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CONSTITUTIONAL LAW - BITUMINOUS COAL CONSERVATION ACT OF 1935 - CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE TO REGULATE LABOR CONDITIONS IN LOCAL INDUSTRY AND FIX THE PRICE OF SALES IN INTERSTATE COMMERCE

COMMENTS

CONSTITUTIONAL LAW — BITUMINOUS COAL CONSERVATION ACT OF 1935 — CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE TO REGULATE LABOR CONDITIONS IN LOCAL INDUSTRY AND FIX THE PRICE OF SALES IN INTERSTATE COMMERCE — By its sweeping decision[1] invalidating the Bituminous Coal Conservation Act of 1935,[2] the Supreme Court precluded any future use of the commerce clause by Congress as a basis for federal regulation of labor conditions in local industry, whether on the theory that production is interstate commerce or that labor conditions directly affect interstate commerce.

Although many investigations had been made by Congress and by specially created commissions with regard to the bituminous coal industry,[3] these failed to bear legislative fruit until 1933. The passing

[1] Carter v. Carter Coal Co., (U. S. 1936) 56 S. Ct. 855.

[2] 49 Stat. L. 991, 15 U. S. C. A., § 801 et seq. (Supp. 1935).

[3] Hearings pursuant to S. Res. 37, 63rd Cong., 1st sess. (1913) (conditions in Paint Creek District, West Virginia); Hearings pursuant to H. Res. 387, 63rd

of the years made more and more acute the maladjustment of the industry. This was caused by overproduction due to the entrance of competing fuels into the markets formerly dominated by bituminous coal, by cut-throat competition among the producers and by reduction of wages as a result of this competition, and the concomitant strikes.[4]

With the Coal Code formulated under the NIRA, passed in 1933, the industry achieved greater stability and prosperity; but the inability to enforce the price provisions in the later days of the Code diminished its effectiveness.[5] However, operators and miners alike were in favor of extending the Code beyond the two year period of the NIRA.[6] The Guffey Coal Act was drafted to meet the deficiencies of the Code and to insure a continuance of regulation after the expiration of the Code in June 1935. Contrary to popular belief, it did not spring from the ashes of the NIRA.[7] The measure was first introduced in the Senate by Senator Guffey on January 24, 1935.[8] The bill was reintroduced in April, 1935, having been redrafted after

Cong., 3rd sess. (1914) (conditions in the coal mines of Colorado); H. Doc. 859, 64th Cong., 1st sess. (1916) (report of the Colorado Coal Commission on the labor difficulties in the coal fields of Colorado during the years 1914 and 1915); S. Hearing on S. Doc. 2354 and S. J. Res. 77, 65th Cong., 1st sess. (1917) (price regulation of coal and other commodities); Hearings pursuant to S. Res. 163, 65th Cong., 2d sess. (1917-1918) (shortage of coal); Hearings pursuant to S. Res. 126, 66th Cong., 1st sess. (1919-1920) (increased price of coal); Hearings pursuant to S. Res. 350, 66th Cong., 3rd sess. (1920-1921) (coal and transportation); S. Hearings on S. 4828, 66th Cong., 3rd sess. (1921) (publication of production and profits in coal); S. Hearings on S. 41, and S. 824, 67th Cong., 1st sess. (1921) (the coal problem); Hearings pursuant to S. Res. 80, 67th Cong., 1st sess. (1921) (West Virginia coal fields); H. Hearing on H. R. 11022, 67th Cong., 2d sess. (1922) (investigation of wages and working conditions in the coal mining industry); S. Doc. 195, 68th Cong., 2d sess. (1923) (report of the United States Coal Commission); Hearings pursuant to S. Res. 105, 70th Cong., 1st sess. (1928) (conditions in the coal fields of Pennsylvania, West Virginia and Ohio); S. Hearing on 4490, 70th Cong., 2d sess. (1929) (Bituminous Coal Commission); S. Hearing on S. 2935, 72d Cong., 1st sess. (1932) (to create a bituminous coal commission); S. Hearing on S. 1417, 74th Cong., 1st sess. (1935) (stabilization of the bituminous coal mining industry); H. Hearing on H. R. 8479, 74th Cong., 1st sess. (1935) (stabilization of bituminous coal mining industry). These hearings are collected in the Brief for Government Officers, Respondents in No. 636 and Petitioners in No. 651 at 15-18.

[4] See 4 GEO. WASH. L. REV. 244 (1936) and 45 YALE L. J. 293 (1935). See also, Appalachian Coals v. United States, 288 U. S. 344, 53 S. Ct. 471 (1933).

[5] N. Y. TIMES 1:2 (March 30, 1934); id., § 8, 2:4 (Dec. 30, 1934); § 1, 3:1 (Sept. 22, 1935); 1:5 (Sept. 23, 1935); 1:5 (Jan. 13, 1934); 2:1 (Dec. 21, 1934); and 5:1 (Jan. 5, 1935). See also 4 GEO. WASH. L. REV. 244 (1936).

[6] N. Y. TIMES 1:6 (Oct. 28, 1934).

[7] 4 GEO. WASH. L. REV. 244 (1936).

[8] S. 1417, 74th Cong., 1st sess. (1935).

a series of hearings conducted before the Senate committee on interstate commerce.[9] With the invalidation of the NIRA on May 27, 1935,[10] the labor situation became tense due to the expiration of the wage agreements in the industry on March 31, 1935,[11] and chaos was forestalled only by extensions of these agreements pending enactment of the proposed legislation.[12] A redrafted bill was then introduced in the House,[13] and it was while this measure was being considered by the Committee on Ways and Means that President Roosevelt sent his much-publicized message to that committee expressing the hope that it would not permit doubts as to constitutionality to block the proposed legislation.[14] Finally, the bill was passed by Congress and signed by the President to become effective on November 1, 1935, for a period of four years.[15] This act, known officially as the Bituminous Coal Conservation Act of 1935, and popularly as the Guffey Coal Act, provided for regulation of the industry by the fixing of prices, wages, hours, and standards of competition. Although membership in the Code purported to be voluntary, it was practically compulsory; this compulsion was due to the economic pressure applied in the form of a tax of fifteen per cent on the sale price at the mine with a ninety per cent drawback to which members were entitled, to a prohibition of the use of any but Code-mined coal by the government or contractors engaged in work for the government, and to a provision permitting Code members alone to cooperate through marketing agencies unrestricted by the anti-trust acts.

The act in its entirety fell as a result of the decision of the Supreme Court holding that the attempt to regulate wages and hours and to enforce collective bargaining was not within the power of Congress, and further that the price-fixing provisions, being inseparable from the labor provisions, could not stand alone.[16]

[9] S. Rep. 470, 74th Cong., 1st sess. (1935); S. 2481, 74th Cong., 1st sess. (1935).

[10] Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837 (1935).

[11] 24 GEORGETOWN L. J. 122 (1935).

[12] The threatened strike of some 400,000 miners, prevented in the interim by numerous temporary agreements, finally became a reality on September 22, 1935, and lasted until October 1, 1935. See 24 GEORGETOWN L. J. 122 (1935); H. Hearing on H. R. 8479, 74th Cong., 1st sess., pp. 312, 322, 323; N. Y. TIMES 1:7 (March 31, 1935); id. 1:6 (June 15, 1935); 1:6 (June 30, 1935); 17:7 (July 27, 1935); 4:2 (Sept. 16, 1935); 1:3 (Sept. 24, 1935); 1:4 (Sept. 27, 1935).

[13] H. R. 8479, 74th Cong., 1st sess. (1935).

[14] N. Y. TIMES 1:8 (July 7, 1935).

[15] 4 GEO. WASH. L. REV. 244 (1936); 24 GEORGETOWN L. J. 122 (1935); 49 Stat. L. 991 at 1008 (1935), 15 U. S. C. A., § 824 (Supp. 1935).

[16] Carter v. Carter Coal Co., (U. S. 1936) 56 S. Ct. 855. Six members of the

Section 1 of the act declared that the mining and distribution of bituminous coal in the United States were affected with a national public interest. It declared that the service of bituminous coal in relation to industrial activities, transportation facilities, health and comfort of the people; that the conservation of the nation's bituminous coal deposits through controlled production and economical mining and marketing; that the maintenance of proper relations between the public, owners, producers and employees; that the right of the public to constant and adequate supplies of coal at reasonable prices; and that the general welfare of the nation all required that the industry be regulated as provided in the act.[17] From this declaration of purpose the Court felt that it was evident that some of the framers of the bill thought Congress had an inherent power to legislate with respect to matters national in scope which bore a close relationship to the general welfare. The opinion, after a copious review of the authorities, denied the existence of any such power and announced the familiar doctrine that the Federal Government possesses only those powers enumerated in the Constitution together with the powers necessary to carry the granted powers into effect. The Court in no uncertain language set at rest the contention that the Federal Government has power to act where the states are incompetent. Justice Sutherland said:

> "The proposition, often advanced and as often discredited, that the power of the federal government inherently extends to purposes affecting the Nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted but always definitely rejected by this court."[18]

Court were of the opinion that the labor provisions were unconstitutional. Five members of the Court felt that the price and labor provisions were inseparable, while four of the justices contended that the price-fixing provisions were independent and constitutional.

[17] 49 Stat. L. 991 (1935), 15 U. S. C. A., § 801 (Supp. 1935).

[18] Carter v. Carter Coal Co., (U. S. 1936) 56 S. Ct. 855 at 864; see also 1 WILLOUGHBY, THE CONSTITUTION, 2d ed., 76 (1929). The basis for the contention that the Federal Government has inherent power in such premises seems to arise from Article 6 of the Virginia Plan submitted to the Framers Convention by Randolph on May 29, 1787. This stated: "the National Legislature ought to be empowered . . . to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation. . . ." 2 THE MADISON PAPERS, 732 (1840).

This was substantially incorporated in Resolution 6 submitted to the Committee of Detail on July 26, 1787, which stated: "The National Legislature ought to possess the legislative rights vested in Congress by the Confederation; and more-

However, the contention of the Government in seeking to sustain the Guffey Coal Act was not rested upon the assertion of any such inherent or residuary power; it was put rather upon the claim that the attempted regulation was a proper exercise of the commerce power.[19] Section 1 of the act, in declaring its purposes, did state that the production and distribution of bituminous coal directly affected interstate commerce and that regulation was necessary for the protection of such commerce.[20] The Government relied upon the fact that wages in the industry constituted approximately sixty-five per cent of the cost of production and that the effect of wages upon interstate commerce was direct, inasmuch as it affected the price at which the commodity was sold in interstate commerce. Further, it was maintained that wage cutting led to strikes which obstructed interstate commerce and that Congress had the power to regulate in order to remove these recurring burdens.[21]

The opinion discusses in detail the nature of the "commerce" which Congress may regulate. The Court announced once more the principle that the process of production prior to sale or shipment in interstate commerce, even though the commodity produced be destined for sale or shipment in such commerce, does not constitute commerce.[22] With respect to the labor provisions of the act, the Court said:[23]

> "We have seen that the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade.' Plainly, the incidents leading up to and culminating in the mining of coal do not constitute such intercourse. The employment of men, the fixing of their wages, hours of labor and working conditions, the

over, to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." 2 THE MADISON PAPERS 1221 (1840).

From these came the powers enumerated as belonging to the Federal Government, and the argument has been made that while the delegated powers limit the Federal Government, the construction of these powers should be in light of the basic principle behind them.

See Grant, "Commerce, Production, and the Fiscal Powers of Congress," 45 YALE L. J. 751 (1936).

[19] Brief for Government Officers, Respondents in No. 636 and Petitioners in No. 651 at 93 et seq.

[20] 49 Stat. L. 991 at 992, 15 U. S. C. A., § 802 (Supp. 1935).

[21] Brief for Government Officers, Respondents in No. 636 and Petitioners in No. 651 at 197 et seq.

[22] The Government had conceded that Congress cannot regulate production as such. Brief for Government Officers, Respondents in No. 636 and Petitioners in No. 651 at 198.

[23] Carter v. Carter Coal Co., (U. S. 1936) 56 S. Ct. 855 at 869, 80 L. Ed. 749.

> bargaining in respect of these things—whether carried on separately or collectively—each and all constitute intercourse for the purposes of production. . . ."

Thus, mining is declared to be local in its nature and not subject to regulation in any of its incidents by the Federal Government on the theory that these constitute steps in the course of "commerce."[24]

The Court, with specific reference to the *Schechter* case,[25] holds that the wages and hours of labor in mining do not directly affect interstate commerce and that therefore Congress lacks the power to regulate these incidents of the industry. The Court once more restates the position taken in the *Schechter* case that if these were held to have a direct effect on interstate commerce it would open the door to government regulation of the processes of production in all industry. In considering this point it was said:[26]

> "Whether the effect of a given activity or condition is direct or indirect is not always easy to determine. The word 'direct' implies that the activity or condition invoked or blamed shall operate proximately — not mediately, remotely, or collaterally —to produce the effect. It connotes the absence of an efficient intervening agency or condition. And the extent of the effect bears no logical relation to its character. . . ."

[24] This result was hardly unexpected inasmuch as the Court had time and again reiterated the proposition that mining, manufacture, and like productive activities were local and not within the scope of the commerce power. These cases dealt with the attempts of such industry to escape state taxation and with the applicability of the federal anti-trust legislation. See Heisler v. Thomas Colliery Co., 260 U. S. 245, 43 S. Ct. 83 (1922) (state tax on anthracite); Oliver Mining Co. v. Lord, 262 U. S. 172, 43 S. Ct. 526 (1923) (state occupation tax on mining); Hope Natural Gas Co. v. Hall, 274 U. S. 284, 47 S. Ct. 639 (1927) (state occupation tax on producers of gas); Utah Power & Light Co. v. Pfost, 286 U. S. 165, 52 S. Ct. 548 (1932) (state license tax on generation of electricity which was later transmitted in interstate commerce); Kidd v. Pearson, 128 U. S. 1, 9 S. Ct. 6 (1888) (state law prohibiting the manufacture of liquor within the state); Anderson v. Shipowners' Assn., 272 U. S. 359, 47 S. Ct. 125 (1926) (action brought under the Clayton Anti-Trust Act); United States v. E. C. Knight Co., 156 U. S. 1, 15 S. Ct. 249 (1895) (action under the anti-trust legislation); 19 ST. LOUIS L. REV. 25 at 28 (1933).

However, the fact that an activity is intrastate has not barred federal interference where this activity has affected interstate commerce. See Stafford v. Wallace, 258 U. S. 495, 42 S. Ct. 397 (1922); United States v. Ferger, 250 U. S. 199, 39 S. Ct. 445 (1919); Board of Trade of Chicago v. Olsen, 262 U. S. 1, 43 S. Ct. 470 (1923); Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 32 S. Ct. 436 (1912); Swift & Co. v. United States, 196 U. S. 375, 25 S. Ct. 276 (1905).

[25] Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837 (1935).

[26] Carter v. Carter Coal Co., (U. S. 1936) 56 S. Ct. 855 at 871, 80 L. Ed. 749.

The Government contended that since wages constituted such a large factor in the price of bituminous coal, the cutting of wages operated directly upon the subsequent sales in interstate commerce and upon the interstate movement of coal because the wage-cutting producer took away the business of the other producers.[27] It seems that at this point the Court could have sustained the validity of the Guffey Coal Act if it had construed a "direct effect" as one which might arise from the degree of effect that the given activity has on interstate commerce. This would be a more realistic approach to the problem than that adopted by the Court. In the *Schechter* case the poultry had come to rest in the local markets and there could be said to be only a speculative effect upon interstate commerce as a result of the labor practices in the industry, but in the bituminous coal industry the picture is quite different. With seventy-five per cent of the product being shipped in interstate commerce and a history of disruption of interstate commerce due to price cutting, wage cutting, and unfair competition, it would have been possible for the Court to find this to be a substantial difference and to hold that the activities sought to be regulated in an industry so circumstanced directly affect interstate commerce.[28] Regulation by Congress has been permitted in the "flow of commerce" cases, although the object of the regulation was an intrastate activity.[29] While these cases lend some strength to the Government's contention, they can be distinguished on the ground that the activities related to commerce in the process of motion, while the objects sought to be regulated by the Guffey Act were somewhat more remote in their effect, inasmuch as they took place before commerce actually commenced. Another ground upon which the Court

[27] Brief for the Government Officers, Respondents in No. 636 and Petitioners in No. 651 at 226.

[28] 45 YALE L. J. 293 at 310 (1935), and see notes 3 and 4 supra. In Standard Oil Co. v. United States, 283 U. S. 163, 51 S. Ct. 421 (1930), the Court held that if a combination of patent owners were to fix royalties for licenses, these owners dominating the industry, it would be tantamount to a power to fix prices and within the ban of the Sherman Act. This should have been of some weight with respect to practices tending to depress the price in the bituminous industry. It is true that there is the element of a "combination" in the anti-trust cases which act in a manner to restrain interstate commerce, but it is the effect that gives the right to go back to the source, and the effect on prices would seem to permit Congress to get at the root of the evil, unless there is a distinction to be drawn with respect to the power to affirmatively regulate and a negative power to remove obstructions. See also, Ford, "Controlling the Production of Oil," 30 MICH. L. REV. 1170 at 1210 (1932); Wahrenbrock, "Federal Anti-Trust Law and The National Industrial Recovery Act," 31 MICH. L. REV. 1009 at 1045 (1933).

[29] Stafford v. Wallace, 258 U. S. 495, 42 S. Ct. 397 (1922); Board of Trade of Chicago v. Olsen, 262 U. S. 1, 43 S. Ct. 470 (1923); Swift & Co. v. United States, 196 U. S. 375, 25 S. Ct. 276 (1905).

might have sustained the validity of the act is that the regulation was designed to prevent a recurrence of the obstructions to interstate commerce by strikes, which had been prolific in the industry. The language used in *Stafford v. Wallace*[30] lends support to the propriety of regulation by Congress of practices which threaten to burden the freedom of interstate commerce. This again throws up the question whether there is an effect on interstate commerce which might serve as a basis for the regulation attempted by the Guffey Act. The answer, in light of the Court's decision that labor relations are always indirect in effect, must be in the negative.[31] This result finds support in cases[32] stating that the tortious prevention of manufacture or production which leads to a reduction in the supply of a commodity to be shipped in interstate commerce, apart from an actual intent to restrain interstate commerce,[33] is but an indirect obstruction to interstate commerce and not within the purview of the anti-trust laws.[34]

The act also provided that whenever hours of labor and wages were agreed upon in any contract negotiated between the producers of more than two-thirds of the tonnage production for the preceding year and more than one-half the miners employed, it should become binding on all Code members.[35] This the majority of the Court condemned as an improper delegation of legislative powers to private

[30] 258 U. S. 495 at 521, 42 S. Ct. 397 (1922):

"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 effect upon it are clearly non-existent."

[31] See Adair v. United States, 208 U. S. 161, 28 S. Ct. 277 (1908).

[32] United Leather Workers v. Herkert & Meisel Trunk Co., 265 U. S. 457, 44 S. Ct. 623 (1924); Coronado Coal Co. v. United Mine Workers of America, 268 U. S. 295, 45 S. Ct. 551 (1925).

[33] Coronado Coal Co. v. United Mine Workers of America, 268 U. S. 295, 45 S. Ct. 551 (1925).

[34] In United States v. Patten, 226 U. S. 525, 33 S. Ct. 141 (1913), the allegation of an "intent" to interfere with interstate commerce was held not requisite to the validity of an indictment for violation of the anti-trust laws where the necessary effect of the intrastate activity is to burden commerce among the states.

If intent is not the test where the necessary effect of the activity is to burden interstate commerce, it seems hard to justify a holding that strikes such as have arisen in the bituminous fields do not constitute a real burden or obstruction which might be prevented by the regulation attempted under the Guffey Coal Act.

See note 30, supra, and In re Second Employers' Liability Cases, 223 U. S. 1, 32 S. Ct. 169 (1912).

[35] Section 4, Part III, subdivision (g) of the Bituminous Coal Conservation Act, 49 Stat. L. 991 at 1002, 15 U. S. C. A., § 808(g) (Supp. 1935).

persons whose interests were hostile, or potentially hostile, to the interests of others in the same business who would be bound by the action of the former. Where this has been the fact, the Court has held such delegation to be so arbitrary as to violate the due process clause.[36] The Government contended that the section of the act in question did not delegate the power to a certain group to set the wages and hours of the others, but provided only that the latter should be subject to certain legal obligations where the designated percentage of producers and employees should have arrived at agreements governing their own conduct.[37] In other words, the Government held that it was analogous to a statute whose operation is dependent upon the happening of an event.[38] The weakness of this contention lies in the fact that the agreements themselves determined what the wages and hours should be for the industry generally.[39] The provision might have been sustained on the ground that the delegation here was not uncontrolled, but to be exercised in accordance with the announced policy of Congress that there be uniformity in wages and hours so as to prevent burdens on interstate commerce theretofore caused by the disparity in labor costs between the various districts.[40]

[36] See Eubank v. Richmond, 226 U. S. 137, 33 S. Ct. 76 (1912), and Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U. S. 116, 49 S. Ct. 50 (1928). Both of these cases involved municipal ordinances which were held invalid. The one attempted to permit the owners of two-thirds of the abutting property to establish the building line for the street, the other provided that orphanages and homes for the aged could be erected in a residential district only by getting the consent of the owners of two-thirds of the property within a certain distance of any such proposed building. Both ordinances were held to violate the due process clause of the Fourteenth Amendment as an unwarranted delegation of power to a group to determine the use of property unguided by any legislative standards.

[37] Brief for Government Officers, Respondents in No. 636 and Petitioners in No. 651, at 268.

[38] Field v. Clark, 143 U. S. 649, 12 S. Ct. 495 (1892); Hampton, Jr. & Co. v. United States, 276 U. S. 394, 48 S. Ct. 348 (1928). In the latter case an act of Congress authorizing the President to regulate customs duties on articles so as to equalize the differences in the cost of production in the United States and in the competing foreign country was held to be valid.

The Government pointed to this case as an example of the conduct of other persons (the producers of foreign goods) being the event upon which the legislative will was to become operative.

[39] The effect of the reduction in prices by foreign producers in Hampton, Jr. & Co. v. United States, 276 U. S. 394, 48 S. Ct. 348 (1928), was similar, for the extent of the reduction would determine the extent of the increase in duty. There is a difference, however, in that this made no rule to become generally effective with respect to the *conduct* of American producers.

[40] Of course, the premise for such a contention is lacking because the Court held that the hours and wages of labor have but an indirect effect on interstate commerce. See Cusack Co. v. City of Chicago, 242 U. S. 526, 37 S. Ct. 190 (1917),

Four members of the Court,[41] only one of whom thought that the case called for a decision as to the labor provisions,[42] were of the opinion that the price-fixing system set up by the act was valid and should have been permitted to stand.

The act provided for the organization of twenty-three district boards of coal producers[43] and set up nine minimum price areas.[44] These boards were to fix the minimum prices for coal intended for the domestic market subject to approval, modification, or disapproval by a commission[45] which was also created by the act.[46] The commission was empowered to fix maximum prices where necessary to protect the interests of the consuming public, such maximum prices in any event to be so fixed as to yield a return which would at least repay the costs of production and insure a reasonable profit to each mine.[47]

It was contended by those opposing the constitutionality of the act that the grant of power to regulate commerce could not have been intended to include the power to regulate prices in interstate commerce because it would permit Congress, in effect, to set up embargoes at state lines; this would be at variance with the policy of free exchange of goods between the states, which petitioner claimed was intended to be subserved by the framers in granting the commerce power to Congress.[48] Placing reliance on cases which deny a

holding valid a municipal ordinance forbidding the erection of billboards in any residence street without obtaining the consent of the owners of a majority of the frontage of the property on both sides of the street in the block where the billboard was proposed to be erected. Distinguished by the Court from Eubank v. Richmond, 226 U. S. 137, 33 S. Ct. 76 (1912), on the ground that there two-thirds of the lot owners were permitted to impose restrictions upon other property in the block, while the ordinance under consideration permitted one-half of the lot owners to remove a restriction from the other property owners.

And see, Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U. S. 116, 49 S. Ct. 50 at 52 (1928).

[41] Justices Hughes, Cardozo, Stone and Brandeis.

[42] Chief Justice Hughes felt that the suits were not prematurely brought as to the labor sections of the act, but that these were separable from the price-fixing provisions which could therefore stand because constitutionally valid. Justices Cardozo, Stone and Brandeis were of the opinion that no decision with respect to the labor provisions was called for because the suits were premature and that the price-fixing provisions were constitutional.

[43] 49 Stat. L. 991 at 994, § 4, Part I (a), 15 U. S. C. A., § 806 (a) (Supp. 1935).

[44] 49 Stat. L. 991 at 996, § 4, Part II (a), 15 U. S. C. A., § 807 (a) (Supp. 1935).

[45] 49 Stat. L. 991 at 995, § 4, Part II, 15 U. S. C. A., § 807 (Supp. 1935).

[46] 49 Stat. L. 991 at 992, § 2, 15 U. S. C. A., § 803 (a) (Supp. 1935).

[47] 49 Stat. L. 991 at 998, § 4, Part II (c), 15 U. S. C. A., § 807 (c) (Supp. 1935).

[48] Brief for the Petitioner in No. 636, 140-182.

power in Congress to prohibit interstate flow of goods,[49] it was claimed that the commerce power could not be used to sustain price fixing on the ground that this substantially amounted to an embargo.[50]

The opinion of the minority on this point seems more realistic; it regards potential abuses in price fixing to be subject to correction by application of the due process clause of the Fifth Amendment and does not regard them as constituting a basis for a denial of the existence of the power to regulate prices under the commerce clause. Sales made in interstate transactions have been held by the Court to constitute interstate commerce which could not be burdened by state regulation.[51] The power of Congress under the commerce clause, while not sufficient to permit embargoes as such, has been held to extend to the exclusion of certain items from interstate commerce and to the denial of the use of its instrumentalities for improper purposes. Thus, even prohibition may be a valid "regulation" in certain instances.[52] Furthermore, price fixing is not the equivalent of an embargo but may be more properly classified as regulation which, if oppressive, may be made the subject of attack under the due process clause of the Fifth Amendment.[53] It is true that the anti-trust acts which were sustained as a proper exercise of the commerce power

[49] Brief for the Petitioner in No. 636, 182 et seq. Relying on such cases as The Abby Dodge, 223 U. S. 166, 32 S. Ct. 310 (1912); Atlantic Cleaners & Dyers v. United States, 286 U. S. 427, 52 S. Ct. 607 (1932).

[50] Cases in which Congress has been permitted to forbid the use of interstate commerce facilities were distinguished on the ground that the commodity was harmful in nature or that those using the facilities had an improper purpose. See Thornton v. United States, 271 U. S. 414, 46 S. Ct. 585 (1926); Hipolite Egg Co. v. United States, 220 U. S. 45, 31 S. Ct. 364 (1911); Hoke v. United States, 227 U. S. 308, 33 S. Ct. 281 (1913); Champion v. Ames, 188 U. S. 321, 23 S. Ct. 321 (1903); Brooks v. United States, 267 U. S. 432, 45 S. Ct. 345 (1925).

[51] Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 42 S. Ct. 106 (1921); Flanagan v. Federal Coal Co., 267 U. S. 222, 45 S. Ct. 233 (1925); Public Utilities Commission v. Attleboro Steam & Elec. Co., 273 U. S. 83, 47 S. Ct. 294 (1926); Federal Trade Comm. v. Pacific States Paper Trade Assn., 273 U. S. 52, 47 S. Ct. 255 (1926); Lemke v. Farmers' Grain Co., 258 U. S. 50, 42 S. Ct. 244 (1922).

[52] See note 50, supra, and cases there cited.

[53] In the "flow of commerce cases" it is interesting to note that the Court has permitted regulation of activities because of the effect those activities had on the price of the commodity in this flow. See Stafford v. Wallace, 258 U. S. 495, 42 S. Ct. 397 (1922); Board of Trade of Chicago v. Olsen, 262 U. S. 1, 43 S. Ct. 470 (1923); and Tagg Bros. & Moorhead v. United States, 280 U. S. 420, 50 S. Ct. 220 (1930).

Certain practices with respect to prices have also been forbidden under the anti-trust acts. See Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 20 S. Ct. 96 (1899); Swift & Co. v. United States, 196 U. S. 375, 25 S. Ct. 276 (1905).

had as their object the prevention of practices which interfere with free competition, and it might be argued that the power of Congress there upheld was merely a negative power furnishing no authority for affirmative regulation of price which is inconsistent with the notion of free competition. The answer to this is that it is for Congress to determine economic policy, a point which is recognized by the Court itself in *Northern Securities Co. v. United States.*[54] No objection to such regulation can be based on the theory of invasion of the reserved rights of the states. *Baldwin v. G. A. F. Seelig, Inc.* precludes any such argument in its express decision that the states have no power over the price of commodities being sold in interstate commerce.[55]

Rather the power to fix prices of bituminous coal might well be extended to the small number of sales which take place intrastate as well as to the sales in interstate commerce. The effectiveness of federal control over the latter being dependent upon control over the former, due to the effect of the one upon the other, operates to bring the situation within the doctrine of the *Shreveport* case.[56]

Assuming that Congress has the power under the commerce clause to regulate the price of sales in interstate commerce, the power is subject to the limitations imposed by the due process clause of the Fifth Amendment. The case of *Nebbia v. New York*[57] recognized that price fixing does not necessarily run counter to "due process." There, it was held that the Fourteenth Amendment was no bar to the power of the state to fix the price of milk when free competition had the effect of endangering the proper continuance of this business which had so close a relationship to the well-being of the public. By parity of

[54] 193 U. S. 197, 24 S. Ct. 436 (1904). At 337 the Court said:

"Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. . . . As, in the judgment of Congress the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men."

[55] 294 U. S. 511, 55 S. Ct. 497 (1935).

[56] Houston, E. & W. T. R. R. v. United States, 234 U. S. 342, 34 S. Ct. 833 (1914), holding that Congress could act to prevent diversion of business from interstate competitors by the fixing of low local rates. In Railroad Commission of Wisconsin v. Chicago, B. & Q. R. R., 257 U. S. 563, 42 S. Ct. 232 (1922), the Court upheld an order of the Interstate Commerce Commission with respect to interstate rates which required the intrastate traffic to contribute its proportionate share to the cost of operation of the carrier. The pertinence of this case is apparent because producers would attempt to make up losses in intrastate sales of coal in their interstate sale. See 45 YALE L. J. 293 at 308 (1935).

[57] 291 U. S. 502, 54 S. Ct. 505 (1934).

reasoning, the power to fix the price of bituminous coal, closely analogous to milk with respect to its relation to the public, should not be deprivation of the liberty or property protected by the due process clause of the Fifth Amendment.[58]

The minority opinion also found no improper delegation of power to the commission which had been set up to fix prices. The soundness of this conclusion can hardly be challenged in view of the elaborate standards set up by Congress to furnish guidance to the commission in its task.[59] These, in general, provided that the minimum prices were to be based upon the weighted average of the total cost of production for each minimum price area and specified the costs which were to be considered in arriving at this weighted average.[60]

Thus, the decision with respect to the Guffey Coal Act establishes the lack of Congressional power under the commerce clause to regulate wages and hours of labor in local industry on the contention that these directly affect interstate commerce. These incidents of production are held to be always indirect in their effect. As has been pointed out, a different approach to the defining of a direct effect might well

[58] The position taken by the minority is aptly stated in the following quotation taken from the opinion of Justice Cardozo in Carter v. Carter Coal Co., (U. S. 1936) 56 S. Ct. 855 at 882, 80 L. Ed. 749:

"Congress was not condemned to inaction in the face of price wars and wage wars so pregnant with disaster. Commerce had been choked and burdened; its normal flow had been diverted from one state to another; there had been bankruptcy and waste and ruin alike for capital and for labor. The liberty protected by the Fifth Amendment does not include the right to persist in this anarchic riot. 'When industry is greviously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry.' . . . The free competition so often figured as a social good imports order and moderation and a decent regard for the welfare of the group. . . . There is testimony in these records, testimony even by the assailants of the statute, that only through a system of regulated prices can the industry be stabilized and set upon the road of orderly and peaceful progress. If further facts are looked for, they are narrated in the findings as well as in congressional reports and a mass of public records. After making every allowance for difference of opinion as to the most efficient cure, the student of the subject is confronted with the indisputable truth that there were ills to be corrected, and ills that had a direct relation to the maintenance of commerce among the states without friction or diversion. An evil existing, and also the power to correct it, the lawmakers were at liberty to use their own discretion in the selection of the means."

[59] 49 Stat. L. 991 at 995, § 4, Part II, 15 U. S. C. A., § 807 et seq. (Supp. 1935).

[60] There can be no doubt but that Congress had in mind the results of Panama Refining Co. v. Ryan, 293 U. S. 388, 55 S. Ct. 241 (1935) and Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837 (1935), when setting up the commission under the Guffey Coal Act.

have led to a different result. As a consequence of the definition given by the Court, only a constitutional amendment will serve to give Congress the power it sought to exercise. If such amendment is adopted, it will very likely be much broader in its implications with respect to the power of Congress than would have been the case had the Court, in view of the circumstances surrounding the industry, sustained the Bituminous Coal Conservation Act.

In the opinion of four members of the Court, Congress has the power to fix the price of sales in interstate commerce in the case of a commodity so circumstanced as bituminous coal. True, Congress has not heretofore engaged in regulating prices of transactions in interstate commerce, but the fact that this power exists subject to the limitations of the due process clause of the Fifth Amendment is difficult to deny.

C. F. H.