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Stark Ritchie
University of Michigan Law School

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CONSTITUTIONAL LAW — DUE PROCESS — FEDERAL PRICE CONTROL UNDER COMMERCE CLAUSE FOR MILK AND COAL INDUSTRIES — As a natural concomitant of the prevailing laissez-faire economic philosophy, a strong feeling against any governmental regulation of business prevailed in American legislatures until well into the second half of the nineteenth century. Prices were considered to be especially immune to governmental tampering. The first step in the breakdown of the notion that government had no power over prices was the case of

Munn v. Illinois.[1] This decision introduced the doctrine that the legislature had the right to regulate prices in any business which the courts should find to be "affected with a public interest."[2] Posed as a deceivingly simple test, subsequent decisions by the Supreme Court revealed that ascertaining whether or not a business was "affected with a public interest" presented many obscurities.[3] It became extremely difficult, if not impossible, for either legislatures or counsel to predict what businesses would fall within the doctrine.

It was at this stage that the case of *Nebbia v. New York*[4] came before the Court. In one sentence Justice Roberts disposed of the problem of determining what businesses were "affected with a public interest" by discarding the doctrine entirely:

> "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."[5]

The decision of the *Nebbia* case removed price regulation from the realm of the sacrosanct,[6] and placed it on the same constitutional basis

[1] 94 U. S. 113 (1876).

[2] It might be said that Munn v. Illinois introduced the doctrine for the first time into *any* law. Though the idea was conjured in the mind of Lord Hale about 1670, it was never even published until 1787 by HARGRAVE in his COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND. See McAllister, "Lord Hale and Business Affected with a Public Interest," 43 HARV. L. REV. 759 (1930).

[3] The case of Munn v. Illinois suggested the idea that the element of a monopoly or quasi-monopoly was an essential. But a decision upholding a North Dakota statute regulating charges of grain elevators where there were over six hundred elevators engaged in vigorous competition dispelled that idea. Brass v. North Dakota ex rel. Stoeser, 153 U. S. 391, 14 S. Ct. 857 (1894). In fact that theory was expressly refuted by Justice McKenna in German Alliance Ins. Co. v. Kansas, 233 U. S. 389, 34 S. Ct. 612 (1914). See also New State Ice Co. v. Liebmann, 285 U. S. 262, 52 S. Ct. 371 (1932). The German Alliance case also destroyed the idea that in order to be "affected with the public interest" the business had to be one which received a grant or franchise from the state. 233 U. S. 389 at 411. The classification of businesses "affected with a public interest" set out in Wolff Packing Co. v. Court of Industrial Relations of Kansas, 262 U. S. 522, 43 S. Ct. 630 (1923), was of little assistance. However, the idea expressed in that case that a business, though not public at its inception, may rise to be such gave encouragement to the thought that the size and importance of a business were the significant factors. This principle met its doom in the case of Williams v. Standard Oil Co. of Louisiana, 278 U. S. 235, 49 S. Ct. 115 (1929).

[4] 291 U. S. 502, 54 S. Ct. 505 (1934).

[5] 291 U. S. 502 at 539.

[6] Speaking for the majority in the Nebbia case, Justice Roberts said, 291 U. S. at 532, "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."

as any other form of regulation, namely, reasonableness.[7] It opened the way for legislative bodies to substitute their own price-fixing procedures in any business wherever they felt that the old automatic regulator, competition, had failed to accomplish the best results. The extension of governmental price-fixing policies is well illustrated in the federal legislation affecting the milk and coal industries.

I.

The case of *United States v. Rock Royal Co-op.*[8] involved federal price-fixing under the Agricultural Marketing Agreement Act of 1937.[9] The policy of the act is to increase the purchasing power of farm products to the same level possessed by these commodities during the base period years from August, 1909 to July, 1914.[10] To effectuate the declared policy, the secretary of agriculture is given authority to issue orders regulating those handling agricultural commodities, including milk, in interstate commerce.[11] The statute provides that due notice and hearing on the proposed action must precede the issuance of all orders.[12] Another provision requires a finding from the evidence introduced at the hearing that the proposed order would tend to effectuate the policy of the statute.[13] Section 8c (5) provides specifically what may be contained in an order pertaining to milk. Stating that any order pursuant to that section "shall contain one or more of the following terms or conditions, and (except as provided in subsection (7)) no others," the statute lays down three methods that may be used by the secretary to accomplish the desired policy:(1) classification of milk according to its eventual use, (2) setting of minimum prices for each class, (3) payment to all producers of a uniform price irrespective of

[7] The "reasonableness" qualification now seems to be one of procedure primarily. The court will look to see whether there has been a sound study made of the problem and whether there has been adequate notice and opportunity for hearing. But the Nebbia decision implies that is as far as the court will look.

[8] 307 U. S. 533, 59 S. Ct. 993 (1939).

[9] 50 Stat. L. 246 (1937), 7 U. S. C. (Supp. 1939), §§ 671-674. This act re-enacts several parts of the Agricultural Adjustment Act of 1933, as variously amended. 48 Stat. L. 31 (1933); 49 Stat. L. 750 (1935); 50 Stat. L. 246 (1937); 7 U. S. C. (Supp. 1939), §§ 601-855.

[10] 48 Stat. L. 32 (1933), 7 U. S. C. (Supp. 1939), § 602.

[11] 48 Stat. L. 34 (1933), 49 Stat. L. 753 (1935), 50 Stat. L. 246 (1937), 7 U. S. C. (Supp. 1939), § 608c. "In nearly two hundred circumstances under which the federal government regulates and controls economic life, it takes action through the statutory order." BLACHLY and OATMAN, FEDERAL REGULATORY ACTION AND CONTROL 66 (1940). See same for list of authorities which use the order method.

[12] 49 Stat. L. 754 (1935), 7 U. S. C. (Supp. 1939), § 608c (3).

[13] 49 Stat. L. 754 (1935), 7 U. S. C. (Supp. 1939), § 608c (4).

the use made of such milk by the handler.[14] All cooperative marketing associations are exempted from the act,[15] and no orders issued are to be applicable to any producer in his capacity as a producer.[16] Orders become effective upon acceptance by two-thirds of the producers in the area affected. Violations of orders are to be punished by a fine.[17] Although the handler is given the right to enter into any marketing agreements with other handlers, processors, or producers which would tend to effectuate the policy of the act, the only voice he exercises in connection with orders of the secretary, in absence of such agreement, is the influence he can exert by means of testimony and evidence at the hearing.

Pursuant to the statute, Order Number 27[18] was promulgated by the secretary in an effort to remedy some of the evils of the milk industry of metropolitan New York.[19] The order contained five basic provisions: (1) It established nine classifications of milk. Each category was determined by the ultimate use to which the milk would be put, such as Class I—fluid milk, Class II-A—cream, Class IV-B—cheese, etc. (2) Minimum prices were set for each class. Class I milk called for the highest price, and prices for the lower classes were stepped down for each category. The minimum price was not what the producer received, but was the amount parted with by the handler.[20] By

[14] 49 Stat. L. 754-755 (1935), 7 U. S. C. (Supp. 1939), § 608c (5). Minimum price differentials are allowed for (1) volume, (2) grade or quality, and (3) locations at which delivery is made to handlers.

[15] 49 Stat. L. 755 (1935), 7 U. S. C. (Supp. 1939), § 608c (5) (F).

[16] 49 Stat. L. 759 (1935), 7 U. S. C. (Supp. 1939), § 608c (13) (B).

[17] 49 Stat. L. 759 (1935), 7 U. S. C. (Supp. 1939), § 608c (14), provides that any handler who violates an order shall be fined not less than $50 nor more than $500 for each violation, and each day during which such violation continues shall be deemed a separate violation.

[18] 3 FED. REG. 1945 (1938).

[19] Many factors were responsible for the chaotic condition of the milk industry in New York. In the four years from 1929 to 1933 the retail price of milk fell 37%, but the price paid to the farmers dropped 61%. The handler's margin decreased only 17%. Because milk is perishable and cannot be stored, and demand varies from day to day it is necessary to produce a surplus. There is a great difference between the value of milk used in fluid form and that used in other forms. Consequently there was a great deal of competition and pressure to get rid of this surplus milk in fluid form. The result was naturally very severe price cutting.

Other factors added to the confusion. There was a periodic increase in the number of cows in milk production. The prevalence of unfair trade practices led to a drop in prices. Transportation and distribution charges did not decrease in proportion to the decrease in milk and cream.

[20] The term "handler" is defined in the order by art. I, § 6, as "any person who engages in the handling of milk, or cream therefrom, which was received at a plant approved by any health authority for the receiving of milk to be sold in the marketing area, which handling is in the current of interstate commerce or directly burdens, obstructs, or affects interstate commerce." 3 FED. REG. 1946 (1938).

multiplying the amount of milk acquired by him in each class during the preceding month by the minimum price for each class, and adding the results, the handler obtained what was termed his "net pool obligation." (3) The producer received what was called the uniform price. This price, which handlers were required to pay producers, was computed by the market administrator for each preceding month. By totaling all the "net pool obligations," and dividing that total by the total amount of milk sold in the area, he arrived at the uniform price for that month (differentials were allowed for variations in quality and location of the producers). It will be seen that the minimum price paid by the handler and the uniform price received by the producer were seldom, if ever, the same figure. Handler *A*, whose milk was used in fluid or Class I form, would find that his net pool obligation was higher per unit than the uniform price. On the other hand, handler *B*, whose milk was used for cheese or Class IV-B form, would probably find that his net pool obligation per unit was less than the uniform price. (4) The fourth provision took care of just such a situation. It required *A* to pay into a producer settlement fund the difference between his net pool obligation and the lower figure—the uniform price of all his milk. From the same fund *B* was allowed to extract the amount he needed to make up the difference between the uniform price the producers were to receive and the net pool obligation *B* was required to pay. (5) Article VII, section 1 of the order exempted all cooperatives from paying the uniform price.[21]

In brief, the purpose of the legislation was to raise the prices of farm products. The method adopted by the secretary was an attempt to abolish the favored position of fluid milk and thus discourage the unfair competitive methods which the extremes in prices induced. The majority of the Court held that the price regulations were within the scope of the commerce clause, and that they in no way contravened the due process clause of the Fifth Amendment.

[21] Both the Agricultural Marketing Agreement Act and Order 27 promulgated under the act contain specific provisions exempting cooperatives. But the opinion of the district court, written by Judge Cooper, brings out the fact that these same cooperatives that were exempted were the instigators of Order 27. (D. C. N. Y. 1939) 26 F. Supp. 534. In the decision, pp. 540-541, he states that the Metropolitan Bargaining Agency was formed almost immediately after the amendment of the Agricultural Marketing Agreement Act in 1937. The bargaining agency consisted entirely of cooperative associations. "Early in 1938, the Bargaining Agency presented to the Secretary of Agriculture of the United States and to the Commissioner of Agriculture and Markets of the State of New York, respectively, petitions for the issuance of Federal and State orders . . . and presented therewith proposed marketing agreement and proposed order regulating the handling of milk in the New York Metropolitan marketing area." 26 F. Supp. at 541. The decision also discloses that the agency sponsored radio addresses urging the adoption of the agreement and order.

2.

The case of *Sunshine Anthracite Coal Co. v. Adkins*,[22] recognizing the constitutionality of the Bituminous Coal Act of 1937,[23] presents another example of Congressional price-fixing mechanisms. Declaring that "there exist practices and methods of distribution and marketing of such coal that waste the coal resources of the Nation and disorganize, burden, and obstruct interstate commerce in bituminous coal,"[24] the act clearly indicates that its purpose, also, is the rehabilitation of an industry where, apparently at least, competition has not accomplished the best results. Although the act originally created a commission of seven members to administer the plan, it is now under the control of the secretary of the interior, who has established a Bituminous Coal Division under a director to handle the administration.[25] The commission's powers, including the principal power to fix minimum and maximum prices, have been assumed by the division under the secretary. Producers of bituminous coal are divided into code members and non-code members, the code members being those producers who accept the promulgations of the division.[26] Twenty-three district boards of code members have been established throughout the country, composed of from three to seventeen producers each. These district boards are the agencies which put the price-fixing process in motion, as each board is required to propose minimum prices to the Bituminous Coal Division. The proposed minimum prices are to yield a return per net ton for each district equal, as nearly as possible, to the weighted average of the total costs per net ton. The act requires that the minimum prices so proposed "shall reflect, as nearly as possible, the relative market value of the various kinds, qualities, and sizes of coal, shall be just and equitable as between producers within the district, and shall have due regard to the interests of the consuming public."[27] The division is given power to approve, modify, or disapprove the proposed prices. After approval, the minimum prices are then submitted by the division to the district boards for "coordination" in "common consuming marketing areas."[28]

[22] 310 U. S. 381, 60 S. Ct. 907 (1940).

[23] 50 Stat. L. 72 (1937), 15 U. S. C. (Supp. 1939), § 828 et seq.

[24] 50 Stat. L. 72 (1937), 15 U. S. C. (Supp. 1939), § 828.

[25] Pursuant to the provisions of the Reorganization Plan No. II, the commission created by the act was abolished by the President, and its functions were transferred to the secretary of the interior. 4 FED. REG. 2731-2732 (1939).

[26] 50 Stat. L. 76 (1937), 15 U. S. C. (Supp. 1939), § 831.

[27] 50 Stat. L. 78 (1937), 15 U. S. C. (Supp. 1939), § 833 (a).

[28] 50 Stat. L. 79 (1937), 15 U. S. C. (Supp. 1939), § 833 (b). Coordination in common consuming marketing areas required, among other things, that the boards observe that the prices (1) are not unduly preferential as between districts; (2) reflect as nearly as possible relative market values at points of delivery; (3) preserve existing fair competitive opportunities.

There is also a provision authorizing the division to set maximum prices whenever it deems that step necessary to the public interest. To encourage compliance with the act there is a provision taxing all non-code members nineteen and one-half per cent more than code members upon the sale or disposal of all coal produced.[29] The *Sunshine Coal Co.* case held that these price-fixing provisions, as in the *Rock Royal* case, fell within the commerce clause, and did not constitute a denial of due process of law.[30]

3.

It will be noted that both of these federal price-fixing schemes are founded upon the commerce clause. Justice Douglas' decision in the *Sunshine Coal Co.* case indicates that the commerce clause should be the basis for any broad price regulation plan attempted by Congress. He quotes from the late Justice Cardozo's dissent in *Carter v. Carter Coal Co.*:[31]

> "To regulate the price for such transactions is to regulate commerce itself, and not alone its antecedent conditions or its ultimate consequences."

There are, however, a number of respects in which the two plans differ. In the first place the Agricultural Marketing Agreement Act seems to place more freedom in the secretary of agriculture in his choice of methods of reaching the proper price.[32] This is understandable when it is realized that Congress has quite definitely set the price which is to be arrived at, namely, a price which will give the commodity a purchasing power equal to that held by the commodity during the years 1909 to 1914. Therefore, there is not a great deal of harm in delegating to the secretary a large amount of discretion in selecting the method

[29] 50 Stat. L. 75, § 3 (b) (1937), 15 U. S. C. (Supp. 1939), § 830 (b). The term "disposal" includes consumption or use by a producer, and any transfer of title by the producer other than by sale.

[30] It will probably be noticed that the two cases differ materially in regard to the particular questions at issue. The Sunshine Coal Co. case was instituted by the company to secure an injunction to restrain the collection of the 19½% tax provided under the Bituminous Coal Act. The contention of the coal company was that the act was unconstitutional. There was no question concerning any specific order issued under the coal act. Thus, the decision concerned only the broad general provisions of the act and their constitutional validity.

The Rock Royal case was not instituted until after an order under the Agricultural Marketing Agreement Act had been issued. The suit was commenced by the federal government, which sought a mandatory injunction to compel compliance with the terms of the order. Therefore, the holding in that case involved not only the broader question of the act's constitutionality, but also the validity of a specific order issued pursuant to the act. This is the reason the above discussion goes into a more detailed statement of the arrangement under the agricultural act.

[31] 298 U. S. 238 at 326, 56 S. Ct. 855 (1936).

[32] See 38 MICH. L. REV. 540 (1940) for a discussion of the Rock Royal case with respect to delegation of legislative power.

by which the price is to be reached. Handlers cannot complain too strenuously that their influence over the secretary's orders is restricted to hearings, because the act gives them the right to enter into marketing agreements of their own, subject to the approval of the secretary. The Bituminous Coal Act, on the other hand, specifically provides that prices shall be proposed by the district boards, submitted to the division, and then returned to the district boards for coordination in common marketing areas. These price proposals are required to follow costs closely. There are also other specific requirements: they must reflect relative market value, must preserve fair competitive opportunities, and they must give due regard to the consumer. The procedure is more rigid. However, under the Coal Act the producers themselves, acting through their representatives, the district boards, make the first price proposals.

Under the Marketing Act the secretary of agriculture inaugurated an unusual administrative arrangement, the pooling fund. The pooling principle is not a new idea,[33] but it has been infrequently resorted to as a price-fixing mechanism.[34] As the decision indicates, the pooling fund idea is not, per se, a violation of substantive due process.[35]

[33] In Van Horn v. People, 46 Mich. 183 (1881), a tax levied on all dog owners went into a fund to pay sheepowners whose sheep were attacked by dogs. The principle was upheld as a proper exercise of the police power. An older, and perhaps more interesting, application of the pooling idea appears in State v. Cassidy, 22 Minn. 312 (1875). That case upheld the collection of a fee from all liquor dealers to establish a "fund for the foundation and maintenance of an asylum for inebriates." This plan was also sustained as being within the police power.

[34] 53 HARV. L. REV. 136 (1939) indicates that the Rock Royal case is the first one in which the Supreme Court has sustained the pooling principle when applied to agricultural marketing.

[35] Mountain Timber Co. v. Washington, 243 U. S. 219, 37 S. Ct. 260 (1917), upholding pooling of tax for workmen's compensation; Noble State Bank v. Haskell, 219 U. S. 104, 31 S. Ct. 186 (1911), assessment on deposits for depositors' guaranty fund; New England Divisions case, 261 U. S. 184, 43 S. Ct. 270 (1923), pooling of joint rates of railroads; Dayton-Goose Creek Ry. v. United States, 263 U. S. 456, 44 S. Ct. 169 (1924), pooling of excess earnings upheld. But when contributions to the pool are unreasonably discriminatory, the plan has been held to be an infringement of due process. In Railroad Retirement Board v. Alton R. R., 295 U. S. 330, 55 S. Ct. 758 (1935), the Court, in considering a plan which set up a common pension fund for all railroad employees, objected to the treatment of all railroads as a single employer. The court felt that insufficient consideration had been taken of varying conditions, such as solvency or insolvency, or the fact that some railroads had a high ratio of superannuated employees, while others had a low ratio. In Thompson v. Consolidated Gas Utilities Corp., 300 U. S. 55, 57 S. Ct. 364 (1937), a legislative plan calling for a pooling of all gas production of all reservoirs in the Panhandle section of Texas was held to be invalid because, among other reasons, the legislature was taking a great deal more away from the producer who had laid pipe lines and developed a market than the well owner who had no outlet. Justice Brandeis, writing the opinion, said, "Our law reports present no more glaring instance of the taking of one man's property and giving it to another." 300 U. S. 55 at 79.

The Agricultural Marketing Agreement Act with its base period standard presents a novel criterion for pricing, in contrast to "reasonable return,"[36] the existing eight-hour day standard,[37] and the "living wage" standard[38] upheld in previous cases. The base period standard requires the ascertainment of the purchasing power of the commodity during the base period.[39] The purchasing power of milk, for instance, depends upon the prices of feed, of labor, of transportation, and of many other items just as much as upon the price of milk itself. The theory of the base period system is to choose a period in which the price of the farmers' product was enjoying a favorable relationship to the prices of other commodities. It would seem then that the base period method still relies upon competition to a large extent to set the general price level, and the regulatory process merely adjusts the relationship of the price of a commodity which has lagged behind the trend.

Minimum prices under the Bituminous Coal Act are based on cost of production.[40] This is a sound standard for an industry harassed by too much competition and its concomitant unfair practices. Though the primary concern of the coal act is set a minimum price below which producers cannot charge, the statute protects the consumer also by granting the division authority to set maximum prices. The standard by which the division, if it deems it necessary, can set maximum prices is that of a reasonable return to producers.[41] The provision setting forth the reasonable return standard contains an express proviso that said

[36] Chicago, B. & Q. R. R. v. Iowa, 94 U. S. 155 (1876); Interstate Commerce Commission v. Chicago, R. I. & P. Ry., 218 U. S. 88, 30 S. Ct. 651 (1910); Minnesota Rate Cases, 230 U. S. 352, 23 S. Ct. 729 (1913); Tagg Bros. & Morehead v. United States, 280 U. S. 420, 50 S. Ct. 220 (1930).

[37] Wilson v. New, 243 U. S. 332, 37 S. Ct. 298 (1917).

[38] West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578 (1937).

[39] One of the provisions of the Agricultural Marketing Agreement Act, 49 Stat. L. 762 (1935), 50 Stat. L. 246 (1937), 7 U. S. C. (Supp. 1939), § 608e, allows the secretary of agriculture to change the base period to the years 1919 to 1929 if the purchasing power for 1909 to 1914 cannot be satisfactorily determined from available statistics of the department of agriculture. If the secretary could not determine the purchasing power of 1909-1914 from the statistics in his department, it is difficult to understand how, and with what degree of accuracy Congress chose that period as being a desirable standard.

[40] The Bituminous Coal Act says that minimum price proposals shall be based on average cost. It specifically provides what shall be included in total costs—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), all other direct expenses of production, coal operators' association dues, district board assessments, and reasonable costs of selling and the cost of administration. 50 Stat. L. 78 (1937), 15 U. S. C. (Supp. 1939), § 833 (a).

[41] 50 Stat. L. 80 (1937), 15 U. S. C., § 833 (c).

maximum prices must result in a "fair return upon a fair value."[42]

Though an overdose of competition seems to be the ailment affecting both the milk industry of metropolitan New York and the bituminous coal industry, the two types of treatment prescribed differ in another respect. The prices regulated by the milk industry are the prices paid by the handlers, or middlemen, to producers; whereas the minimum prices set under the Bituminous Coal Act are the minimum prices which the producers can charge. Both acts, on their faces, seem to set minimum prices only. However, the administration of the plan of the milk industry, by using the pooling fund method, results in setting not only the minimum price, but also the exact price.[43] The scheme to regulate the milk industry thereby becomes a much more stringent regulation of prices than the plan of establishing minimum prices in the bituminous coal industry.

It would seem that the taxation method of encouraging compliance with the Bituminous Coal Act is much more effective than the criminal sanctions of the agricultural act. This is probably especially true of a price regulation plan, where many parties, numerous transactions, and various evasion schemes make criminal prosecution costly and extremely difficult. Where the power to regulate is within the power of Congress, there does not seem to be any constitutional principle to prevent the use of the taxing power to enforce that regulation. Of course, the power to regulate must first be established, as was clearly indicated by the decision in the *Child Labor Tax* case.[44]

Both of these price-fixing plans were induced by the cutthroat com-

[42] Smyth v. Ames, 169 U. S. 466, 18 S. Ct. 418 (1898). For a criticism and comprehensive discussion of the doctrine of that case see, Kauper, "Wanted: A New Definition of the Rate Base," 37 MICH. L. REV. 1209 (1939).

[43] There are two reasons why this exact price resulted. In the first place, the order set the minimum price the handler was to pay, as contrasted with a set minimum price to be charged. There would be a natural tendency to pay the lowest price possible—which would be the minimum. Not only would that be the natural tendency, but the pooling principle would take away any advantage in paying a price above the minimum. It would not encourage better service from the producer, because he would not receive the surplus over the net minimum. The surplus would go into the producer settlement fund.

[44] "Where the sovereign enacting the law has power to impose both tax and penalty the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another." Child Labor Tax Case, 259 U. S. 20 at 38, 42 S. Ct. 449 (1922).

That a penalty disguised as a federal tax is invalid where the attempted regulation is beyond the pale of federal authority, see United States v. La Franca, 282 U. S. 568 at 572, 51 S. Ct. 278 (1931); United States v. Constantine, 296 U. S. 287 at 293, 56 S. Ct. 223 (1935); United States v. Butler, 297 U. S. 1 at 70, 56 S. Ct. 312 (1936); Hill v. Wallace, 259 U. S. 44, 42 S. Ct. 453 (1922).

petitive conditions that existed in their respective industries. Price regulation was invoked in these instances, not directly to protect the consumer, but to prevent destruction of the producers. Under Order Number 27 the milk handlers had apparently little to say regarding the prices that were imposed upon them. But behind both the statutes seems to be a common philosophy of encouraging cooperation among the parties in industry. The attempt to place all bituminous coal producers under district boards composed of their own members, the encouragement to farm commodity producers and processors to enter into marketing agreements, the inducement under the agricultural act to enter large cooperatives—all these provisions seem to be based on the desire to have the regulation and rehabilitation come from within the industry itself, subject to governmental supervision. Self-regulation of the type discussed has been deemed a violation of the Sherman Act.[45] But it is to be noted that both the Bituminous Coal Act and the Agricultural Marketing Agreement Act contain provisions specifically exempting any plans promulgated under the two acts from the anti-trust laws.[46]

The decisions of the *Rock Royal* and *Sunshine Coal Co.* cases establish these federal price-fixing plans constitutionally. But price setting is a gigantic undertaking. It requires weeks and months of hearings[47] and involves the coordination of an infinite number of factors. And so, though this type of federal price regulation seems to meet the constitutional test, it must undergo the test of time before its usefulness and value can be fully determined.[48]

Stark Ritchie

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[45] United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 60 S. Ct. 811 (1940).

[46] 50 Stat. L. 77 (1937), 15 U. S. C. (Supp. 1939), § 832 (d); 48 Stat. L. 34 (1933), 50 Stat. L. 246 (1937), 7 U. S. C. (Supp. 1939), § 608b.

[47] Final hearings on proposed coordinated prices which were to be published in April, 1940, lasted from May, 1939 to January, 1940. "These hearings concerned coals produced at the mines of more than 12,000 code members, shipping annually about 400 million tons of bituminous coal from more than 30 states. Nearly 1,000 hours were spent in the hearings, and approximately 26,000 pages of testimony and 1,800 exhibits were put into the record." 2 LYON, ABRAMSON, etc., GOVERNMENT AND ECONOMIC LIFE 979 (1940). It is to be remembered that the described procedure was only one step in the process.

[48] For an analysis and economic appraisal of the Bituminous Coal Act of 1937, see 2 LYON, ABRAMSON, etc., GOVERNMENT AND ECONOMIC LIFE 981-987 (1940).