, each being for a period of more than one year. (R. 576)

A Code provision that would be violated should deliveries be made on such contracts is the third paragraph of sub-section (e) of PART II—MARKETING, of Section 4 of the Act which reads:

> "From and after the date of approval of this Act, until prices shall have been established pursuant to subsections (a) and (b) of part II of this section, no contract for the sale of coal shall be made providing for delivery for a period longer than thirty days from the date of the contract."

It is enough to say in respect of the situation in which Carter Coal Company will find itself if this Court holds the Act valid that said defendant will have deliberately elected to take its chances in ignoring the Code provision; and it is hardly conceivable that plaintiff was unaware of the Company's negotiation of the contracts.

The record also discloses that Carter Coal Company has contracts with some customers for substantial tonnages of coal; that it is customary for large consumers to buy on long-term contracts; (R. 270) that such contracts are at prices below what the corporation believes to be its cost of production; that at times it makes sales at prices very substantially below cost (272); and that the aggregate of contracts entered into since May 27, 1935 by Carter Coal Company for one year or longer is for 850,750 net tons (R. 576), which include the 230,000 tons above mentioned.

The provision of the Act which is germane to the part of the narrative statement just referred to is Section 12, which is outside the Code. It reads:

> "Sec. 12. No coal may be delivered upon a contract made prior to the effective date of this Act at a price below the minimum price at the time of delivery upon such contract, as established pursuant to Part II of section 4 of this Act, and such contract shall be invalid and unenforceable: *Provided,* That this prohibition shall not apply (a) to a lawful and bona fide written contract entered into prior to October 2, 1933; nor (b) to a lawful and bona fide written contract entered into subsequent to that date and prior to May 27, 1935, at not less than the minimum price current as published under the Code of Fair Competition for the Bituminous Coal Industry, pursuant to the National Industrial Recovery Act, at the time of making of such contract; nor (c) to a lawful and bona fide written con-

> tract entered into on or after May 27, 1935, and prior to the date of the approval of this Act, at not less than the minimum price for current sale as published under said code of fair competition, as at May 27, 1935."

This provision is of fundamental importance for the practical operation of the plan of regulation embraced in the law; for, if contracts for the sale of coal made prior to the enactment of the statute, other than those saved by Section 12, were to be performed, the objectives of the regulation designed by the Act must in large measure be defeated.

That the provisions of Section 12 affecting certain classes of contracts for the sale of coal existent at the date of enactment are permissible legislation appears quite clearly from

> *Norman v. Baltimore & Ohio Railroad Co.,* 294 U. S. 240.

The case is the celebrated "Gold Clause" case which presented the question of the validity of the Joint Resolution of Congress of June 5, 1933, concerning gold clauses of private contracts for the payment of money.

In discussing the power of Congress to invalidate the provisions of existing contracts, the Court says, at page 307 *et seq.*:

> "Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by

making contracts about them. See *Hudson Water Co. v. McCarter,* 209 U. S. 349, 357.

"This principle has familiar illustration in the exercise of the power to regulate commerce. If shippers and carriers stipulate for specified rates, although the rates may be lawful when the contracts are made, if Congress through the Interstate Commerce Commission exercises its authority and prescribes different rates, the latter control and override inconsistent stipulations in contracts previously made. This is so, even if the contract be a charter granted by a state and limiting rates, or a contract between municipalities and carriers. *New York v. United States,* 257 U. S. 591, 600, 601; *United States v. Village of Hubbard,* 266 U. S. 474, 477, *note.* See, also, *Armour Packing Co. v. United States,* 209 U. S. 56, 80-82; *Union Dry Goods Co. v. Georgia Public Service Corp.,* 248 U. S. 372, 375.

"In *Addyston Pipe & Steel Co. v. United States,* 175 U. S. 211, 229, 230, the Court raised the pertinent question,—if certain kinds of private contracts directly limit or restrain, and hence regulate, interstate commerce, why should not the power of Congress reach such contracts equally with legislation of a State to the same effect? 'What sound reason', said the court, 'can be given why Congress should have the power to interfere in the case of the State, and yet have none in the case of the individual? Commerce is the important subject of consideration, and anything which directly obstructs and thus regulates that commerce which is carried on among the States, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce'.

"Applying that principle, the Court held that a contract, valid when made (in 1871) for the giving of a free pass by an interstate carrier, in consideration of a release of a claim for damages, could not be enforced after the Congress had passed the Act of June 29, 1906, 34 Stat. 584. *Louisville & Nashville R. Co., v. Mottley,* 219 U. S. 467. * * *"

"Accordingly, it has been 'authoritatively settled' by decisions of this Court that no previous contracts or combinations can prevent the application of the Anti-Trust Acts to compel the discontinuance of combinations declared to be illegal. *Addyston Pipe & Steel Co. v. United States, supra; United States v. Southern Pacific Co.,* 259 U. S. 214, 234, 235. See, also, *Calhoun v. Massie,* 253 U. S. 170, 176; *Omnia Commercial Co. v. United States,* 261 U. S. 502, 509; *Stephenson v. Binford,* 287 U. S. 251, 276.

"The principle is not limited to the incidental effect of the exercise by the Congress of its constitutional authority. *There is no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts although previously made, and valid when made, when they interfere with the carrying out of the policy it is free to adopt. * * * To subordinate the exercise of the Federal authority to the continuing operation of previous contracts would be to place to this extent the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of the Congress so much of the field as they might choose by 'prophetic discernment' to bring within the range of their agreements. The Constitution recognizes no such limitation. Id.* pp. 613, 614. See, also, *United States v. Southern Pacific Co., supra; Sproles v. Binford,* 286 U. S. 374, 390, 391; *Radio Commission v. Nelson Brothers Co.,* 289 U. S. 266, 282."

In *Stephenson v. Binford,* 287 U. S. 251, one of the cases cited in the opinion of the Court just quoted, the Court remarked, at page 275:

> "*The principle that Congress may regulate private contracts whenever reasonably necessary to effect any of the great purposes for which the national government was created, Highland v. Russell Car Co., supra,* at p. 261, applies to a state under like circumstances."

It is, therefore, well settled that Congress may regulate private contracts when necessary in the exercise of its power under Section 8 of Article I of the Constitution.

> "To regulate Commerce with foreign Nations, and among the several States, * * *".

If, as must be conceded, Congress has the power to provide for regulation of interstate commerce in coal, and in order to do so, it is necessary to abrogate certain existing contracts for the shipment of coal, it cannot be said that such action is a denial of due process.

IX.

The Act Contains No Unconstitutional Delegation of Legislative Power.

The Act provides for the creation of a National Bituminous Coal Commission in the Department of the Interior, composed of five members appointed by the President, by and with the advice and consent of the Senate, for a term of four years or until the prior termination of the Act. This Commission is, therefore, official, the salaries of the members are paid by the Federal Government, and the Commission has the power and duty of hearing evidence and finding facts.

There are twenty-three district boards provided for under PART I, Section 4-a of said Act, which are selected by the coal producers in the various districts. In the "Annex To Act" there is a schedule of the districts. The district areas are in turn placed in nine minimum price areas. The district board members do not receive salaries.

It is provided that code members shall report information as to sales to the district boards, and that such district boards may maintain statistical organizations. The general duties of the district boards are set up in the preceding section of this brief, but it is to be noted that the National Bituminous Coal Commission not only advises, but finally passes upon the operations of such district boards, as appears in detail in paragraphs numbered one to twenty-six, inclusive, on pages 63 to 67 of this brief. It is clear that Congress has established the National Bituminous Coal Commission as a public agency to effectuate the purposes contemplated in the Bituminous Coal Conservation Act of 1935, and that the district boards are not invested with law making power.

It is contended by the plaintiff that the authority vested in the Commission and the district boards is an illegal delegation of power. We respectfully suggest that all of the legal requirements for the delegation of authority by Congress to governmental agencies have been fully complied with in this Act. The question of such requirements has been fully considered by this Court in a number of cases.

In *Schechter Poultry Corporation et al. v. United States,* 295 U. S. 495, the Court said, at pages 529-530:

> "We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly. We pointed out in the Panama Company case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply."

The question then arises as to the nature and character of the standards which must be fixed by Congress for the guidance of agencies established by it to carry out details of administration. The instances of delegation of such administrative authority are numerous. Power is delegated to the executive departments in almost innumerable instances to carry on the great and growing business of governing the Nation. A great number of decisions of this and lower courts has resulted from the effort clearly to determine and fix the limitations of such power which can be delegated by Congress.

One of the early cases on this general subject is *Field v. Clark,* 143 U. S. 649, where delegation to the President, under the Tariff Act of 1890, of power to suspend the provisions of the Act relating to the free introduction of sugar, molasses, coffee, tea and hides was attacked. It was held that the legislative power was exercised when Congress declared that the suspension should take place upon a named contingency, that it was not the making of a law, that the President was the mere agent of the law-making department to ascertain and declare the event upon which it is expressed and was to take effect. In discussing the theory underlying the delegation of powers to executive and administrative agents, the Court said, at pages 694-695:

> " 'The true distinction,' as Judge Ranney speaking for the Supreme Court of Ohio has well said, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' *Cincinnati, W. & Z. R. Co. v. Clinton County Comrs.,* 1 Ohio St. 88. In *Moers v. Reading,* 21 Pa. 202, the language of the court was: 'Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.' So, in *Locke's App.,* 72 Pa. 491: 'To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the Legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know.' The proper distinction the court said was this: 'The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of govern-

ment. There are many things upon which wise and useful legislation must depend which cannot be known to the law making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation.' "

In *Buttfield v. Stranahan,* 192 U. S. 470, it was contended that a statute left to the arbitrary discretion of the Secretary of the Treasury the determination of the character of tea that could be imported. The Court, however, said that since the statute provided that tea of inferior quality or unfit for consumption should not be permitted to be imported, a primary standard was thereby fixed, and there devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute.

In *Union Bridge Company v. United States,* 204 U. S. 364, the question raised was as to the right of the Secretary of War to determine whether in any particular case a bridge over a navigable waterway was an unreasonable obstruction to navigation. The Court held that the Act in question was not unconstitutional as conferring upon the Secretary of War powers of such nature that they could not be delegated to him by Congress.

Again, in the case of *Monongahela Bridge Co. v. United States,* 216 U. S. 177, the Court said, page 192:

> "* * * Congress charged the Secretary of War with the duty of ascertaining, in each case, upon notice to the parties concerned, whether the particular bridge came within the general rule prescribed; that any other method was impracticable in view of the vast and varied interests of the Nation requiring legislation from time to time; * * *"

In the case of *United States v. Grimaud,* 220 U. S. 506, the Court had under consideration the Forest Reserve Act of 1891 in which the Secretary of Agriculture was given power to make rules and regulations with respect to forest reserves. The defendant was indicted for grazing sheep in Sierra Forest without procuring permission, as required by the rules and regulations. The defendant contended that Congress could not delegate the power to make rules, the violation of which would be a criminal offense. The Court held that Congress could delegate such power, saying at page 516:

> "In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power. The authority actually given was much less than what has been granted to municipalities by virtue of which they make by-laws, ordinances and regulations for the government of towns and cities. Such ordinances do not declare general rules with reference to rights of persons and property, nor do they create or regulate obligations and liabilities, nor declare what shall be crimes nor fix penalties therefor."

At page 517, the Court said:

> "From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations —not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But

> when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done."

And at page 518, the Court said:

> "But in making these regulations the officers did not legislate. They did not go outside of the circle of that which the act itself had affirmatively required to be done, or treated as unlawful if done. But confining themselves within the field covered by the statute they could adopt regulations of the nature they had thus been generally authorized to make, in order to administer the law and carry the statute into effect."

In *Interstate Commerce Commission v. Goodrich Transit Company*, 224 U. S. 194, the question that arose was whether the Interstate Commerce Commission could require accounts to be kept by the carriers in a manner prescribed by the Commission. The Court said, at page 214:

> "The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress. This rule has been frequently stated and illustrated in recent cases in this court, and needs no amplification here."

In *Houston, East and West Texas Railway Co. v. United States,* 234 U. S. 342, the Court said, at page 351:

> "Congress is empowered to regulate,—that is, to provide the law for the government of interstate commerce; * * *"

On page 355, the Court said:

> "Having this power, Congress could provide for its execution through the aid of a subordinate body; and we conclude that the order of the Commission now in question cannot be held invalid upon the ground that it exceeded the authority which Congress could lawfully confer."

In *Wisconsin v. Illinois,* 278 U. S. 367, in determining whether the delegation to the Secretary of War of the power to fix the amount of water that could be taken from the Great Lakes by a sanitary district, was constitutional, the Court held, page 414:

> "The determination of the amount that could be safely taken from the lake is one that is shown by the evidence to be a peculiarly expert question. It is such a question as this that is naturally within the executive function that can be deputed by Congress."

In *Federal Radio Commission v. Nelson Bros. Co.,* 289 U. S. 266, it was held that the Radio Act dividing the United States into five zones, and giving power to the Radio Commission to make fair and equitable allocations of license wave lengths, time for operation and station power to each of the states was within the power of Congress. It was further held that the provision of the Act which limited review of the Radio Commission by the Court of Appeals of the District of Columbia to questions of law and provided "that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive, unless it shall clearly appear that the findings of the Commission are arbitrary or capricious" was valid in that it created a judicial review, and that the standards set forth in the Act were suitable.

In *Florida v. United States,* 282 U. S. 194, in referring to the power of the Interstate Commerce Commission to establish intrastate rates, the Court said, at page 211:

> "In the exercise of this power, the Congress has given to the Commission authority not only to remove an undue prejudice as between persons or localities, but to establish a statewide level of intrastate rates when this is found to be necessary to accomplish the purpose of the statute."

We submit that in the Bituminous Coal Conservation Act of 1935 primary standards are definitely fixed, and that the powers delegated to the agencies created by the Act are within the limitations prescribed by the decisions of this Court.

X.

The Provisions of the Act and Also of the Code Are Separable.

The Act is divided into a number of sections with appropriate captions or titles. Section 4 is captioned "BITUMINOUS COAL CODE", and is divided into several parts, as follows:

PART I —ORGANIZATION AND PRODUCTION
PART II —MARKETING
(1) MINIMUM—PRICE—AREA TABLE
(2) UNFAIR METHODS OF COMPETITION
PART III—LABOR RELATIONS

Section 5 is entitled "ORGANIZATION OF THE CODE"; and Section 16 is entitled "OTHER DUTIES OF THE COMMISSION". Both of these sections are outside the Code.

It will be observed from the foregoing that PART III—LABOR RELATIONS is an independent subtitle of the Code. It will be further observed that its administration is committed to a Bituminous Coal Labor Board, consisting of three members to be appointed by the President, by and with the consent of the Senate; and that such "Labor Board" is to be assigned to the Department of Labor. The tribunal thus established is entirely distinct from the National Bituminous Coal Commission which administers the other branches of the Code, the Commission being created under Section 2 of the Act and established in the Department of the Interior.

In its seventh and eighth conclusions of law (R. 213-214), the trial court held paragraphs (a), (b) and (g) of PART III of Section 4 of the Act and "the corresponding sections of the Code" to be invalid.

The trial court, however, in its 12th conclusion of law held (R. 215):

> "The labor provisions are separable from the other provisions of the Act and Code."

We do not believe it will be essential unduly to multiply citations in support of the trial court's conclusion as to separability.

This Court has said in the case of *El Paso & N. E. R. Co. v. Gutierrez,* 215 U. S. 87, 96:

> "It is hardly necessary to repeat what this court has often affirmed, that an act of Congress is not to be declared invalid except for reasons so

> clear and satisfactory as to leave no doubt of its unconstitutionality. Furthermore, it is the duty of the court, where it can do so without doing violence to the terms of an act, to construe it so as to maintain its constitutionality; and, whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid."

However, reliance on the principle just stated is not required in the instant case in view of the fact that Congress has itself taken care of the subject in Section 15 of the Act, which reads:

> "Sec. 15. If any provision of this Act or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby."

This Court in 1931 laid down the rule of construction which governs such a statutory provision in the following apt language:

> "Further, the Act expressly requires that if any of its provisions is found to be unconstitutional, 'or the applicability thereof to any person or circumstances' is held invalid, the validity of the remainder of the Act and 'the applicability of its provisions to other persons and circumstances' shall not be affected. Sec. 50. We think that this requirement clearly evidences the intention of the Congress not only that an express provision found to be unconstitutional should be disregarded without disturbing the remainder of the statute, but also that any implication from the terms of the Act

which would render them invalid should not be indulged."

Crowell v. Benson, 285 U. S. 22, 62-63.

The Court has also said:

"We need not consider whether the act in some other aspect would be good or bad. It is enough to support its validity that, plainly, one of its aims is to conserve the highways. If the legislature had other or additional purposes, which, considered apart, it had no constitutional power to make effective, that would not have the result of making the act invalid. *Ellis v. United States,* 206 U. S. 246, 256."

Stephenson v. Binford, supra, 276.

In the case at bar, under the statute being considered, minimum and maximum prices can be established and unfair practices in the industry can be eliminated, without express regulation of wages and hours by direct Congressional exertion of power. In a field of activity calling for regulation, the regulation of a major factor such as prices, tends to stabilize conditions governing other major features, such as wages. In a field where competition has become chaotic, price regulation obviously will beneficially affect underlying factors that are major constituents of the price structure.

The cost element is the predominant one upon which price establishment is based. The Act specifically prescribes in sub-section (a), PART II, Section 4, that the

"* * * computation of the total costs shall include the costs of labor, supplies, power, taxes, insurance, workmen's compensation, royalties, depreciation and depletion (as determined by the Bureau of Internal Revenue in the computation of the Federal Income Tax) and all other direct expenses of production, coal operators' association dues, district board assessments for Board operating expenses only levied under the code, and reasonable costs of selling and the costs of administration."

Even if an objective of establishing minimum prices according to the measure prescribed is stated in the Act to be "the stabilization of wages, working conditions and maximum hours of labor," the statement of such objective is not controlling. Every regulation of prices expressly, or impliedly, has a social purpose as one of its objectives.

The statement of such purpose does not invalidate an act that is otherwise constitutional.

CONCLUSION.

It is respectfully submitted that the Bituminous Coal Conservation Act of 1935 is a lawful measure for the regulation of interstate commerce in bituminous coal; for the prevention of unfair methods of competition which directly affect such interstate commerce; for the regulation of those transactions, not interstate commerce themselves, which directly affect such interstate commerce; is within the grants of power of the Federal Constitution and not in conflict with any of its prohibitions; and that the Act is constitutional and valid.

Respectfully,

A. M. LIVERIGHT,
THURLOW G. ESSINGTON,
JOHN L. STEINBUGLER,
C. F. C. ARENSBERG,
Amici Curiae.

APPENDIX.

Bituminous Coal Producers For Whom The Foregoing Brief Is Presented.

DISTRICT 1

Name and Address	1935 Tonnage	Number of Employees
Abretsky, M. J. Lilly, Penna.	400	3
Adams, R. W. Glasgow, Penna.	415	3
A. G. & S. Mining Company Kittanning, Penna.	1,504	8
Alto Coal Company Coalport, Penna.	18,000	25
Anita Coal Company Punxsutawney, Penna.	15,620	23
Anita Coal Mining Company Punxsutawney, Penna.	15,665	23
Appalacha Coal Company Indiana, Penna.	15,800	30
Apple Coal Company Fallen Timber, Penna.	..	..
Argyle Coal Company Johnstown, Penna.	126,838	275
Axelson, M. R. DuBois, Penna.	5,860	8
Ayers, A. D. Beech Creek, Penna.	2,787	10
Baker-Whiteley Coal Company, The Baltimore, Maryland.	133,700	239
Bambling Coal Company Hopewell, Penna.	3,358	4
Banner Coal Mining Company Baltimore, Maryland.	51,322	200

Name and Address	1935 Tonnage	Number of Employees
Barrick, G. H. Elk Garden, W. Va.	1,016	2
Batcheler, John Philipsburg, Penna.	..	..
Batschelet Mines Renovo, Penna.	11,774	20
Beacon Coal Company Fallen Timber, Penna.	13,908	54
Beadle & McCauley Coal Company Brockway, Penna.	14,375	30
Beaver Run Coal Company Philadelphia, Penna.	136,292	202
Beck, Andrew Nanty-Glo, Penna.	738	5
Beck, J. K. St. Marys, Penna.	1,980	4
Bellfield Coal & Coke Company Frugality, Penna.	5,571	19
Bells Mill Coal Company Blairsville, Penna.	19,072	45
Bernard, John Barnesboro, Penna.	293	..
Beunier Coal Mining Company Patton, Penna.	18,210	47
Bigler, A. W., Coal Company, Inc. Clearfield, Penna.	3,179	30
Bird Coal Company Philadelphia, Penna.	542,798	700
Blackwater Coal Company Thomas, W. Va.	21,290	40
Bland Bros. Coal Company Bellwood, Penna.	10,000	25
Blough, C. Johnstown, Penna.	695	..

Name and Address	1935 Tonnage	Number of Employees
Bock, James Wallaceton, Penna.	454	2
Boron Bros. Coal Company Ramey, Penna.	14,309	25
"B" Quality Coal Company, The Windber, Penna.	18,036	50
Brennan, E. R., and Sons Barton, Maryland	1,468	5
Brighton Coal Mining Company Osceola Mills, Penna.	36,800	70
Brock Mining Company Brockway, Penna.	10,298	26
Brockway Coal Company Brockway, Penna.	15,221	25
Brush Run Fuel Company Clarion, Penna.	12,500	26
Buffalo & Susquehanna Coal & Coke Co. Sykesville, Penna.	556,345	1,000
Burkit, Anthon Hollidaysburg, Penna.	1,394	3
Buss, John E. Wellsboro, Penna.	486	4
Barnes, Henry S. Midlothian, Maryland	619	3
Burnwell Coal Company Windber, Penna.	10,190	21
Byrnes Coal Company Barnesboro, Penna.	2,130	3
Cambria-Lochrie Coal Company Johnstown, Penna.	16,264	35
Cambria Fuel Company Johnstown, Penna.	305,229	345

Name and Address	1935 Tonnage	Number of Employees
Campbell Coal Company Piedmont, W. Va.	61,008	135
Carroll, E. J., Coal Company Lucinda, Penna.	7,910	15
Carroll-Gatesman Coal Company Lucinda, Penna.	3,574	8
Cassler Coal Sales Agency Clearfield, Penna.	28,469	75
Catalano, Arch Rossiter, Penna.	1,221	5
Central Moshannon Coal Mining Co. Houtzdale, Penna.	9,863	26
Chamberlain, Ed. Six Mile Run, Penna.	..	..
Cherry Run Coal Mining Company Snow Shoe, Penna.	55,635	85
Christy, H. J. Kittanning, Penna.	7,300	20
Citizens Coal Company Johnstown, Penna.	12,151	20
Clymer-Moshannan Coal Mining Co., Inc. Clymer, Penna.	1,067	4
Colonial Iron Company New York, New York	18,455	60
Compton, W. S., Coal & Lumber Co. Salisbury, Penna.	..	..
Cottle, Frank Hopewell, Penna.	336	5
Countryman Coal Company Somerset, Penna.	3,000	4
Couser-Moshannon Coal Mining Co. Houtzdale, Penna.	9,600	14

Name and Address	1935 Tonnage	Number of Employees
Cover, James A. Friendsville, Maryland	106	..
Cumberland Coal Company Baltimore, Maryland	115,133	160
Day-Wood Coal Company Osceola Mills, Penna.	8,778	25
Deffinbaugh, Albert Mt. Savage, Maryland	445	3
Dibert Mines, David Johnstown, Penna.	19,924	30
Diehl, J. C. Broad Top City, Penna.	668	..
Docko, Andrew J. Barnesboro, Penna.	516	2
Dora Coal Company, Inc. DuBois, Penna.	16,472	40
Dougherty-Mountain Coal Company Fallen Timber, Penna.	8,713	24
Dumbleton Brothers Philipsburg, Penna.	1,993	4
East Windber Coal Company Johnstown, Penna.	43,000	70
Ebensburg Coal Company Philadelphia, Penna.	915,250	1,016
Eck Brothers Coal Company East Brady, Penna.	6,447	21
Eichelberger & Hughes Langdondale, Penna.	200	2
Eichenlaub, G. F., Coal Company Gallitzin, Penna.	54,206	240
Eisentrout, E. Listonburg, Penna.	527	3
Elgin Coal Company Johnstown, Penna.	..	..

Name and Address	1935 Tonnage	Number of Employees
Elk Mining Company St. Marys, Penna.	12,000	25
Farber Coal Company Johnstown, Penna.	407	7
Fasenmyer & Ditz Marble, Penna.	3,374	10
Feeney & Rudneski Coal Company Ralston, Penna.	17,744	42
Fitzgerald, Ellis Kittanning, Penna.	300	..
Flugle, I. B. Central City, Penna.	450	1
Flynn, Edward J. Grampian, Penna.	1,200	4
Forks Coal Mining Company Cresson, Penna.	59,000	135
Fowler Coal Company Portage, Penna.	876	..
Friend, L. O. Kitzmiller, Maryland	141	3
Gail Coal Company Houtzdale, Penna.	1,500	6
George's Creek Coal Company, Inc. Cumberland, Maryland	86,482	220
Glass, James S. Gallitzin, Penna.	822	4
Globe Coal Company Indiana, Penna.	66,944	140
Good Clay and Coal Company Patton, Penna.	23,250	70
Gould, Thos. V. Brisbin, Penna.	3,258	25
Graceton Coal & Coke Company New York, New York	182,435	275