● PSF Supreme Court - 1935-1936 Subject File Box 185

BF Supreme Court file

SUPREME COURT OF THE UNITED STATES.

No. 49.—October Term, 1935.

Lee Moor, Petitioner, *vs.* Texas and New Orleans Railroad Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[ ]

Per Curiam.

Lee Moor brought this suit on October 23, 1934, for a mandatory injunction to compel the Texas and New Orleans Railroad Company to transport ten bales of cotton from Clint, Texas, to New Orleans. The company had refused to transport the bales because of the lack of the bale tags required by the Cotton Control Act of April 21, 1934 (secs. 10, 14, 48 Stat. 598, 604). Moor contended that the statute was void, as an attempt to regulate the production of cotton contrary to the provisions of the Fifth and Tenth Amendments of the Constitution of the United States. On final hearing, the District Court did not rule upon the constitutional question but denied the injunction and dismissed the complaint upon the ground that it had not been shown that the plaintiff would suffer irreparable injury for which he had no adequate remedy at law. The Circuit Court of Appeals affirmed the decree (75 F. (2d) 386) and certiorari was granted.

The complaint alleged that the plaintiff was the owner of more than 3500 acres of land in El Paso County, Texas; that the encumbrances and the taxes and charges assessed for water were such as to require that he raise and sell annually 2000 bales of cotton for at least ten cents a pound net, or lose his land through foreclosure proceedings; that his cotton would have no value unless it could be transported to cotton markets; that the Cotton Control Act imposed a tax of fifty percentum of the average central market price per pound of lint cotton and in no event less than five cents per pound; that having ginned about 1000 bales of cotton, and being under the financial necessity of selling them, which was im-

possible under the statute unless he procured bale tags showing that the cotton was exempt or the tax had been paid, he had sought, under duress, and had obtained tax exemption certificates for 855½ bales, the entire amount to which he was entitled; that he would raise and gin a total of about 2500 bales, each of the average weight of 500 pounds, during the year 1934 and had already ginned 1833 bales; that he had tendered, without the required tags, ten bales to the Southern Pacific Railroad Company for shipment to New York and ten bales to the defendant for shipment to New Orleans, but shipment had been refused solely by reason of the absence of the tags; that the average central market price of lint cotton was about twelve cents per pound and, if transported, his cotton would be worth about $60 a bale and the tax would be about $30 a bale; that if he was not permitted to move his cotton in interstate commerce he would suffer damage to the extent at least of $60,000, but that it would be impossible to determine the amount of damage accurately; that he had no adequate remedy at law and would be required to file a large number of suits based upon the refusal of the railroad companies to accept shipments. The complaint was not verified.

On October 25, 1934, the defendant moved to dismiss the complaint, invoking the provisions of the Act as a valid enactment, and on the same day the defendant answered to the same effect.

The case was tried on October 30 and November 5, 1934. Plaintiff made two "trial amendments" which somewhat amplified the allegations of his complaint. Defendant admitted the truth of substantially all the allegations except those relating to duress in connection with plaintiff's application for exemption certificates and as to the amount of his allotment, those as to future shipments, and those containing legal conclusions as to the invalidity of the Act and the tax which it imposed.

The trial court received evidence. Plaintiff did not appear as a witness. The manager of his farm testified generally as to its cotton production, the market for cotton, and plaintiff's inability to sell or move his cotton without the bale tags; that the average central market price of cotton was about twelve cents a pound, or $60 a bale of 500 pounds; that plaintiff had borrowed $50,000 to finish harvesting his cotton, mortgaging his 855 bales as security for that loan which had been liquidated; and that plaintiff's

financial condition was such that it is was necessary for him to realize on his cotton. Another witness testified as to general market conditions. No testimony was offered for the defendant.

The allegations of the complaint with respect to plaintiff's financial necessities, as a ground for equitable intervention, were of the most general character and the evidence in that relation was general and meagre. There were general statements as to encumbrances and expenses, without any showing of details. Apparently, plaintiff had disposed of the 855 exempt bales and there was no showing that he could not have obtained the money necessary to move the remaining bales. The trial court concluded that plaintiff had failed to make a case for equitable relief and should be left to his legal remedy.

The Circuit Court of Appeals, in affirming the decree, rested its decision upon the established principle that a mandatory injunction is not granted as a matter of right, but is granted or refused in the exercise of a sound judicial discretion. *Morrison* v. *Work*, 266 U. S. 481, 490.

In this view of the record, and of the discretion which the trial court was entitled to exercise, the writ of certiorari was improvidently granted and it is dismissed.

It is so ordered.

The Sheboygan Press

THE PAST IS GONE · WE FACE TO-DAY

the appended comment is from the issue of

May 28, 1935
(By C. E. Broughton, Editor)

Codes Remedied What Greed Destroyed

(By The Editor of The Sheboygan Press.)

Politically there are those who may rejoice over the unanimous decision of the supreme court in annihilating the NRA, but in the broader sense it was a co-operative movement aimed to better conditions in the United States of America.

Nine men take the heart out of the NRA and strew the forty-eight states with a debris and wreckage that it will take years to remedy. That is their right and privilege, but in the wake of this decision human suffering will stalk through the nation and unanswered pleas will come from those who believed that a new day had risen in America.

It is true that the NRA had teeth in it, that those teeth made impressions upon greed and certain individuals who thought more of the almighty dollar than they did of the welfare of their employes.

The fruits of the NRA were many. It was a pioneering movement aimed to abolish misuses and for every hardship that was inflicted there were a thousand benefits, benefits that improved conditions in the mines, in the textile industries and in the country as a whole. We said it was a co-operative movement, and upon that basis there is little cause for disagreement.

(Continued on editorial page)

Codes Remedied What Greed Destroyed

(Continued from page 1.)

Industry was asked to submit codes and these codes when submitted and approved by the president brought into being the human part of a basic principle worthy of the support of every one. In each instance it was a code of fair competition for the industry affected. It aimed to shorten the hours of labor in order that we might absorb a larger army of unemployed. It had for its purpose an increased purchasing power through a minimum wage. It outlawed child labor and with it the sweatshop.

Any one of these outbalances any injustices that might have crept in. With the approval of the code there was likewise provided opportunity for the industry affected to meet and suggest amendments from time to time and these were incorporated as soon as they were submitted and approved by the president.

We refer to the textile code as the pioneer in code making. It was approved by President Roosevelt on July 9, 1933, and effective July 31, 1933, after which the maximum hours of labor were fixed and a minimum wage established.

Down through the scroll of time efforts had been made to outlaw child labor without success because of the desire of certain individuals to wax fat at the expense of innocent little human beings. It established a minimum wage and maximum hours in industry throughout the United States, creating for the first time standards of living and for employment that were equitable and just, and yet nine men can go to the extent of unmaking an entire law that had so many worth while features.

The humane side, the benefits to innocent children and to struggling humanity was forgotten in the interest of a legal interpretation. We have always contended that the delegation of power which the Congress accorded the president was an emergency necessity. Something had to be done, a remedy applied, if we were to emerge rather than be submerged. But the supreme court viewed this as an encroachment upon the Constitution, and as a result there is repudiation of all codes, leaving the country in a floundering position.

It offered no suggested remedy. Neither did it grant a stay pending the applying of legislative remedies. As a layman we cannot take issue with the legal points involved, but we deplore a decision so sweeping that it increases the burdens upon the backs of unfortunates, those who will be offered as a sacrifice to the greed of the sweatshop advocate, the exponent of cutthroat competition whose whole history has been that of making ill-gotten gains at the expense of the employe.

There will be rejoicing in the land by those

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There will be rejoicing in the land by those selfishly inclined, but this will be out-weighed many times by honest industrialists, storekeepers and men who were sympathetically inclined to the codes and who sensed a new day under the national recovery act. The supreme court refers to the infringement of state's rights, but this was an emergency in a national sense and codes enacted in one state would have no effect in another. If we are going to remedy an evil, if we are going to establish a minimum wage and the curtailment of hours to absorb unemployment of necessity it requires national codes.

We cannot allow the old condition of cutthroat competition such as existed before the National Recovery act to creep in again. Concerns engaged in interstate commerce suffer when one state operates on a wage scale different from that of another state. All of these evils were met under NRA, and the results, the fruits of the codes, were so outstanding that we cannot help but view with alarm the decision of nine men who, clothed with authority, can jeopardize the interests of the whole nation.

We do not question the honesty or integrity of the supreme court, but we do question a power that is so great that it can crush freedom of opportunity, that it can send us back to those dark days of grinding the hearts out of children in the desire to accumulate wealth.

Let us hope that in the next few days there will be some message of comfort emerging from that supreme court that will be a consolation and a comfort to humanity. We cannot believe that a great nation adhering to the underlying principles of codes of ethics will remain still at a time like this. We have had many catastrophes in this country but none greater than that which has annihilated the entire principle of a protection of human rights as against property rights.

To be more exact, we would say that the true interpretation of law is cruel at times. It must be tempered with mercy, bearing in mind the greatest good to the greatest number. We wonder if the supreme court of the United States had all of this in mind when it rendered the decision yesterday, thereby restoring, not intentionally, but nevertheless restoring the old evils that were dominant for more than 100 years and which were sending to early graves employes, including little children, under a system that created wealth at the sacrifice of human suffering.

PSF: Supreme Court

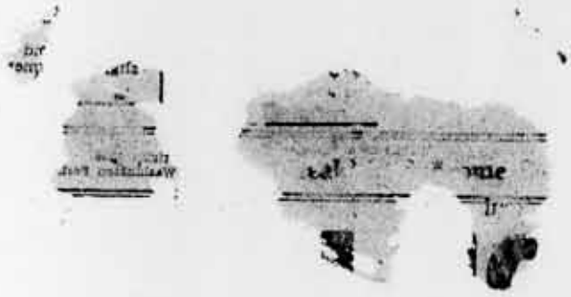
THE WHITE HOUSE
WASHINGTON

Memorandum for the President
From Stanley High

I think it is significant that the Herald-Tribune which heretofore has hailed every one of the Supreme Court's adverse decisions with editorial glee - paseed up this morning with no editorial whatsoever on yesterdsay's decision.

It is possible that they recognize that there can be too much of a "good thing" and that this - more than any previous decision - may solidify opinion in favor of an amendment.

I am appending Waltman's column this morning which is unusual - to say the least.



The Twilight Zone

Politics and People

Roosevelt Gets Great 'Break' in Supreme Court Wage Ruling; May Be Turning Point.

By Franklyn Waltman

IRRESPECTIVE of the legal merits of the opinion of the majority of the Supreme Court in declaring invalid the New York minimum wage law, that decision is one of the best political breaks which President Roosevelt and the New Deal has received in many months. Indeed, it may become the turning point in the entire controversy over the Supreme Court and the necessity for amending the Constitution.

WALTMAN

In that decision the court, by a 5-to-4 decision ruled that the State Legislatures are without authority to fix minimum wages of workers in a given industry. A week ago the court ruled in the Guffey decision that the relationship between employer and employe constituted a local transaction and thus was outside of the authority of Congress and the Federal Government.

Thus who can regulate the relationship of employers and employes? As far as wages are concerned, the Supreme Court says in effect, none but the employer and the worker. Both are guaranteed the right of freedom of contract by the Constitution, asserted the court majority. Both, added the opinion, have the right to engage in bargaining to establish wages without any restraints imposed by the Government, State or Federal.

This may be good law, but it is not a realistic approach to our present economic situation. As Justice Harlan Stone asserted in his dissenting opinion, in recent years "we have had opportunity to learn that a wage is not always the resultant of free bargaining between employers and employes; that it may be one forced upon employes by their economic necessities and upon employers by the most ruthless of their competitors."

And Justice Stone added that the payment of insufficient wages visits its consequences on all the community and he went on to assert that "because of their nature and extent these are public problems. A generation ago they were for the individual to solve; today they are the burden of the Nation. I can perceive no more objection, on constitutional grounds, to their solution by requiring an industry to bear the subsistence cost of the labor which it employs than to the imposition upon it of the cost of its industrial accidents."

The Supreme Court minority appears to have the best of the argument in this case. Perhaps it is presumptuous of one not a member of the bar to pass pronouncement on the declaration of five Supreme Court jurists. Nevertheless, the majority opinion does not appear even to be good law.

The Supreme Court on other occasions had upheld the validity of State legislation imposing maximum working hours. What is the difference between that and imposing minimum wages, assuming there is nothing arbitrary or unreasonable about such actions?

How far does freedom of contract on the part of individuals go? Would the Supreme Court hold valid and enforceable a contract whereby a man agreed to become the slave of another for life? It certainly would not, even though at the time the contract was made the man was in full possession of his senses and willing that the agreement be made.

The Twilight Zone

P.S.F.: Supreme Court file

JANUARY 13, 1936

Lette

THE SUPREME COURT RULING.

Flaws Are Found in Reasoning of the Majority Decision.

To the Editor of The New York Times:

Your editorial of Jan. 7 upon the Hoosac Mills case places the Supreme Court's holding upon two grounds. The first of these, that the AAA was invalid because it contemplated Federal payments to special local groups, was definitely not a ground of the decision. Both majority and minority opinions were in accord that Federal spending must be for a national purpose, but neither so much as intimates that proper payments in aid of agriculture during recent years would not be "for the general welfare," within the constitutional grant of power. Indeed, the many millions spent by the Hoover Farm Board to peg the price of grain artificially, would otherwise have been made without constitutional sanction.

The whole decision was placed on the second ground mentioned in your editorial, that the manner of making the payments constituted an unwarranted invasion of States' rights. The holding that the tax was "not a true tax" was but the means by which the court reached the larger question as to the scope of the Federal spending power. Granting that Congress has power to tax, that it has power to spend in the national welfare, still if it sees fit to condition its spending, in order, as pointed out by the minority, to carry out effectually the purposes which justify the spending in the first place, then the whole structure must fall. Why? Because, in the view of the majority, this would constitute an invasion of rights reserved to the States, although it could point to no provision in the Constitution requiring that the broad grant of power to Congress to spend in the general welfare must be so crippled.

The "Coercion" Element.

Perhaps nothing shows the tenuous character of the majority opinion better than its reference to the Federal grants in aid of agricultural schools. These have customarily been made upon condition and the court even now raises no question of their constitutionality. The decision says merely that the distinction between such grants and the AAA grants, where conditions are spelled out in a contract with the farmer, is "obvious." But is it obvious in any but an artificial sense? In neither case could the Federal Government do directly what it provides for by condition. Both envisage the same measure of this new-found element of "coercion" which the court for the first time in our history finds to have been a part of our constitutional law. And in both conditions are necessary to insure that the spending should clearly be "for the general welfare."

To clinch the argument for a distinction between such grants, however, Justice Roberts says: "But an appropriation to an educational institution which by its terms is to become available only if the beneficiary enters into a contract to teach doctrines subversive of the Constitution is clearly bad." Here was the crux of the case so far as precedent is concerned and, Walter Lippmann to the contrary notwithstanding, the majority fumbled the issue badly. No one has contended that a grant in aid of communism, let us say, would be constitutional. Such a grant would be invalid for reasons having no bearing whatever on the AAA case. The true analogue would concern a grant to a school which agrees "by contract" to teach doctrines consistent with the Constitution. Why did the court not press its newly discovered distinction between conditions merely stipulated and those found in contract so far as to declare such grants invalid? Possibly because the argument would not stand in daylight.

"Subversive" Doctrines.

There lingers in the mind a question why Justice Roberts ever raised this matter of a possible grant to schools teaching "doctrines subversive of the Constitution." Does the majority of the court perhaps have some notion of an "American" system by which it tests the constitutionality of legislation, rather than by the words of the Constitution itself? Does it perchance think that the AAA program is to be compared with "teaching doctrines subversive of the Constitution," and for that reason is unconstitutional? Surely a century of government intervention via the tariff to reduce the supply of industrial goods at the expense of agriculture should lend respectability to a similar grant in aid of agriculture. It would be extremely unfortunate if the majority opinion should proceed from any such considerations and I would be the last to intimate as much. But still, why the reference, especially since it was hopelessly irrelevant to the exact point being argued?

The tragic part of the opinion—whatever one may think of the policy of the AAA, or of the other spending agencies of the government equally subjected to censure—is that one more blow has been struck at the possibility of effective government, whatever party may be in power. This in the face of a steadily increasing need not only as respects agriculture but also as regards oil, mining, labor, finance and the utilities. After all, the forefathers granted Congress the power to spend to provide for the common welfare.

ROSCOE STEFFEN.

Yale Law School, Jan. 10, 1936.

Wilson on the War.

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BF
Supreme Court

SUPREME COURT OF THE UNITED STATES.

No. 577.—October Term, 1935.

Rickert Rice Mills, Inc., Petitioner,
vs.
Rufus W. Fontenot, Individually and as Acting United States Collector of Internal Revenue for the District of Louisiana.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 13, 1936.]

Mr. Justice Roberts delivered the opinion of the Court.

This is one of eight companion cases.[1] They were consolidated for hearing by the District Court. It will be sufficient briefly to state the facts in No. 577:

The petitioner, a processor of rice, filed its bill in the District Court for Eastern Louisiana, to restrain the respondent from assessing or collecting taxes levied for the month of September, 1935, and subsequent months, pursuant to the Agricultural Adjustment Act, 1933,[2] as amended by the Act of August 24, 1935.[3] The bill charges the exaction is unconstitutional and alleges the respondent threatens collection by distraint, which will cause irreparable injury, as the petitioner has no adequate remedy at law to recover what may be collected. A preliminary injunction was sought. The respondent filed a motion to dismiss, citing Revised Statutes 3224 and Section 21 (a) of the amended Agricultural Adjustment Act as prohibiting restraint of collection, and also asserting that the petitioner had a plain, adequate, and complete remedy at law. The court refused an interlocutory injunction and entered a decree dismissing the bill. Appeal was perfected to the Circuit Court of Appeals. The District Judge refused to grant an injunction pend-

[1] The others are: 578, *Dore* v. *Fontenot;* 579, *United Rice Milling Products Co., Inc.* v. *Fontenot;* 580, *Baton Rouge Rice Mill, Inc.* v. *Fontenot;* 581, *Simon* v. *Fontenot;* 585, *Levy Rice Milling Co., Inc.* v. *Fontenot;* 586, *Farmers Rice Milling Co., Inc.* v. *Fontenot,* and 587, *Noble-Trotter Rice Milling Co., Inc.* v. *Fontenot.*

[2] C. 25, 48 Stat. 31.

[3] Public No. 320, 74th Cong., 1st Sess.

ing the appeal. Application to the Circuit Court of Appeals for such an injunction was denied upon the view that the petitioner had an adequate remedy at law and the statute deprived the court of jurisdiction to restrain collection.

In praying a writ of certiorari the petitioner asserted that by reason of the provisions of Section 21 (d) it would be impossible to recover taxes collected, even though the act were unconstitutional, since the section forbids recovery except upon a showing of facts not susceptible of proof. This court granted the writ and restrained collection of the tax upon condition that the petitioner should pay the amount of the accruing taxes to a depository, to the joint credit of petitioner and respondent, such funds to be withdrawn only upon the further order of the court. The cause was advanced for hearing and has been fully argued on the questions of the constitutionality of the exaction and the inadequacy of the remedy for recovery of taxes paid.

The changes made by the amendatory act of August 24, 1935, do not cure the infirmities of the original act which were the basis of decision in *United States* v. *Butler* (January 6, 1936). The exaction still lacks the quality of a true tax. It remains a means for effectuating the regulation of agricultural production, a matter not within the powers of Congress.

We have no occasion to discuss or decide whether Section 21 (d) affords an adequate remedy at law. As yet the petitioner has not paid the taxes to the respondent, and, in view of the decision in the *Butler* case, hereafter cannot be required so to do. If the respondent should now attempt to collect the tax by distraint he would be a trespasser. The decree of the District Court will be vacated, an appropriate order entered directing the repayment to the petitioner of the funds impounded *pendente lite*, and the cause remanded to the District Court for the entry of a decree enjoining collection of the assailed exaction. A similar disposition will be made of the companion cases.

So ordered.

1936

PSF Supreme Court 6

BEFORE THE COURT BILL

(FROM BEGINNING OF OCTOBER 1935 TERM TO INTRODUCTION OF COURT BILL)

A. AAA unconstitutional - limiting the federal spending power.

B. Guffey Act unconstitutional - limiting the federal commerce power.

C. New York Minimum Wage Law unconstitutional - limiting States through the due process clause.

D. Jones Case - crippling administrative procedure of Securities and Exchange Commission.

E. Washington Utility Case - limiting utility regulation by States under due process clause.

AFTER THE COURT BILL

A. Washington Minimum Wage Case - overruling New York Minimum Wage Case - a new interpretation of due process clause applied to the States.

B. Wagner Act Case - reversing the Guffey Act case -- a new interpretation of the federal commerce power.

C. Social Security Case - overruling AAA case -- a new interpretation of the federal spending and taxing power.

The President has attained the most difficulty of his objectives, i.e., the liberalization of the interpretation of the Constitution.

He has yet to obtain: Here two objectives

(a) insurance of the continuity of that liberalism and

(b) a more perfect judicial mechanism for giving a maximum of justice in a minimum of time.

PSF: Supreme Court

January 14, 1936

MEMORANDUM FOR THE ATTORNEY GENERAL:

What was the McArdle case (7 Wall 506- year 1869)? I am told that the Congress withdrew some act from the jurisdiction of the Supreme Court.

F. D. R.

ad

[PSF, Supv Ct]

Parker Y

File (S) Warren 1-3 L

THE ATTORNEY GENERAL
WASHINGTON

January 16, 1936.

My dear Mr. President:

The case of ex parte McCardle, 7 Wallace 506, decided in December, 1868, to which you refer in your memorandum, is one of the classic cases to which we refer when considering the possibility of limiting the jurisdiction of Federal Courts. This whole matter has been the subject of considerable study in this Department, and, in view of recent developments, is apt to be increasingly important.

A brief analysis of the case in question is annexed hereto.

Sincerely yours,

Homer Cummings

The President,

The White House.

ADDRESS REPLY TO
"THE ATTORNEY GENERAL"
AND REFER TO
INITIALS AND NUMBER

DEPARTMENT OF JUSTICE
WASHINGTON, D.C.

AH:gc

January 16, 1936.

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Ex Parte McCardle, (1868), 7 Wall. 506.

The Act of February 5, 1867, conferred upon the United States Courts the power to grant writs of habeas corpus in all cases where any person might be restrained of his or her liberty in violation of the Constitution or of any treaty or law of the United States. The Act further provided that from the final decision of any judge, justice or court inferior to the Circuit Court, appeal might be taken to the Circuit Court of the United States for the district in which the cause was heard, and from the judgment of said Circuit Court to the Supreme Court of the United States.

One McCardle, who was held in custody by military authority for trial before a military commission, filed a petition in the Circuit Court for the Southern District of Mississippi for a writ of habeas corpus. At the hearing he was remanded to the military custody, and an appeal was then taken to the Supreme Court under the provisions of the above mentioned Act. During the pendency of the appeal, the Congress on March 27, 1868, repealed so much of the Act of 1867 as authorized an appeal from a judgment of the Circuit Court to the Supreme Court, or the exercise of any such jurisdiction by the Supreme Court on appeals which had been, or might thereafter, be taken.

The Supreme Court, Chief Justice Chase writing the opinion, held that the Act of 1868 had taken away the appellate jurisdiction of the Supreme Court

defined by the Act of 1867, and that, therefore, the appeal should be dismissed for want of jurisdiction.

The court referred to the provision contained in Article III, Section 2 of the Constitution, which reads as follows:

> "In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

The court pointed out that while strictly speaking the appellate jurisdiction of the Supreme Court is not derived from acts of the Congress, but is conferred by the Constitution, nevertheless it is conferred with such exceptions and under such regulations as the Congress shall make. The court further stated that affirmation of appellate jurisdiction by the Congress implies the negation of all such jurisdiction not affirmed. It further held that the repeal of the appellate jurisdiction in cases of habeas corpus was an exercise of the power of the Congress to make exceptions to the appellate jurisdiction of the Supreme Court.

The opinion refers to Durousseau v. United States, 6 Cranch 307, in which the Supreme Court, in an opinion by Chief Justice Marshall, held that the Congress may make exceptions to the appellate jurisdiction of the Supreme Court.

It seems to me that the foregoing cases are authorities for the proposition that the Congress may limit the appellate jurisdiction of the Supreme Court by taking away from it the power to review certain classes of cases. I venture to suggest, however, that these decisions do not support the inference that the Congress may circumscribe the manner in which the Supreme Court shall decide a case, after the case has been permitted to reach that tribunal. In other words, if the Supreme Court is given the power to review certain types of cases, it would hardly be valid

for the Congress to direct the manner in which the case shall be determined, for example as to whether or not a statute on which one of the parties relies, may be declared unconstitutional.

Respectfully,

Alexander Holtzoff

Alexander Holtzoff.

PSF: Supreme Court

THE ATTORNEY GENERAL
WASHINGTON

May 18, 1936.

My dear Mr. President:

I enclose herewith the following:

1. The three opinions in the Guffey Coal Act case.

2. A release which I gave out today on the subject.

3. A summary of the decisions.

Very sincerely yours,

Homer Cummings

The President,

The White House.

SUPREME COURT OF THE UNITED STATES.

Nos. 636, 651, 649, and 650.—October Term, 1935.

James Walter Carter, Petitioner, 636 *vs.* Carter Coal Company, et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.
Guy T. Helvering, et al., Petitioner, 651 *vs.* James Walter Carter, et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.
R. C. Tway Coal Company, Kentucky-Cardinal Coal Corporation, Harlan-Wallins Coal Corporation, et al., Petitioners, 649 *vs.* Selden R. Glenn, Individually, and as Collector of Internal Revenue for the District of Kentucky.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.
R. C. Tway Coal Company, et al., Petitioners, 650 *vs.* C. H. Clark.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[May 18, 1936.]

Mr. Justice Cardozo (dissenting in Nos. 636, 649 and 650, and in No. 651 concurring in the result).

My conclusions compendiously stated are these:

(a) Part II of the statute sets up a valid system of price-fixing as applied to transactions in interstate commerce and to those in intrastate commerce where interstate commerce is directly or intimately affected. The prevailing opinion holds nothing to the contrary.

(b) Part II, with its system of price-fixing, is separable from Part III, which contains the provisions as to labor considered and condemned in the opinion of the court.

(c) Part II being valid, the complainants are under a duty to come in under the code, and are subject to a penalty if they persist in a refusal.

(d) The suits are premature in so far as they seek a judicial declaration as to the validity or invalidity of the regulations in respect of labor embodied in Part III. No opinion is expressed either directly or by implication as to those aspects of the case. It will be time enough to consider them when there is the threat or even the possibility of imminent enforcement. If that time shall arrive, protection will be given by clear provisions of the statute (§ 3) against any adverse inference flowing from delay or acquiescence.

(e) The suits are not premature to the extent that they are intended to avert a present wrong, though the wrong upon analysis will be found to be unreal.

The complainants are asking for a decree to restrain the enforcement of the statute in all or any of its provisions on the ground that it is a void enactment, and void in all its parts. If some of its parts are valid and are separable from others that are or may be void, and if the parts upheld and separated are sufficient to sustain a regulatory penalty, the injunction may not issue and hence the suits must fail. There is no need when that conclusion has been reached to stir a step beyond. Of the provisions not considered, some may never take effect, at least in the absence of future happenings which are still uncertain and contingent. Some may operate in one way as to one group and in another way as to others according to particular conditions as yet unknown and unknowable. A decision in advance as to the operation and validity of separable provisions in varying contingencies is premature and hence unwise. "The court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' *Steamship Co.* v. *Emigration Commissioners,* 113 U. S. 33, 39; *Abrams* v. *Van Schaick,* 293 U. S. 188; *Wilshire Oil Co.* v. *United States,* 295 U. S. 100. 'It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case'. *Burton* v. *United States,* 196 U. S. 283, 295." Per Brandeis, J., in *Ashwander* v. *Tennessee Valley Authority,* — U. S. —, February 17, 1936. The moment we perceive that there are valid and separable portions, broad enough to lay the basis for a regulatory

penalty, inquiry should halt. The complainants must conform to whatever is upheld, and as to parts excluded from the decision, especially if the parts are not presently effective, must make their protest in the future when the occasion or the need arises.

First: I am satisfied that the Act is within the power of the central government in so far as it provides for minimum and maximum prices upon sales of bituminous coal in the transactions of interstate commerce and in those of intrastate commerce where interstate commerce is directly or intimately affected. Whether it is valid also in other provisions that have been considered and condemned in the opinion of the court, I do not find it necessary to determine at this time. Silence must not be taken as importing acquiescence. Much would have to be written if the subject, even as thus restricted were to be explored through all its implications, historical and economic as well as strictly legal. The fact that the prevailing opinion leaves the price provisions open for consideration in the future makes it appropriate to forego a fullness of elaboration that might otherwise be necessary. As a system of price fixing the Act is challenged upon three grounds: (1) because the governance of prices is not within the commerce clause; (2) because it is a denial of due process forbidden by the Fifth Amendment; and (3) because the standards for administrative action are indefinite, with the result that there has been an unlawful delegation of legislative power.

(1) With reference to the first objection, the obvious and sufficient answer is, so far as the Act is directed to interstate transactions, that sales made in such conditions constitute interstate commerce, and do not merely "affect" it. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 290; *Flanagan* v. *Federal Coal Co.,* 267 U. S. 222, 225; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50, 60; *Public Utilities Commission* v. *Attleboro Steam & Electric Co.,* 273 U. S. 83, 90; *Federal Trade Commission* v. *Pacific States Paper Trade Association,* 273 U. S. 52, 64. To regulate the price for such transactions is to regulate commerce itself, and not alone its antecedent conditions or its ultimate consequences. The very act of sale is limited and governed. Prices in interstate transactions may not be regulated by the states. *Baldwin* v. *Seelig,* 294 U. S. 511. They must therefore be subject to the power of the nation unless they are to be withdrawn altogether from governmental supervision. Cf. *The Head Money Cases,* 112 U. S. 580, 593; Story, Com-

mentaries on the Constitution, § 1082. If such a vacuum were permitted, many a public evil incidental to interstate transactions would be left without a remedy. This does not mean, of course, that prices may be fixed for arbitrary reasons or in an arbitrary way. The commerce power of the nation is subject to the requirement of due process like the police power of the states. *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156; cf. *Brooks* v. *United States*, 267 U. S. 432, 436, 437; *Nebbia* v. *New York*, 291 U. S. 502, 524. Heed must be given to similar considerations of social benefit or detriment in marking the division between reason and oppression. The evidence is overwhelming that Congress did not ignore those considerations in the adoption of this Act. What is to be said in that regard may conveniently be postponed to the part of the opinion dealing with the Fifth Amendment.

Regulation of prices being an exercise of the commerce power in respect of interstate transactions, the question remains whether it comes within that power as applied to intrastate sales where interstate prices are directly or intimately affected. Mining and agriculture and manufacture are not interstate commerce considered by themselves, yet their relation to that commerce may be such that for the protection of the one there is need to regulate the other. *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495, 544, 545, 546. Sometimes it is said that the relation must be "direct" to bring that power into play. In many circumstances such a description will be sufficiently precise to meet the needs of the occasion. But a great principle of constitutional law is not susceptible of comprehensive statement in an adjective. The underlying thought is merely this, that "the law is not indifferent to considerations of degree." *Schechter Poultry Corporation* v. *United States, supra*, concurring opinion, p. 554. It cannot be indifferent to them without an expansion of the commerce clause that would absorb or imperil the reserved powers of the states. At times, as in the case cited, the waves of causation will have radiated so far that their undulatory motion, if discernible at all, will be too faint or obscure, too broken by cross-currents, to be heeded by the law. In such circumstances the holding is not directed at prices or wages considered in the abstract, but at prices or wages in particular conditions. The relation may be tenuous or the opposite according to the facts. Always the setting of the facts is to be viewed if one would know the closeness of the tie. Perhaps, if one group of

adjectives is to be chosen in preference to another, "intimate" and "remote" will be found to be as good as any. At all events, "direct" and "indirect", even if accepted as sufficient, must not be read too narrowly. Cf. Stone, J., in *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 44. A survey of the cases shows that the words have been interpreted with suppleness of adaptation and flexibility of meaning. The power is as broad as the need that evokes it.

One of the most common and typical instances of a relation characterized as direct has been that between interstate and intrastate rates for carriers by rail where the local rates are so low as to divert business unreasonably from interstate competitors. In such circumstances Congress has the power to protect the business of its carriers against disintegrating encroachments. *The Shreveport Case*, 234 U. S. 342, 351, 352; *Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy R. Co.*, 257 U. S. 563, 588; *United States* v. *Louisiana*, 290 U. S. 70, 75; *Florida* v. *United States*, 292 U. S. 1. To be sure, the relation even then may be characterized as indirect if one is nice or over-literal in the choice of words. Strictly speaking, the intrastate rates have a primary effect upon the intrastate traffic and not upon any other, though the repercussions of the competitive system may lead to secondary consequences affecting interstate traffic also. *Atlantic Coast Line R. Co.* v. *Florida*, 295 U. S. 301, 306. What the cases really mean is that the causal relation in such circumstances is so close and intimate and obvious as to permit it to be called direct without subjecting the word to an unfair or excessive strain. There is a like immediacy here. Within rulings the most orthodox, the prices for intrastate sales of coal have so inescapable a relation to those for interstate sales that a system of regulation for transactions of the one class is necessary to give adequate protection to the system of regulation adopted for the other. The argument is strongly pressed by intervening counsel that this may not be true in all communities or in exceptional conditions. If so, the operators unlawfully affected may show that the Act to that extent is invalid as to them. Such partial invalidity is plainly an insufficient basis for a declaration that the Act is invalid as a whole. *Dahnke-Walker Co.* v. *Bondurant, supra*, p. 289; *DuPont* v. *Commissioner*, 289 U. S. 685, 688.

What has been said in this regard is said with added certitude when complainants' business is considered in the light of the statis-

tics exhibited in the several records. In No. 636, the Carter case, the complainant has admitted that "substantially all" (over 97½%) of the sales of the Carter Company are made in interstate commerce. In No. 649 the percentages of intrastate sales are, for one of the complaining companies, twenty-five per cent, for another one per cent, and for most of the others two per cent or four. The Carter Company has its mines in West Virginia; the mines of the other companies are located in Kentucky. In each of those states, moreover, coal from other regions is purchased in large quantities, and is thus brought into competition with the coal locally produced. Plainly, it is impossible to say either from the statute itself or from any figures laid before us that interstate sales will not be prejudicially affected in West Virginia and Kentucky if intrastate prices are maintained on a lower level. If it be assumed for present purposes that there are other states or regions where the effect may be different, the complainants are not the champions of any rights except their own. *Hatch* v. *Reardon*, 204 U. S. 152, 160, 161; *Premier-Pabst Sales Co.* v. *Grosscup*, (May 18, 1936) — U. S. —.

(2) The commerce clause being accepted as a sufficient source of power, the next inquiry must be whether the power has been exercised consistently with the Fifth Amendment. In the pursuit of that inquiry, *Nebbia* v. *New York*, 291 U. S. 502, lays down the applicable principle. There a statute of New York prescribing a minimum price for milk was upheld against the objection that price-fixing was forbidden by the Fourteenth Amendment.[1] We found it a sufficient reason to uphold the challenged system that "the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself." 291 U. S. at p. 538.

All this may be said, and with equal, if not greater force, of the conditions and practices in the bituminous coal industry, not only

[1] Hamilton *v.* Kentucky Distilleries Co., 251 U. S. 146, 156: "The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations (Ex parte Milligan, 4 Wall 2, 121-127; Monongahela Navigation Co. *v.* United States, 148 U. S. 312, 336; United States *v.* Joint Traffic Assn., 171 U. S. 505, 571; McCray *v.* United States, 195 U. S. 27, 61; United States *v.* Cress, 243 U. S. 316, 326); but the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power. In re Kemmler, 136 U. S. 436, 448; Carroll *v.* Greenwich Ins. Co., 199 U. S. 401, 410." Cf. Brooks *v.* United States, 267 U. S 432, 436, 437; Nebbia *v.* New York, 291 U. S. 502, 524.

at the enactment of this statute in August, 1935, but for many years before. Overproduction was at a point where free competition had been degraded into anarchy. Prices had been cut so low that profit had become impossible for all except a lucky handful. Wages came down along with prices and with profits. There were strikes, at times nation-wide in extent, at other times spreading over broad areas and many mines, with the accompaniment of violence and bloodshed and misery and bitter feeling. The sordid tale is unfolded in many a document and treatise. During the twenty-three years between 1913 and 1935, there were nineteen investigations or hearings by Congress or by specially created commissions with reference to conditions in the coal mines.[2] The hope of betterment was faint unless the industry could be subjected to the compulsion of a code. In the weeks immediately preceding the passage of this Act the country was threatened once more with a strike of ominous proportions. The plight of the industry was not merely a menace to owners and to mine workers: it was and had long been a menace to the public, deeply concerned in a steady and uniform supply of a fuel so vital to the national economy.

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 grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry." *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 372. The free competition so often figured as a social good imports order and moderation and a decent regard for the welfare of the group. Cf. *The Sugar Institute, Inc.* v. *United States*, — U. S. —, March 30, 1936. 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.[3] If further facts are looked for,

[2] The dates and titles are given in the brief for the Government in No. 636, at pp. 15-18.

[3] See also the Report of the Fifteenth Annual Meeting of the National Coal Association, October 26-27, 1934, and the statement of the resolutions adopted at the Sixteenth Annual Meeting as reported at hearings preliminary

they are narrated in the findings as well as in congressional reports and a mass of public records.[4] 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.[5]

(3) Finally, and in answer to the third objection to the statute in its price-fixing provisions, there has been no excessive delegation of legislative power. The prices to be fixed by the District Boards and the Commission must conform to the following standards: they must be just and equitable; they must take account of the weighted average cost of production for each minimum price area; they must not be unduly prejudicial or preferential as between districts or as between producers within a district; and they must reflect as nearly as possible the relative market value of the various kinds, qualities and sizes of coal, at points of delivery in each common consuming market area; to the end of affording the producers in the several districts substantially the same opportunity to dispose of their coals on a competitive basis as has heretofore existed. The minimum for any district shall yield a return, per net ton, not less than the weighted average of the total costs per net ton of the tonnage of the minimum price area; the maximum for any mine, if a maximum is fixed, shall yield a return not less than cost plus a reasonable profit. Reasonable prices can as easily be ascertained for coal as for the carriage of passengers or property under the Interstate Commerce Act, or for the services of brokers in the stockyards (*Tagg Bros. & Moorhead* v. *United States*, 280 U. S.

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to the passage of this Act. Hearings before a Subcommittee of the Committee on Ways and Means, House of Representatives, 74th Congress, 1st Session, on H. R. 8479, pp. 20, 152.

[4] There is significance in the many bills proposed to the Congress after painstaking reports during successive national administrations with a view to the regulation of the coal industry by Congressional action. S. 2557, October 4, 1921, 67th Cong., 1st Sess.; S. 3147, February 13, 1922, 67th Cong., 2nd Sess.; H. R. 9222, February 11, 1926, 69th Cong., 1st Sess.; H. R. 11898, May 4, 1926 (S. 4177), 69th Cong., 1st Sess.; S. 2935, January 7, 1932 (H. R. 7536), 72nd Cong., 1st Sess.; also same session H. R. 12916 and 9924.

[5] "Price control, like any other form of discrimination, 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." Nebbia *v.* New York, *supra*, at p. 538.

420), or for the use of dwellings under the Emergency Rent Laws (*Block* v. *Hirsh*, 256 U. S. 135, 157; *Marcus Brown Co.* v. *Feldman*, 256 U. S. 170; *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242), adopted at a time of excessive scarcity, when the laws of supply and demand no longer gave a measure for the ascertainment of the reasonable. The standards established by this Act are quite as definite as others that have had the approval of this court. *New York Central Securities Corporation* v. *United States*, 287 U. S. 12, 24; *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 286; *Tagg Bros. & Moorhead* v. *United States, supra; Mahler* v. *Eby*, 264 U. S. 32. Certainly a bench of judges, not experts in the coal business, cannot say with assurance that members of a commission will be unable, when advised and informed by others experienced in the industry, to make the standards workable, or to overcome through the development of an administrative technique many obstacles and difficulties that might be baffling or confusing to inexperience or ignorance.

The price provisions of the Act are contained in a chapter known as Part II. The final subdivisions of that part enumerate certain forms of conduct which are denounced as "unfair methods of competition". For the most part the prohibitions are ancillary to the fixing of a minimum price. The power to fix a price carries with it the subsidiary power to forbid and prevent evasion. Cf. *United States* v. *Ferger*, 250 U. S. 199. The few prohibitions that may be viewed as separate are directed to situations that may never be realized in practice. None of the complainants threatens or expresses the desire to do these forbidden acts. As to those phases of the statute the suits are premature.

Second: The next inquiry must be whether Part I of the statute which creates the administrative agencies, and Part II, which has to do in the main with the price-fixing machinery, as well as preliminary sections levying a tax or penalty, are separable from Part III, which deals with labor relations in the industry, with the result that what is earlier would stand if what is later were to fall.

The statute prescribes the rule by which construction shall be governed. "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". § 15. The rule is not read as an inexorable mandate. *Dorchy* v. *Kansas*, 264 U. S.

286, 290; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 184 *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 362. It creates a "presumption of divisibility", which is not applied mechanically or in a manner to frustrate the intention of the law-makers. Even so, the burden is on the litigant who would escape its operation. Here the probabilities of intention are far from overcoming the force of the presumption. They fortify and confirm it. A confirmatory token is the formal division of the statute into "Parts" separately numbered. Part III which deals with labor is physically separate from everything that goes before it. But more convincing than the evidences of form and structure, the division into chapters and sections and paragraphs, each with its proper subject matter, are the evidences of plan and function. Part II, which deals with prices, is to take effect at once, or as soon as the administrative agencies have finished their administrative work. Part III in some of its most significant provisions, the section or subdivision in respect of wages and the hours of labor, may never take effect at all. This is clear beyond the need for argument from the mere reading of the statute. The maximum hours of labor may be fixed by agreement between the producers of more than two thirds of the annual national tonnage production for the preceding calendar year and the representatives of more than one half the mine workers. Wages may be fixed by agreement or agreements negotiated by collective bargaining in any district or group of two or more districts between representatives of producers of more than two thirds of the annual tonnage production of such districts or each of such districts in a contracting group during the preceding calendar year, and representatives of the majority of the mine workers therein. It is possible that none of these agreements as to hours and wages will ever be made. If made, they may not be completed for months or even years. In the meantime, however, the provisions of Part II will be continuously operative, and will determine prices in the industry. Plainly, then, there was no intention on the part of the framers of the statute that prices should not be fixed if the provisions for wages or hours of labor were found to be invalid.

Undoubtedly the rules as to labor relations are important provisions of the statute. Undoubtedly the law-makers were anxious that provisions so important should have the force of law. But they announced with all the directness possible for words that they would keep what they could have if they could not have the whole.

Stabilizing prices would go a long way toward stabilizing labor relations by giving the producers capacity to pay a living wage.[6] To hold otherwise is to ignore the whole history of mining. All in vain have official committees inquired and reported in thousands of printed pages if this lesson has been lost. In the face of that history the court is now holding that Congress would have been unwilling to give the force of law to the provisions of Part II, which were to take effect at once, if it could not have Part III, which in the absence of agreement between the employers and the miners would never take effect at all. Indeed, the prevailing opinion goes so far, it seems, as to insist that if the least provision of the statute in any of the three chapters is to be set aside as void, the whole statute must go down, for the reason that everything from end to end, or everything at all events beginning with section 4, is part of the Bituminous Coal Code, to be swallowed at a single draught, without power in the commission or even in the court to abate a jot or tittle. One can only wonder what is left of the "presumption of divisibility" which the law-makers were at pains to establish later on. Codes under the National Recovery Act are not a genuine analogy. The Recovery Act made it mandatory (§ 7a) that every code should contain provisions as to labor, including wages and hours, and left everything else to the discretion of the codifiers. Wages and hours in such circumstances were properly described as "essential features of the plan, its very bone and sinew" (*Schechter Poultry Corporation* v. *United States, supra,* concurring opinion, p. 555), which taken from the body of a code would cause it to collapse. Here on the face of the statute the price provisions of one Part and the labor provisions of the

[6] At a hearing before a Subcommittee of the Committee on Ways and Means, House of Representatives, 74th Congress, First Session, on H. R. 8479, counsel for the United Mine Workers of America, who had coöperated in the drafting of the Act, said (p. 35):

"We have, as can be well understood, a provision of this code dealing with labor relations at the mines. We think that is justified; we think it is impossible to conceive of any regulation of this industry that does not provide for regulation of labor relations at the mines. I realize that while it may be contested, yet I feel that it is going to be sustained.

"Also, there is a provision in this act that if this act, or any part of it, is declared to be invalid as affecting any person or persons, the rest of it will be valid, and if the other provisions of this act still stand and the labor provisions are struck down, we still want the act, because it stabilizes the industry and enables us to negotiate with them on a basis which will at least be different from what we have been confronted with since April, and that is a disinclination to even negotiate a labor wage scale because they claim they are losing money.

"If the labor provisions go down, we still want the industry stabilized so that our union may negotiate with them on the basis of a living American wage standard."

other (the two to be administered by separate agencies) are made of equal rank.

What is true of the sections and subdivisions that deal with wages and the hours of labor is true also of the other provisions of the same chapter of the Act. Employees are to have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from interference, restraint or coercion of employers, or their agents, in the designation of such representatives, or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and no employee and no one seeking employment shall be required as a condition of employment to join any company union. No threat has been made by any one to do violence to the enjoyment of these immunities and privileges. No attempt to violate them may be made by the complainants or indeed by any one else in the term of four years during which the Act is to remain in force. By another subdivision employees are to have the right of peaceable assemblage for the discussion of the principles of collective bargaining, shall be entitled to select their own check-weighman to inspect the weighing or measuring of coal, and shall not be required as a condition of employment to live in company houses or to trade at the store of the employer. None of these privileges or immunities has been threatened with impairment. No attempt to impair them may ever be made by any one.

Analysis of the statute thus leads to the conclusion that the provisions of Part III, so far as summarized, are separable from Parts I and II, and that any declaration in respect of their validity or invalidity under the commerce clause of the Constitution or under any other section will anticipate a controversy that may never become real. This being so, the proper course is to withhold an expression of opinion until expression becomes necessary. A different situation would be here if a portion of the statute, and a portion sufficient to uphold the regulatory penalty, did not appear to be valid. If the whole statute were a nullity, the complainants would be at liberty to stay the hand of the tax-gatherer threatening to collect the penalty, for collection in such circumstances would be a trespass, an illegal and forbidden act. *Child Labor Tax Case*, 259 U. S. 20; *Hill* v. *Wallace*, 259 U. S. 44, 62; *Terrace* v. *Thompson*, 263 U. S. 197, 215; *Pierce* v. *Society of Sisters*, 268 U. S. 510 536. It would be no answer to say that the complainants might avert the penalty by declaring themselves code members (§ 3) and

fighting the statute afterwards. In the circumstances supposed there would be no power in the national government to put that constraint upon them. The Act by hypothesis being void in all its parts as a regulatory measure, the complainants might stand their ground, refuse to sign anything, and resist the onslaught of the collector as the aggression of a trespasser. But the case as it comes to us assumes a different posture, a posture inconsistent with the commission of a trespass either present or prospective. The hypothesis of complete invalidity has been shown to be unreal. The price provisions being valid, the complainants were under a duty to come in under the code, whether the provisions as to labor are valid or invalid, and their failure to come in has exposed them to a penalty lawfully imposed. They are thus in no position to restrain the acts of the collector, or to procure a judgment defeating the operation of the statute, whatever may be the fate hereafter of particular provisions not presently enforcible. The right to an injunction failing, the suits must be dismissed. Nothing more is needful—no pronouncement more elaborate—for a disposition of the controversy.

A last assault upon the statute is still to be repulsed. The complainants take the ground that the Act may not coerce them through the imposition of a penalty into a seeming recognition or acceptance of the code, if any of the code provisions are invalid, however separable from others. I cannot yield assent to a position so extreme. It is one thing to impose a penalty for refusing to come in under a code that is void altogether. It is a very different thing if a penalty is imposed for refusing to come in under a code invalid at the utmost in separable provisions, not immediately operative, the right to contest them being explicitly reserved. The penalty in those circumstances is adopted as a lawful sanction to compel submission to a statute having the quality of law. A sanction of that type is the one in controversy here. So far as the provisions for collective bargaining and freedom from coercion are concerned, the same duties are imposed upon employers by § 9 of the statute whether they come in under the code or not. So far as code members are subject to regulation as to wages and hours of labor, the force of the complainants' argument is destroyed when reference is made to those provisions of the statute in which the effect of recognition and acceptance is explained and limited. By § 3 of the Act, "No producer shall by reason of his acceptance of the code provided for in section 4 or of the drawback of taxes provided for 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 said producer.'' These provisions are reinforced and made more definite by §§ 5 (c) and 6 (b), which so far as presently material are quoted in the margin.[7] For the subscriber to the code who is doubtful as to the validity of some of its requirements, there is thus complete protection. If this might otherwise be uncertain, it would be made clear by our decision in *Ex parte Young*, 209 U. S. 123, which was applied in the court below at the instance and for the benefit of one of these complainants to give relief against penalties accruing during suit. *Helvering* v. *Carter*, No. 651. Finally, the adequacy of the remedial devices is made even more apparent when one remembers that the attack upon the statute in its labor regulations assumes the existence of a controversy that may never become actual. The failure to agree upon a wage scale or upon maximum hours of daily or weekly labor may make the statutory scheme abortive in the very phases and aspects that the court has chosen to condemn. What the code will provide as to wages and hours of labor, or whether it will provide anything, is still in the domain of prophecy. The opinion of the court begins at the wrong end. To adopt a homely form of words, the complainants have been crying before they are really hurt.

My vote is for affirmance.

I am authorized to state that Mr. Justice BRANDEIS and Mr. Justice STONE join in this opinion.

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[7] § 5 (c). ''Any producer whose membership in the code and whose right to a drawback on the taxes as provided under this Act has been canceled, shall have the right to have his membership restored upon payment by him of all taxes in full for the time during which it shall be found by the Commission that his violation of the code or of any regulation thereunder, the observance of which is required by its terms, shall have continued. In making its findings under this subsection the Commission shall state specifically (1) the period of time during which such violation continued, and (2) the amount of taxes required to be paid to bring about reinstatement as a code member.''

§ 6 (b). ''Any person aggrieved by an order issued by the Commission or Labor Board in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission or Labor Board be modified or set aside in whole or in part. . . . The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission or Labor Board, as the case may be, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347.)''

SUPREME COURT OF THE UNITED STATES.

Nos. 636, 651, 649 and 650.—October Term, 1935.

James Walter Carter, Petitioner, 636 *vs.* Carter Coal Company, George L. Carter, as Vice-President and a Director of said Company, et al.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia.
Guy T. Helvering, et al., Petitioners, 651 *vs.* James Walter Carter, et al.	
R. C. Tway Coal Company, Kentucky Cardinal Coal Corporation, Harlan-Wallins Coal Corporation, et al., Petitioners, 649 *vs.* Selden R. Glenn, Individually and as Collector of Internal Revenue for the District of Kentucky.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.
R. C. Tway Coal Company, R. C. Tway, President and Directors of R. C. Tway Coal Company, et al., Petitioners, 650 *vs.* C. H. Clark.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[May 18, 1936.]

Mr. Justice Sutherland delivered the opinion of the Court.

The purposes of the "Bituminous Coal Conservation Act of 1935", involved in these suits, as declared by the title, are to stabilize the bituminous coal-mining industry and promote its interstate commerce; to provide for cooperative marketing of bituminous coal; to levy a tax on such coal and provide for a drawback under certain conditions; to declare the production, distribution, and use of such coal to be affected with a national public interest; to conserve the national resources of such coal; to provide for the general

welfare, and for other purposes. C. 824, 49 Stat. 991. The constitutional validity of the act is challenged in each of the suits.

Nos. 636 and 651 are cross-writs of certiorari in a stockholder's suit, brought in the Supreme Court of the District of Columbia by Carter against the Carter Coal Company and some of its officers, Guy T. Helvering (Commissioner of Internal Revenue of the United States), and certain other officers of the United States, to enjoin the coal company and its officers named from filing an acceptance of the code provided for in said act, from paying any tax imposed upon the coal company under the authority of the act, and from complying with its provisions or the provisions of the code. The bill sought to enjoin the Commissioner of Internal Revenue and the other federal officials named from proceeding under the act in particulars specified, the details of which it is unnecessary to state.

No. 649 is a suit brought in a federal district court in Kentucky by petitioners against respondent collector of internal revenue for the district of Kentucky, to enjoin him from collecting or attempting to collect the taxes sought to be imposed upon them by the act, on the ground of its unconstitutionality.

No. 650 is a stockholder's suit brought in the same court against the coal company and some of its officers, to secure a mandatory injunction against their refusal to accept and operate under the provisions of the Bituminous Coal Code prepared in pursuance of the act.

By the terms of the act, every producer of bituminous coal within the United States is brought within its provisions.

Section 1 is a detailed assertion of circumstances thought to justify the act. It declares that the mining and distribution of bituminous coal throughout the United States by the producer are affected with a national public interest; and that the service of such coal in relation to industrial activities, transportation facilities, health and comfort of the people, conservation by controlled production and economical mining and marketing, maintenance of just and rational relations between the public, owners, producers and employees, the right of the public to constant and adequate supplies of coal at reasonable prices, and the general welfare of the nation, require that the bituminous coal industry should be regulated as the act provides.

Section 1, among other things, further declares that the production and distribution by producers of such coal bear upon and directly affect interstate commerce, and render regulation of production and distribution imperative for the protection of such commerce; that certain features connected with the production, distribution, and marketing have led to waste of the national coal resources, disorganization of interstate commerce in such coal, and burdening and obstructing interstate commerce therein; that practices prevailing in the production of such coal directly affect 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 disparate labor costs detrimental to fair interstate competition, and in order to avoid obstructions to interstate commerce that recur in industrial disputes over labor relations at the mines. These declarations constitute not enactments of law, but legislative averments by way of inducement to the enactment which follows.

The substantive legislation begins with § 2, which establishes in the Department of the Interior a National Bituminous Coal Commission, to be appointed and constituted as the section then specifically provides. Upon this commission is conferred the power to hear evidence and find facts upon which its orders and actions may be predicated.

Section 3 provides:

"There is hereby imposed upon the sale or other disposal of all bituminous coal produced within the United States an excise tax of 15 per centum on the sale price at the mine, or in the case of captive coal the fair market value of such coal at the mine, such tax, subject to the later provisions of this section, to be payable to the United States by the producers of such coal, and to be payable monthly for each calendar month, on or before the first business day of the second succeeding month, and under such regulations, and in such manner, as shall be prescribed by the Commissioner of Internal Revenue: *Provided,* That in the case of captive coal produced as aforesaid, the Commissioner of Internal Revenue shall fix a price therefor at the current market price for the comparable kind, quality, and size of coals in the locality where the same is produced: *Provided further,* That any such coal producer who has filed with the National Bituminous Coal Commission his acceptance of the code provided for in section 4 of this Act, and who acts in compliance with the provisions of such code, shall be entitled to a

drawback in the form of a credit upon the amount of such tax payable hereunder, equivalent to 90 per centum of the amount of such tax, to be allowed and deducted therefrom at the time settlement therefor is required, in such manner as shall be prescribed by the Commissioner of Internal Revenue. Such right or benefit of drawback shall apply to all coal sold or disposed of from and after the day of the producer's filing with the Commission his acceptance of said code in such form of agreement as the Commission may prescribe. 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."

Section 4 provides that the commission shall formulate the elaborate provisions contained therein into a working agreement to be known as the Bituminous Coal Code. These provisions require the organization of twenty-three coal districts, each with a district board the membership of which is to be determined in a manner pointed out by the act. Minimum prices for coal are to be established by each of these boards, which is authorized to make such classification of coals and price variation as to mines and consuming market areas as it may deem proper. "In order to sustain the stabilization of wages, working conditions, and maximum hours of labor, said prices shall be established so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated 'Minimum-price area table', equal as nearly as may be to the weighted average of the total costs, per net ton, determined as hereinafter provided, of the tonnage of such minimum price area. The computation of the total costs shall include the cost 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 cost of administration." The district board must determine and adjust the total cost of the ascertainable tonnage produced in the district so as to give effect to any changes in wage rates, hours of employment, or other factors substantially affecting costs, which may have been established since January 1st, 1934.

Without repeating the long and involved provisions with regard to the fixing of minimum prices, it is enough to say that the act confers the power to fix the minimum price of coal at each and every coal mine in the United States, with such price variations as the board may deem necessary and proper. There is also a provision authorizing the commission, when deemed necessary in the public interest, to establish maximum prices in order to protect the consumer against unreasonably high prices.

All sales and contracts for the sale of coal are subject to the code prices provided for and in effect when such sales and contracts are made. Various unfair methods of competition are defined and forbidden.

The labor provisions of the code, found in Part III of the same section, require that in order to effectuate the purposes of the act the district boards and code members shall accept specified conditions contained in the code, among which are the following:

Employees to be given the right to organize and bargain collectively, through representatives of their own choosing, free from interference, restraint, or coercion of employers or their agents in respect of their concerted activities.

Such employees to have the right of peaceable assemblage for the discussion of the principles of collective bargaining and to select their own check-weighman to inspect the weighing or measuring of coal.

A labor board is created, consisting of three members, to be appointed by the President and assigned to the Department of Labor. Upon this board is conferred authority to adjudicate disputes arising under the provisions just stated, and to determine whether or not an organization of employees had been promoted, or is controlled or dominated by an employer in its organization, management, policy, or election of representatives. The board "may order a code member to meet the representatives of its employees for the purpose of collective bargaining."

Subdivision (g) of Part III provides:

"Whenever the maximum daily and weekly hours of labor are agreed upon in any contract or contracts negotiated between the producers of more than two-thirds the annual national tonnage production for the preceding calendar year and the representatives of more than one-half of the mine workers employed, such maximum hours of labor shall be accepted by all the code members. The

wage agreement or agreements negotiated by collective bargaining in any district or group of two or more districts, between representatives of producers of more than two-thirds of the annual tonnage production of such district or each of such districts in a contracting group during the preceding calendar year, and representatives of the majority of the mine workers therein, shall be filed with the Labor Board and shall be accepted as the minimum wages for the various classifications of labor by the code members operating in such district or group of districts."

The bill of complaint in Nos. 636 and 651 was filed in the Supreme Court of the District of Columbia on August 31, 1935, the day after the Coal Conservation Act came into effect. That court, among other things, found that the suit was brought in good faith; that if Carter Coal Company should join the code it would be compelled to cancel existing contracts and pay its proportionate share of administering the code; that the production of bituminous coal is a local activity carried on within state borders; that coal is the nation's greatest and primary source of energy, vital to the public welfare, of the utmost importance to the industrial and economic life of the nation and the health and comfort of its inhabitants; and that its distribution in interstate commerce should be regular, continuous, and free of interruptions, obstructions, burdens, and restraints.

Other findings are to the effect that such coal is generally sold f.o.b. mine, and the predominant portion of it shipped outside the state in which it is produced; that the distribution and marketing is predominantly interstate in character, and that the intrastate distribution and sale are so connected that interstate regulation cannot be accomplished effectively unless tranactions of intrastate distribution and sale be regulated.

The court further found the existence of a condition of unrestrained and destructive competition in the system of distribution and marketing such coal, and of destructive price-cutting, burdening and restraining interstate commerce and dislocating and diverting its normal flow.

The court concluded as a matter of law that the bringing of the suit was not premature; that the plaintiff was without legal remedy, and rightly invoked relief in equity; that the labor provisions of the act and code were unconstitutional for reasons stated, but the price-fixing provisions were valid and constitutional; that the labor

provisions are separable; and, since the provisions with respect to price-fixing and unfair competition are valid, the taxing provisions of the act could stand. Therefore, except for granting a permanent injunction against collection of the "taxes" accrued during the suit (*Ex parte Young*, 209 U. S. 123, 147-148), the court denied the relief sought, and dismissed the bill.

Appeals were taken to the United States Court of Appeals for the District of Columbia by the parties; but pending hearing and submission in that court, petitions for writs of certiorari were presented asking us to review the decree of the Supreme Court of the District without awaiting such hearing and submission. Because of the importance of the question and the advantage of a speedy final determination thereof, the writs were granted. — U. S. —.

The remaining two suits (Nos. 649 and 650), involving the same questions, were brought in the federal District Court for the Western District of Kentucky. That court held the act valid and constitutional in its entirety and entered a decree accordingly. 12 F. Supp. 570. Appeals were taken to the Circuit Court of Appeals for the Sixth Circuit; but, as in the Carter case and for the same reasons, this court granted writs of certiorari in advance of hearing and submission. — U. S. —.

The questions involved will be considered under the following heads:

1. The right of stockholders to maintain suits of this character.
2. Whether the suits were prematurely brought.
3. Whether the exaction of 15 *per centum* on the sale price of coal at the mine is a tax or a penalty.
4. The purposes of the act as set forth in § 1, and the authority vested in Congress by the Constitution to effectuate them.
5. Whether the labor provisions of the act can be upheld as an exercise of the power to regulate interstate commerce.
6. Whether subdivision (g) of Part III of the Code, is an unlawful delegation of power.
7. The constitutionality of the price-fixing provisions, and the question of severability—that is to say, whether, if either the group of labor provisions or the group of price-fixing provisions be found constitutionally invalid, the other can stand as separable.

First. In the Carter case (Nos. 636 and 651) the stockholder who brought the suit had formally demanded of the board of directors

that the company should not join the code, should refuse to pay the tax fixed by the act, and should bring appropriate judicial proceedings to prevent an unconstitutional and improper diversion of the assets of the company and to have determined the liability of the company under the act. The board considered the demand, determined that, while it believed the act to be unconstitutional and economically unsound and that it would adversely affect the business of the company if accepted, nevertheless it should accept the code provided for by the act because the penalty in the form of a 15% tax on its gross sales would be seriously injurious and might result in bankruptcy. This action of the board was approved by a majority of the shareholders at a special meeting called for the purpose of considering it.

In the Tway Company cases, the company itself brought suit to enjoin the enforcement of the act (No. 649); and a stockholder brought suit to compel the company to accept the code and operate under its provisions (No. 650).

Without repeating the long averments of the several bills, we are of opinion that the suits were properly brought and were maintainable in a court of equity. The right of stockholders to bring such suits under the circumstances disclosed is settled by the recent decision of this court in *Ashwander et al.* v. *Tennessee Valley Authority,* — U. S. — (February 17, 1936), and requires no further discussion.

Second. That the suits were not prematurely brought also is clear. Section 2 of the act is mandatory in its requirement that the commission be appointed by the President. The provisions of § 4 that the code be formulated and promulgated are equally mandatory. The so-called tax of 15% is definitely imposed, and its exaction certain to ensue.

In *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 592-595, suits were brought by Pennsylvania and Ohio against West Virginia to enjoin the defendant state from enforcing an act of her legislature upon the ground that it would injuriously affect or cut off the supply of natural gas produced in her territory and carried by pipe lines into the territory of the plaintiff states and there sold and used. These suits were brought a few days after the West Virginia act became effective. No order had yet been made under it by the

Public Service Commission, nor had it been tested in actual practice. But it appeared that the act was certain to operate as the complainant states apprehended it would. This court held that the suit was not premature. "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."

Pierce v. *Society of Sisters,* 268 U. S. 510, 535-536, involved the constitutional validity of the Oregon Compulsory Education Act, which required every parent or other person having control of a child between the ages of eight and sixteen years to send him to the public school of the district where he resides. Suit was brought to enjoin the operation of the act by corporations owning and conducting private schools, on the ground that their business and property was threatened with destruction through the unconstitutional compulsion exercised by the act upon parents and guardians. The suits were held to be not premature, although the effective date of the act had not yet arrived. We said—"The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of courts of equity."

See, also, *Terrace* v. *Thompson,* 263 U. S. 197, 215-216; *Swift & Co.* v. *United States,* 276 U. S. 311, 326; *Euclid* v. *Ambler Co.,* 272 U. S. 365, 386; *City Bank Co.* v. *Schnader,* 291 U. S. 24, 34.

Third. The so-called excise tax of 15 *per centum* on the sale price of coal at the mine, or, in the case of captive coal the fair market value, with its drawback allowance of 13½%, is clearly not a tax but a penalty. The exaction applies to all bituminous coal produced, whether it be sold, transported or consumed in interstate commerce, or transactions in respect of it be confined wholly to the limits of the state. It also applies to "captive coal"—that is to say, coal produced for the sole use of the producer.

It is very clear that the "excise tax" is not imposed for revenue but exacted as a penalty to compel compliance with the regulatory provisions of the act. The whole purpose of the exaction is to coerce what is called an agreement—which, of course, it is not, for it lacks the essential element of consent. One who does a thing in order to avoid a monetary penalty does not agree; he

yields to compulsion precisely the same as though he did so to avoid a term in jail.

The exaction here is a penalty and not a tax within the test laid down by this court in numerous cases. *Child Labor Tax Case,* 259 U. S. 20, 37-39; *United States* v. *La Franca,* 282 U. S. 568, 572; *United States* v. *Constantine,* 296 U. S. 287, 293 *et seq.; United States* v. *Butler,* 297 U. S. 1, 70. While the lawmaker is entirely free to ignore the ordinary meanings of words and make definitions of his own, *Karnuth* v. *United States,* 279 U. S. 231, 242; *Tyler* v. *United States,* 281 U. S. 497, 502, that device may not be employed so as to change the nature of the acts or things to which the words are applied. But it is not necessary to pursue the matter further. That the "tax" is in fact a penalty is not seriously in dispute. The position of the government, as we understand it, is that the validity of the exaction does not rest upon the taxing power but upon the power of Congress to regulate interstate commerce; and that if the act in respect of the labor and price-fixing provisions be not upheld, the "tax" must fall with them. With that position we agree and confine our consideration accordingly.

Fourth. Certain recitals contained in the act plainly suggest that its makers were of opinion that its constitutionality could be sustained under some general federal power, thought to exist, apart from the specific grants of the Constitution. The fallacy of that view will be apparent when we recall fundamental principles which, although hitherto often expressed in varying forms of words, will bear repetition whenever their accuracy seems to be challenged. The recitals to which we refer are contained in § 1 (which is simply a preamble to the act), and, among others, are to the effect that the distribution of bituminous coal is of national interest, affecting the health and comfort of the people and the general welfare of the nation; that this circumstance, together with the necessity of maintaining just and rational relations between the public, owners, producers, and employees, and the right of the public to constant and adequate supplies at reasonable prices, require regulation of the industry as the act provides. These affirmations—and the further ones that the production and distribution of such coal "directly affect interstate commerce", because of which and of the waste of the national coal resources and other circumstances, the regulation is necessary for the protection of such commerce—do not constitute an exertion

of the *will* of Congress which is legislation, but a recital of considerations which in the *opinion* of that body existed and justified the expression of its will in the present act. Nevertheless, this preamble may not be disregarded. On the contrary it is important, because it makes clear, except for the pure assumption that the conditions described "directly" affect interstate commerce, that the powers which Congress undertook to exercise are not specific but of the most general character—namely, to protect the general public interest and the health and comfort of the people, to conserve privately-owned coal, maintain just relations between producers and employees and others, and promote the general welfare, by controlling nation-wide production and distribution of coal. These, it may be conceded, are objects of great worth; but are they ends, the attainment of which has been committed by the Constitution to the federal government? This is a vital question; for nothing is more certain than that beneficient aims, however great or well directed, can never serve in lieu of constitutional power.

The ruling and firmly established principle is that the powers which the general government may exercise are only those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers. Whether the end sought to be attained by an act of Congress is legitimate is wholly a matter of constitutional power and not at all of legislative discretion. Legislative congressional discretion begins with the choice of means and ends with the adoption of methods and details to carry the delegated powers into effect. The distinction between these two things—power and discretion—is not only very plain but very important. For while the powers are rigidly limited to the enumerations of the Constitution, the means which may be employed to carry the powers into effect are not restricted, save that they must be appropriate, plainly adapted to the end, and not prohibited by, but consistent with, the letter and spirit of the Constitution. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421. Thus, it may be said that to a constitutional end many ways are open; but to an end not within the terms of the Constitution, all ways are closed.

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. Mr. Justice Story, as early as 1816, laid down the cardinal rule, which has ever since been followed—that the general government "can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 326. In the Framers Convention, the proposal to confer a general power akin to that just discussed was included in Mr. Randolph's resolutions, the sixth of which, among other things, declared that the National Legislature ought to enjoy the legislative rights vested in Congress by the Confederation, and "moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." The convention, however, declined to confer upon Congress power in such general terms; instead of which it carefully limited the powers which it thought wise to entrust to Congress by specifying them, thereby denying all others not granted expressly or by necessary implication. It made no grant of authority to Congress to legislate substantively for the general welfare, *United States* v. *Butler, supra,* p. 64; and no such authority exists, save as the general welfare may be promoted by the exercise of the powers which are granted. Compare *Jacobsen* v. *Massachusetts,* 197 U. S. 11, 22.

There are many subjects in respect of which the several states have not legislated in harmony with one another, and in which their varying laws and the failure of some of them to act at all have resulted in injurious confusion and embarrassment. See *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 232-233. The state laws with respect to marriage and divorce present a case in point; and the great necessity of national legislation on that subject has been from time to time vigorously urged. Other pertinent examples are laws with respect to negotiable instruments, desertion and non-support, certain phases of state taxation, and others which we do not pause to mention. In many of these fields of legislation, the necessity of bringing the applicable rules of law into general harmonious relation has been so great that a Commission on Uniform State Laws, composed of commissioners from every state in

the Union, has for many years been industriously and successfully working to that end by preparing and securing the passage by the several states of uniform laws. If there be an easier and constitutional way to these desirable results through congressional action, it thus far has escaped discovery.

Replying directly to the suggestion advanced by counsel in *Kansas* v. *Colorado,* 206 U. S. 46, 89-90, to the effect that necessary powers national in their scope must be found vested in Congress, though not expressly granted or essentially implied, this court said:

"But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act."

The general rule with regard to the respective powers of the national and the state governments under the Constitution, is not in doubt. The states were before the Constitution; and, consequently, their legislative powers antedated the Constitution. Those who framed and those who adopted that instrument meant to carve from the general mass of legislative powers, then possessed by the states, only such portions as it was thought wise to confer upon the federal government; and in order that there should be no uncertainty in respect of what was taken and what was left, the national powers of legislation were not aggregated but enumerated—with the result that what was not embraced by the enumeration remained vested in the states without change or impairment. Thus, "when it was found necessary to establish a national government for national purposes," this court said in *Munn* v. *Illinois,* 94 U. S. 113, 124, "a part of the powers of the States and of the people of the States was granted to the United States and the people of the United

States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people." While the states are not sovereign in the true sense of that term, but only *quasi*-sovereign, yet in respect of all powers reserved to them they are supreme—"as independent of the general government as that government within its sphere is independent of the States." *The Collector* v. *Day,* 11 Wall. 113, 124. And since every addition to the national legislative power to some extent detracts from or invades the power of the states, it is of vital moment that, in order to preserve the fixed balance intended by the Constitution, the powers of the general government be not so extended as to embrace any not within the express terms of the several grants or the implications necessarily to be drawn therefrom. It is no longer open to question that the general government, unlike the states, *Hammer* v. *Dagenhart,* 247 U. S. 251, 275, possesses no *inherent* power in respect of the internal affairs of the states; and emphatically not with regard to legislation. The question in respect of the inherent power of that government as to the external affairs of the nation and in the field of international law is a wholly different matter which it is not necessary now to consider. See, however, *Jones* v. *United States,* 137 U. S. 202, 212; *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 659; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 705 *et seq.; Burnet* v. *Brooks,* 288 U. S. 378, 396.

The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government in all matters not committed to the general government is one of the plainest facts which emerges from the history of their deliberations. And adherence to that determination is incumbent equally upon the federal government and the states. State powers can neither be appropriated on the one hand nor abdicated on the other. As this court said in *Texas* v. *White,* 7 Wall, 700, 725—"the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National goverment. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." Every journey to a forbidden end begins with the first step; and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the jour-

ney may find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified.

And the Constitution itself is in every real sense a law—the lawmakers being the people themselves, in whom under our system all political power and sovereignty primarily resides, and through whom such power and sovereignty primarily speaks. It is by that law, and not otherwise, that the legislative, executive, and judicial agencies which it created exercise such political authority as they have been permitted to possess. The Constitution speaks for itself in terms so plain that to misunderstand their import is not rationally possible. "We the People of the United States", it says, "do ordain and establish this Constitution . . ." Ordain and establish! These are definite words of enactment, and without more would stamp what follows with the dignity and character of law. The framers of the Constitution, however, were not content to let the matter rest here, but provided explicitly—"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; . . ." The supremacy of the Constitution as law is thus declared without qualification. That supremacy is absolute; the supremacy of a statute enacted by Congress is not absolute but conditioned upon its being made in pursuance of the Constitution. And a judicial tribunal, clothed by that instrument with complete judicial power, and, therefore, by the very nature of the power, required to ascertain and apply the law to the facts in every case or proceeding properly brought for adjudication, must apply the supreme law and reject the inferior statute whenever the two conflict. In the discharge of that duty, the opinion of the lawmakers that a statute passed by them is valid must be given great weight, *Adkins* v. *Children's Hospital*, 261 U. S. 525, 544; but their opinion, or the court's opinion, that the statute will prove greatly or generally beneficial is wholly irrelevant to the inquiry. *Schechter* v. *United States*, 295 U. S. 495, 549-550.

We have set forth, perhaps at unnecessary length, the foregoing principles, because it seemed necessary to do so in order to demon-

strate that the general purposes which the act recites, and which, therefore, unless the recitals be disregarded, Congress undertook to achieve, are beyond the power of Congress except so far, and only so far, as they may be realized by an exercise of some specific power granted by the Constitution. Proceeding by a process of elimination, which it is not necessary to follow in detail, we shall find no grant of power which authorizes Congress to legislate in respect of these general purposes unless it be found in the commerce clause—and this we now consider.

Fifth. Since the validity of the act depends upon whether it is a regulation of interstate commerce, the nature and extent of the power conferred upon Congress by the commerce clause becomes the determinative question in this branch of the case. The commerce clause vests in Congress the power—"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The function to be exercised is that of regulation. The thing to be regulated is the commerce described. In exercising the authority conferred by this clause of the Constitution, Congress is powerless to regulate anything which is not commerce, as it is powerless to do anything about commerce which is not regulation. We first inquire, then—What is commerce? The term, as this court many times has said, is one of extensive import. No all-embracing definition has ever been formulated. The question is to be approached both affirmatively and negatively—that is to say, from the points of view as to what it includes and what it excludes.

In *Gibbons* v. *Ogden,* 9 Wheat. 1, 189-190, Chief Justice Marshall said:

"Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. . . ."

As used in the Constitution, the word "commerce" is the equivalent of the phrase "intercourse for the purposes of trade", and includes transportation, purchase, sale, and exchange of commodities between the citizens of the different states. And the power to regulate commerce embraces the instruments by which commerce is carried on. *Welton* v. *State of Missouri,* 91 U. S. 275, 280; *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 241; *Hopkins* v. *United States,* 171 U. S. 578, 597. In *Adair* v. *United States,*

208 U. S. 161, 177, the phrase "Commerce among the several States" was defined as comprehending "traffic, intercourse, trade, navigation, communication, the transit of persons and the transmission of messages by telegraph—indeed, every species of commercial intercourse among the several States." In *Veazie et al.* v. *Moor,* 14 How. 568, 573-574, this court, after saying that the phrase could never be applied to transactions wholly internal, significantly added: "Nor can it be properly concluded, that, because the products of domestic enterprise in agriculture or manufactures, or in the arts, may ultimately become the subjects of foreign commerce, that the control of the means or the encouragements by which enterprise is fostered and protected, is legitimately within the import of the phrase *foreign commerce,* or fairly implied in any investiture of the power to regulate such commerce. A pretension as far reaching as this, would extend to contracts between citizen and citizen of the same State, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries and mines and furnaces of the country; for there is not one of these avocations, the results of which may not become the subjects of foreign commerce, and be borne either by turnpikes, canals, or railroads, from point to point within the several States, towards an ultimate destination, like the one above mentioned. . . ."

The distinction between manufacture and commerce was discussed in *Kidd* v. *Pearson,* 128 U. S. 1, 20, 21, 22; and it was said:

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation —the fashioning of raw materials into a change of form for use. The functions of commerce are different. . . . If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining —in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the

States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are and must be local in all the details of their successful management."

And then, as though foreseeing the present controversy, the opinion proceeds:

"Any movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. On the other hand, any movement toward the local, detailed and incongruous legislation required by such interpretation would be about the widest possible departure from the declared object of the clause in question. Nor this alone. Even in the exercise of the power contended for, Congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market. . . . A situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine."

Chief Justice Fuller, speaking for this court in *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12, 13, said:

"Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. . . .

"It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.

" . . . The regulation of commerce applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles

bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce. . . ."

That commodities produced or manufactured within a state are intended to be sold or transported outside the state does not render their production or manufacture subject to federal regulation under the commerce clause. As this court said in *Coe* v. *Errol*, 116 U. S. 517, 526, "Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State?" It is true that this was said in respect of a challenged power of the state to impose a tax; but the query is equally pertinent where the question, as here, is with regard to the power of regulation. The case was relied upon in *Kidd* v. *Pearson, supra*, p. 26. "The application of the principles above announced", it was there said, "to the case under consideration leads to a conclusion against the contention of the plaintiff in error. The police power of a State is as broad and plenary as its taxing power; and property within the State is subject to the operations of the former so long as it is within the regulating restrictions of the latter."

In *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 259-260, we held that the possibility, or even certainty of exportation of a product or article from a state did not determine it to be in interstate commerce before the commencement of its movement from the state. To hold otherwise "would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined,

because they are in varying percentages destined for and surely to be exported to States other than those of their production."

In *Oliver Iron Co.* v. *Lord,* 262 U. S. 172, 178, we said on the authority of numerous cited cases: "Mining is not interstate commerce, but, like manufacturing, is a local business subject to local regulation and taxation. . . . Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce."

The same rule applies to the production of oil. "Such production is essentially a mining operation and therefore is not a part of interstate commerce even though the product obtained is intended to be and in fact is immediately shipped in such commerce." *Champlin Rfg. Co.* v. *Commission,* 286 U. S. 210, 235. One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale and shipment were originally intended or not, has engaged in two distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce. In respect of the former, he is subject only to regulation by the state; in respect of the latter, to regulation only by the federal government. *Utah Power & L. Co.* v. *Pfost,* 286 U. S. 165, 182. Production is not commerce; but a step in preparation for commerce. *Chassaniol* v. *Greenwood,* 291 U. S. 584, 587.

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 bargaining in respect of these things—whether carried on separately or collectively—each and all constitute intercourse for the purposes of production, not of trade. The latter is a thing apart from the relation of employer and employee, which in all producing occupations is purely local in character. Extraction of coal from the mine is the aim and the completed result of local activities. Commerce in the coal mined is not brought into being by force of these activities, but by negotiations, agreements, and circumstances entirely

apart from production. Mining brings the subject matter of commerce into existence. Commerce disposes of it.

A consideration of the foregoing, and of many cases which might be added to those already cited, renders inescapable the conclusion that the effect of the labor provisions of the act, including those in respect of minimum wages, wage agreements, collective bargaining, and the Labor Board and its powers, primarily falls upon production and not upon commerce; and confirms the further resulting conclusion that production is a purely local activity. It follows that none of these essential antecedents of production constitutes a transaction in or forms any part of interstate commerce. *Schechter Corp.* v. *United States, supra,* p. 542 et seq. Everything which moves in interstate commerce has had a local origin. Without local production somewhere, interstate commerce, as now carried on, would practically disappear. Nevertheless, the local character of mining, of manufacturing and of crop growing is a fact, and remains a fact, whatever may be done with the products.

Certain decisions of this court, superficially considered, seem to lend support to the defense of the act now under review. But upon examination, they will be seen to be inapposite. Thus, *Coronado Co.* v. *U. M. Workers,* 268 U. S. 295, 310, and kindred cases, involved conspiracies to restrain interstate commerce in violation of the Anti-trust laws. The acts of the persons involved were local in character; but the intent was to restrain interstate commerce, and the means employed were calculated to carry that intent into effect. Interstate commerce was the direct object of attack; and the restraint of such commerce was the necessary consequence of the acts and the immediate end in view. *Bedford Co.* v. *Stone Cutters Assn.,* 274 U. S. 37, 46. The applicable law was concerned not with the character of the acts or of the means employed, which might be in and of themselves purely local, but with the intent and direct operation of those acts and means upon interstate commerce. "The mere reduction in the supply of an article", this court said in the *Coronado Co.* case, *supra,* p. 310, "to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act."

Another group of cases, of which *Swift and Company* v. *United States,* 196 U. S. 375, is an example, rest upon the circumstance that the acts in question constituted direct interferences with the "flow" of commerce among the states. In the *Swift* case, livestock was consigned and delivered to stockyards—not as a place of final destination, but, as the court said in *Stafford* v. *Wallace,* 258 U. S. 495, 516, "a throat through which the current flows". The sales which ensued merely changed the private interest in the subject of the current without interfering with its continuity. *Industrial Ass'n* v. *United States,* 268 U. S. 64, 79. It was nowhere suggested in these cases that the interstate commerce power extended to the growth or production of the things which, after production, entered the flow. If the court had held that the raising of the cattle, which were involved in the *Swift* case, including the wages paid to and working conditions of the herders and others employed in the business, could be regulated by Congress, that decision and decisions holding similarly would be in point; for it is that situation, and not the one with which the court actually dealt, which here concerns us.

The distinction suggested is illustrated by the decision in *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.,* 249 U. S. 134, 150-152. That case dealt with orders of a state commission fixing railroad rates. One of the questions considered was whether certain shipments of rough material from the forest to mills in the same state for manufacture, followed by the forwarding of the finished product to points outside the state, was a continuous movement in interstate commerce. It appeared that when the rough material reached the mills it was manufactured into various articles which were stacked or placed in kilns to dry, the processes occupying several months. Markets for the manufactured articles were almost entirely in other states or in foreign countries. About 95% of the finished articles was made for outbound shipment. When the rough material was shipped to the mills, it was expected by the mills that this percentage of the finished articles would be so sold and shipped outside the state. And all of them knew and intended that this 95% of the finished product would be so sold and shipped. This court held that the state order did not interfere with interstate commerce, and that the *Swift* case was not in point; as it is not in point here.

The restricted field covered by the *Swift* and kindred cases is illustrated by the *Schechter* case, *supra,* p. 543. There the commodity in question, although shipped from another state, had come to rest in the state of its destination, and, as the court pointed out, was no longer in a current or flow of interstate commerce. The *Swift* doctrine was rejected as inapposite. In the *Schechter* case the flow had ceased. Here it had not begun. The difference is not one of substance. The applicable principle is the same.

But § 1 (the preamble) of the act now under review declares that all production and distribution of bituminous coal "bear upon and directly affect its interstate commerce"; and that regulation thereof is imperative for the protection of such commerce. The contention of the government is that the labor provisions of the act may be sustained in that view.

That the production of every commodity intended for interstate sale and transportation has some effect upon interstate commerce may be, if it has not already been, freely granted; and we are brought to the final and decisive inquiry, whether here that effect is direct, as the "preamble" recites, or indirect. The distinction is not formal, but substantial in the highest degree, as we pointed out in the *Schechter* case, *supra,* p. 546, *et seq.* "If the commerce clause were construed", we there said, "to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control." It was also pointed out, p. 548, that "the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system."

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. The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect,

but entirely upon the manner in which the effect has been brought about. If the production by one man of a single ton of coal intended for interstate sale and shipment, and actually so sold and shipped, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined. It is quite true that rules of law are sometimes qualified by considerations of degree, as the government argues. But the matter of degree has no bearing upon the question here, since that question is not—What is the *extent* of the local activity or condition, or the *extent* of the effect produced upon interstate commerce? but—What is the *relation* between the activity or condition and the effect?

Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is *greatly* affected thereby. But, in addition to what has just been said, the conclusive answer is that the evils are all local evils over which the federal government has no legislative control. The relation of employer and employee is a local relation. At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character.

The government's contentions in defense of the labor provisions are really disposed of adversely by our decision in the *Schechter* case, *supra*. The only perceptible difference between that case and this is that in the *Schechter* case, the federal power was asserted with respect to commodities which had come to rest after their interstate transportation; while here, the case deals with commodities at rest before interstate commerce has begun. That difference is without significance. The federal regulatory power ceases when interstate

commercial intercourse ends; and, correlatively, the power does not attach until interstate commercial intercourse begins. There is no basis in law or reason for applying different rules to the two situations. No such distinction can be found in anything said in the *Schechter* case. On the contrary, the situations were recognized as akin. The opinion, at page 546, after calling attention to the fact that if the commerce clause could be construed to reach transactions having an indirect effect upon interstate commerce the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government, we said: "Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control." And again, after pointing out that hours and wages have no direct relation to interstate commerce and that if the federal government had power to determine the wages and hours of employees in the internal commerce of a state because of their relation to cost and prices and their indirect effect upon interstate commerce, we said, p. 549: "All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation of cost would be a question of discretion and not of power." A reading of the entire opinion makes clear, what we now declare, that the want of power on the part of the federal government is the same whether the wages, hours of service, and working conditions, and the bargaining about them, are related to production before interstate commerce has begun, or to sale and distribution after it has ended.

Sixth. That the act, whatever it may be in form, in fact is compulsory clearly appears. We have already discussed § 3, which imposes the excise tax as a penalty to compel "acceptance" of the code. Section 14 provides that the United States shall purchase no bituminous coal produced at any mine where the producer has not complied with the provisions of the code; and that each contract made by the United States shall contain a provision that the contractor will buy no bituminous coal to use on, or in the carrying out of, such contract unless the producer be a member of the code, as certified by the coal commission. In the light of these provisions we come to a consideration of subdivision (g) of Part III of § 4, dealing with "Labor Relations".

That subdivision delegates the power to fix maximum hours of labor to a part of the producers and the miners—namely, "the producers of more than two-thirds of the annual national tonnage production for the preceding calendar year" and "more than one-half of the mine workers employed"; and to producers of more than two-thirds of the district annual tonnage during the preceding calendar year and a majority of the miners, there is delegated the power to fix minimum wages for the district or group of districts. The effect, in respect of wages and hours, is to subject the dissentient minority, either of producers or miners or both, to the will of the stated majority, since, by refusing to submit, the minority at once incurs the hazard of enforcement of the drastic compulsory provisions of the act to which we have referred. To "accept", in these circumstances, is not to exercise a choice, but to surrender to force.

The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. The record shows that the conditions of competition differ among the various localities. In some, coal dealers compete among themselves. In other localities, they also compete with the mechanical production of electrical energy and of natural gas Some coal producers favor the code; others oppose it; and the record clearly indicates that this diversity of view arises from their conflicting and even antagonistic interests. The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. *Schechter Corp* v. *United States,* 295 U. S. at p. 537; *Eubank* v. *Richmond,* 226 U. S. 137, 143; *Seattle Trust Co.* v. *Roberge,* 278 U. S. 116, 121-122.

Seventh. Finally, we are brought to the price-fixing provisions of the code. The necessity of considering the question of their constitutionality will depend upon whether they are separable from the labor provisions so that they can stand independently. Section 15 of the act provides:

"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."

In the absence of such a provision, the presumption is that the legislature intends an act to be effective as an entirety—that is to say, the rule is against the mutilation of a statute; and if any provision be unconstitutional, the presumption is that the remaining provisions fall with it. The effect of the statute is to reverse this presumption in favor of inseparability, and create the opposite one of separability. Under the non-statutory rule, the burden is upon the supporter of the legislation to show the separability of the provisions involved. Under the statutory rule, the burden is shifted to the assailant to show their inseparability. But under either rule, the determination, in the end, is reached by applying the same test—namely, What was the intent of the lawmakers?

Under the statutory rule, the presumption must be overcome by considerations which establish "the clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains", *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 241 *et seq.;* or, as stated in *Utah Power & L. Co.* v. *Pfost*, 286 U. S. 165, 184-185, "the clear probability that the legislature would not have been satisfied with the statute unless it had included the invalid part." Whether the provisions of a statute are so interwoven that one being held invalid the others must fall, presents a question of statutory construction and of legislative intent, to the determination of which the statutory provision becomes an aid. "But it is an aid merely; not an inexorable command." *Dorchy* v. *Kansas*, 264 U. S. 286, 290. The presumption in favor of separability does not authorize the court to give the statute "an effect altogether different from that sought by the measure viewed as a whole." *Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 362.

The statutory aid to construction in no way alters the rule that in order to hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent

upon one another. Perhaps a fair approach to a solution of the problem is to suppose that while the bill was pending in Congress a motion to strike out the labor provisions had prevailed, and to inquire whether, in that event, the statutes should be so construed as to justify the conclusion that Congress, notwithstanding, probably would not have passed the price-fixing provisions of the code.

Section 3 of the act, which provides that no producer shall, by accepting the code or the drawback of taxes, be estopped from contesting the constitutionality of any provision of the code is thought to aid the separability clause. But the effect of that provision is simply to permit the producer to challenge any provision of the code despite his acceptance of the code or the drawback. It seems not to have anything to do with the question of separability.

With the foregoing principles in mind, let us examine the act itself. The title of the act and the preamble demonstrate, as we have already seen, that Congress desired to accomplish certain general purposes therein recited. To that end it created a commission, with mandatory directions to formulate into a working agreement the provisions set forth in § 4 of the act. That being done, the result is a code. Producers accepting and operating under the code are to be known as code members; and § 4 specifically requires that, in order to carry out the policy of the act, "the code shall contain the following conditions, provisions, and obligations . . .", which are then set forth. No power is vested in the commission, in formulating the code, to omit any of these conditions, provisions, or obligations. The mandate to include them embraces all of them. Following the requirement just quoted, and, significantly, *in the same section* (*International Textbook Co.* v. *Pigg*, 217 U. S. 91, 112-113) under appropriate headings, the price-fixing and labor-regulating provisions are set out in great detail. These provisions, plainly meant to operate together and not separately, constitute the means designed to bring about the stabilization of bituminous-coal production, and thereby to regulate or affect interstate commerce in such coal. The first clause of the title is: "To stabilize the bituminous coal-mining industry and promote its interstate commerce".

Thus, the primary contemplation of the act is stabilization of the industry through the regulation of labor *and* the regulation of prices; for, since both were adopted, we must conclude that both were thought essential. The regulations of labor on the one hand

and prices on the other furnish mutual aid and support; and their associated force—not one or the other but both combined—was deemed by Congress to be necessary to achieve the end sought. The statutory mandate for a code upheld by two legs at once suggests the improbability that Congress would have assented to a code supported by only one.

This seems plain enough; for Congress must have been conscious of the fact that elimination of the labor provisions from the act would seriously impair, if not destroy, the force and usefulness of the price provisions. The interdependence of wages and prices is manifest. Approximately two-thirds of the cost of producing a ton of coal is represented by wages. Fair prices necessarily depend upon the cost of production; and since wages constitute so large a proportion of the cost, prices cannot be fixed with any proper relation to cost without taking into consideration this major element. If one of them becomes uncertain, uncertainty with respect to the other necessarily ensues.

So much is recognized by the code itself. The introductory clause of Part III declares that the conditions respecting labor relations are "To effectuate the purposes of this Act". And subdivision (a) of Part II, quoted in the forepart of this opinion, reads in part: "In order to sustain the stabilization of wages, working conditions, and maximum hours of labor, said prices shall be established so as 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 the total costs, per net ton . . ." Thus wages, hours of labor, and working conditions are to be so adjusted as to effectuate the purposes of the act; and prices are to be so regulated as to *stabilize* wages, working conditions, and hours of labor which have been or are to be fixed under the labor provisions. The two are so woven together as to render the probability plain enough that uniform prices, in the opinion of Congress, could not be fairly fixed or effectively regulated, without also regulating these elements of labor which enter so largely into the cost of production.

These two sets of requirements are not like a collection of bricks, some of which may be taken away without disturbing the others, but rather are like the interwoven threads constituting the warp and woof of a fabric, one set of which cannot be removed without fatal consequences to the whole. Paraphrasing the words of this

court in *Butts* v. *Merchants Transp'n Co.*, 230 U. S. 126, 133, we inquire—What authority has this court, by construction, to convert the manifest purpose of Congress to regulate production by the mutual operation and interaction of fixed wages and fixed prices into a purpose to regulate the subject by the operation of the latter alone? Are we at liberty to say from the fact that Congress has adopted an entire integrated system that it probably would have enacted a doubtfully-effective fraction of the system? The words of the concurring opinion in the *Schechter case*, 295 U. S. at pages 554-555, are pertinent in reply. "To take from this code the provisions as to wages and the hours of labor is to destroy it altogether. . . . Wages and the hours of labor are essential features of the plan, its very bone and sinew. There is no opportunity in such circumstances for the severance of the infected parts in the hope of saving the remainder." The conclusion is unavoidable that the price-fixing provisions of the code are so related to and dependent upon the labor provisions as conditions, considerations or compensations, as to make it clearly probable that the former being held bad, the latter would not have been passed. The fall of the former, therefore, carries down with it the latter. *International Textbook Co.* v. *Pigg, supra*, p. 113; *Warren* v. *Mayor and Aldermen of Charlestown*, 2 Gray [Mass.] 84, 98-99.

The price-fixing provisions of the code are thus disposed of without coming to the question of their constitutionality; but neither this disposition of the matter, nor anything we have said, is to be taken as indicating that the court is of opinion that these provisions, if separately enacted, could be sustained.

If there be in the act provisions, other than those we have considered, that may stand independently, the question of their validity is left for future determination when, if ever, that question shall be presented for consideration.

The decrees in Nos. 636, 649, and 650 must be reversed and the causes remanded for further consideration in conformity with this opinion. The decree in No. 651 will be affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES.

Nos. 636, 651, 649 and 650.—October Term, 1935.

James Walter Carter, Petitioner, 636 *vs.* Carter Coal Company, George L. Carter, as Vice-President and a Director of said Company, et al. Guy T. Helvering, et al., Petitioners, 651 *vs.* James Walter Carter, et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.
R. C. Tway Coal Company, Kentucky Cardinal Coal Corporation, Harlan-Wallins Coal Corporation, et al., Petitioners, 649 *vs.* Selden R. Glenn, Individually and as Collector of Internal Revenue for the District of Kentucky.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.
R. C. Tway Coal Company, R. C. Tway, President and Directors of R. C. Tway Coal Company, et al., Petitioners, 650 *vs.* C. H. Clark.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[May 18, 1936.]

Separate opinion of Mr. Chief Justice Hughes.

I agree that the stockholders were entitled to bring their suits; that, in view of the question whether any part of the Act could be sustained, the suits were not premature; that the so-called tax is not a real tax, but a penalty; that the constitutional power of the Federal Government to impose this penalty must rest upon the commerce clause, as the Government concedes; that production—in this case mining—which precedes commerce, is not itself commerce; and that the power to regulate commerce among the

several States is not a power to regulate industry within the State.

The power to regulate interstate commerce embraces the power to protect that commerce from injury, whatever may be the source of the dangers which threaten it, and to adopt any appropriate means to that end. *Second Employers' Liability Cases,* 223 U. S. 1, 51. Congress thus has adequate authority to maintain the orderly conduct of interstate commerce and to provide for the peaceful settlement of disputes which threaten it. *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548, 570. But Congress may not use this protective authority as a pretext for the exertion of power to regulate activities and relations within the States which affect interstate commerce only indirectly. Otherwise, in view of the multitude of indirect effects, Congress in its discretion could assume control of virtually all the activities of the people to the subversion of the fundamental principle of the Constitution. If the people desire to give Congress the power to regulate industries within the State, and the relations of employers and employees in those industries, they are at liberty to declare their will in the appropriate manner, but it is not for the Court to amend the Constitution by judicial decision.

I also agree that subdivision (g) of Part III of the prescribed Code is invalid upon three counts: (1) It attempts a broad delegation of legislative power to fix hours and wages without standards or limitation. The Government invokes the analogy of legislation which becomes effective on the happening of a specified event, and says that in this case the event is the agreement of a certain proportion of producers and employees, whereupon the other producers and employees become subject to legal obligations accordingly. I think that the argument is unsound and is pressed to the point where the principle would be entirely destroyed. It would remove all restrictions upon the delegation of legislative power, as the making of laws could thus be referred to any designated officials or private persons whose orders or agreements would be treated as "events", with the result that they would be invested with the force of law having penal sanctions. (2) The provision permits a group of producers and employees, according to their own views of expediency, to make rules as to hours and wages for other producers and employees who were not parties to the agreement. Such a provision, apart from the mere question of the

delegation of legislative power, is not in accord with the requirement of due process of law which under the Fifth Amendment dominates the regulations which Congress may impose. (3) The provision goes beyond any proper measure of protection of interstate commerce and attempts a broad regulation of industry within the State.

But that is not the whole case. The Act also provides for the regulation of the prices of bituminous coal sold in interstate commerce and prohibits unfair methods of competition in interstate commerce. Undoubtedly transactions in carrying on interstate commerce are subject to the federal power to regulate that commerce and the control of charges and the protection of fair competition in that commerce are familiar illustrations of the exercise of the power, as the Interstate Commerce Act, the Packers and Stockyards Act, and the Anti-Trust Acts abundantly show. The Court has repeatedly stated that the power to regulate interstate commerce among the several States is supreme and plenary. *Minnesota Rate Cases,* 230 U. S. 352, 398. It is "complete in itself, and may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution". *Gibbons* v. *Ogden,* 9 Wheat. 1, 196. We are not at liberty to deny to the Congress, with respect to interstate commerce, a power commensurate with that enjoyed by the States in the regulation of their internal commerce. See *Nebbia* v. *New York,* 291 U. S. 502.

Whether the policy of fixing prices of commodities sold in interstate commerce is a sound policy is not for our consideration. The question of that policy, and of its particular applications, is for Congress. The exercise of the power of regulation is subject to the constitutional restriction of the due process clause, and if in fixing rates, prices or conditions of competition, that requirement is transgressed, the judicial power may be invoked to the end that the constitutional limitation may be maintained. *Interstate Commerce Commission* v. *Union Pacific R. R. Co.,* 222 U. S. 541, 547; *St. Joseph Stock Yards Co.* v. *United States,* decided April 27, 1936.

In the legislation before us, Congress has set up elaborate machinery for the fixing of prices of bituminous coal sold in interstate commerce. That provision is attacked *in limine.* Prices have not yet been fixed. If fixed, they may not be contested. If contested, the Act provides for review of the administrative ruling.

If in fixing prices, due process is violated by arbitrary, capricious or confiscatory action, judicial remedy is available. If an attempt is made to fix prices for sales in intrastate commerce, that attempt will also be subject to attack by appropriate action. In that relation it should be noted that in the *Carter* cases, the court below found that substantially all the coal mined by the Carter Coal Company is sold f.o.b. mines and is transported into States other than those in which it is produced for the purpose of filling orders obtained from purchasers in such States. Such transactions are in interstate commerce. *Savage* v. *Jones,* 225 U. S. 501, 520. The court below also found that "the interstate distribution and sale and the intrastate distribution and sale" of the coal are so "intimately and inextricably connected" 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." Substantially the same situation is disclosed in the *Kentucky* cases. In that relation, the Government invokes the analogy of transportation rates. *The Shreveport Case,* 234 U. S. 342; *Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563. The question will be the subject of consideration when it arises in any particular application of the Act.

Upon what ground, then, can it be said that this plan for the regulation of transactions in interstate commerce in coal is beyond the constitutional power of Congress? The Court reaches that conclusion in the view that the invalidity of the labor provisions requires us to condemn the Act in its entirety. I am unable to concur in that opinion. I think that the express provisions of the Act preclude such a finding of inseparability.

This is admittedly a question of statutory construction; and hence we must search for the intent of Congress. And in seeking that intent we should not fail to give full weight to what Congress itself has said upon the very point. The Act provides (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."

That is a flat declaration against treating the provisions of the Act as inseparable. It is a declaration which Congress was competent to make. It is a declaration which reverses the presumption of indivisibility and creates an opposite presumption. *Utah*

Power & Light Co. v. *Pfost*, 286 U. S. 165, 184.

The above quoted provision does not stand alone. Congress was at pains to make a declaration of similar import with respect to the provisions of the Code (sec. 3):

"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".

This provision evidently contemplates, when read with the one first quoted, that a stipulation of the Code may be found to be unconstitutional and yet that its invalidity shall not be regarded as affecting the obligations attaching to the remainder.

I do not think that the question of separability should be determined by trying to imagine what Congress would have done if certain provisions found to be invalid were excised. That, if taken broadly, would lead us into a realm of pure speculation. Who can tell amid the host of divisive influences playing upon the legislative body what its reaction would have been to a particular excision required by a finding of invalidity? The question does not call for speculation of that sort but rather for an inquiry whether the provisions are inseparable by virtue of inherent character. That is, when Congress states that the provisions of the Act are not inseparable and that the invalidity of any provision shall not affect others, we should not hold that the provisions are inseparable unless their nature, by reason of an inextricable tie, demands that conclusion.

All that is said in the preamble of the Act, in the directions to the Commission which the Act creates, and in the stipulations of the Code, is subject to the explicit direction of Congress that the provisions of the statute shall not be treated as forming an indivisible unit. The fact that the various requirements furnish to each other mutual aid and support does not establish indivisibility. The purpose of Congress, plainly expressed, was that if a part of that aid were lost, the whole should not be lost. Congress desired that the Act and Code should be operative so far as they met the constitutional test. Thus we are brought, as I have said, to the question whether, despite this purpose of Congress, we must treat the marketing provisions and the labor provisions as inextricably tied together because of their nature. I find no such tie.

The labor provisions are themselves separated and placed in a separate part (Part III) of the Code. It seems quite clear that the validity of the entire Act cannot depend upon the provisions as to hours and wages in paragraph (g) of Part III. For what was contemplated by that paragraph is manifestly independent of the other machinery of the Act, as it cannot become effective unless the specified proportion of producers and employees reach an agreement as to particular wages and hours. And the provision for collective bargaining in paragraphs (a) and (b) of Part III is apparently made separable from the Code itself by section 9 of the Act, providing, in substance, that the employees of all producers shall have the right of collective bargaining even when producers do not accept or maintain the Code.

The marketing provisions (Part II) of the Code naturally form a separate category. The interdependence of wages and prices is no clearer in the coal business than in transportation. But the broad regulation of rates in order to stabilize transportation conditions has not carried with it the necessity of fixing wages. Again, the requirement, in paragraph (a) of Part II that district boards shall establish prices so as to yield a prescribed "return per net ton" for each district in a minimum price area, in order "to sustain the stabilization of wages, working conditions and maximum hours of labor", does not link the marketing provisions to the labor provisions by an unbreakable bond. Congress evidently desired stabilization through both the provisions relating to marketing and those relating to labor, but the setting up of the two sorts of requirements did not make the one dependent upon the validity of the other. It is apparent that they are not so interwoven that they cannot have separate operation and effect. The marketing provisions in relation to interstate commerce can be carried out as provided in Part II without regard to the labor provisions contained in Part III. That fact, in the light of the congressional declaration of separability, should be considered of controlling importance.

In this view, the Act, and the Code for which it provides, may be sustained in relation to the provisions for marketing in interstate commerce, and the decisions of the courts below, so far as they accomplish that result, should be affirmed.

PSF
Supreme
Court

FOR IMMEDIATE RELEASE

DEPARTMENT OF JUSTICE

May 18, 1936

With reference to the decision of the Supreme Court in the Guffey Coal Act case, Attorney General Cummings said:

"A careful study of the majority opinion and of the other two opinions will have to be made before it can be ascertained what course may still be open to the Government in dealing with the problems of the bituminous coal mining industry.

"It should not be overlooked that the opinion of the three dissenting Justices, and the separate opinion of the Chief Justice, constitute the first clear expression by members of the Supreme Court upholding the constitutionality of price ~~fixing~~ control for commodities moving in interstate commerce. Important, also, is the statement in the opinion of Mr. Justice Cardozo 'that the prevailing opinion leaves the price provisions open for consideration in the future.'"

SUMMARY OF THE GUFFEY COAL ACT DECISIONS

The majority opinion rendered by Mr. Justice Sutherland holds the wages and hours provisions of the statute unconstitutional under the commerce clause and as an unconstitutional delegation of power. It does not pass upon the constitutionality of the price-fixing provisions, but holds that since they are inseparable from the wages and hours provisions both the price and the wages and hours provisions must be held invalid. The following points are contained in the majority opinion:

(1) That the stockholders were entitled to maintain these suits;

(2) That the suits were not premature;

(3) That the 15% tax is not a tax but a penalty;

(4) That the Federal Government does not have power to legislate with respect to matters not expressly confided to it and that Congress possesses no power to legislate with respect to this subject unless this power be found in the commerce clause;

(5) The labor provisions of the Act cannot be upheld as an exercise of the interstate commerce power. Mining does not constitute commerce. The labor provisions of the Act, including those with respect to wages and collective bargaining, primarily deal with production and not commerce. Working conditions are local conditions and the controversy and evils which it is the purpose of the Act to regulate and minimize are local. Such effect as they may have upon commerce, however extensive ~~they~~ it may be, is secondary and indirect. The Schechter opinion is conclusive on this point;

(6) The wages and hours provisions constitute an unlawful delegation of power to private groups;

(7) The price-fixing provisions are inseparable from the labor provisions, consequently they must be held invalid, but no opinion is expressed with regard to their constitutionality although the opinion states that it is not to be taken as indicated that these provisions if separately enacted could be sustained. The opinion also states that if there be provisions other than those considered that may stand independently the question of their validity is left for future

determination.

The separate opinion of the Chief Justice agrees with the majority that the wages and hours provisions are unconstitutional because they contain an unlawful delegation of power and as a violationof due process and because they "go beyond any proper measure of protection of interstate commerce". He holds, however, that Congress does have the power to fix the price of commodities moving in interstate commerce and disagrees with the majority on the question of separability, holding that the price provisions are separable, consequently he votes for the affirmance of the decisions below in so far as they relate to the price-fixing provisions for marketing in interstate commerce.

Mr. Justice Cardozo dissented and was joined by Mr. Justice Brandeis and Mr. Justice Stone. This opinion held

(1) that the price-fixing provisions of the statute are valid as applied to transactions in interstate commerce and to those in intrastate commerce which directly affect interstate commerce;

(2) the price provisions are separable from the labor provisions;

(3) the price provisions being valid, the complainants are under a duty to come in under the code;

(4) the suits are premature in so far as they seek a declaration of the validity of the labor provisions. No opinion is expressed as to this aspect of the case. They should be considered only when there is a threat or possibility of imminent enforcement. Consequently these three justices vote for affirmance of the decisions below.

A. H. Feller

PSF: Supreme Court

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fiscal affairs of all or any political subdivisions thereof, and whenever such agency has assumed such supervision or control over any political subdivision, then no petition of such political subdivision may be received hereunder unless accompanied by the written approval of such agency, and no plan of readjustment shall be put into temporary effect or finally confirmed without the written approval of such agency of such plans."

We need not consider this Act in detail or undertake definitely to classify it. The evident intent was to authorize a federal court to require objecting creditors to accept an offer by a public corporation to compromise, scale down, or repudiate its indebtedness without the surrender of any property whatsoever. The Act has been assailed upon the ground that it is not in any proper sense a law on the subject of bankruptcies and therefore is beyond the power of Congress; also because it conflicts with the Fifth Amendment. Passing these, and other objections, we assume for this discussion that the enactment is adequately related to the general "subject of bankruptcies." See *Hanover National Bank* v. *Moyses*, 186 U. S. 181; *Continental Illinois N. B. & T. Co.* v. *C., R. I. & P. R. Co.*, 294 U. S. 648; *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555.

The respondent was organized in 1914 as Cameron County Irrigation District No. One, to furnish water for irrigation and domestic uses; in 1919, it became the Cameron County Water Improvement District No. One, all as authorized by statutes passed under § 52, Art. 3, Constitution of Texas, which permits creation of political divisions of the State, with power to sue and be sued, issue bonds, levy and collect taxes. An amendment to the Constitution—§ 59a, Art. 16—(October 2, 1917) declares the conservation and development of all the natural resources of the State, including reclamation of lands and their preservation, are "public rights and duties." Most of the bonds now in question were issued during 1914; the remainder in 1919.

By Act approved April 27, 1935, the Texas Legislature declared that municipalities, political subdivisions taxing districts, &c., might proceed under the Act of Congress approved May 24, 1934.

It is plain enough that respondent is a political subdivision of the State, created for the local exercise of her sovereign powers, and that the right to borrow money is essential to its

operations. *Houck* v. *Little River Drainage District,* 239 U. S. 254, 261-262; *Perry* v. *United States,* 294 U. S. 330. Its fiscal affairs are those of the State, not subject to control or interference by the National Government, unless the right so to do is definitely accorded by the Federal Constitution.

The pertinent doctrine, now firmly established, was stated through Mr. Chief Justice Chase in *Texas* v. *White,* 7 Wall. 700, 725.—

> "We have already had occasion to remark at this term, that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

Collector v. *Day,* 11 Wall. 113, 125, 126—

> "Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired; should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence."

In *Indian Motocycle Company* v. *United States*, 283 U. S. 570, 575, *et seq.*, relevant cases are collected and the following conclusion announced—

> "This principle is implied from the independence of the National and State governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system."

Notwithstanding the broad grant of power "to lay and collect taxes," opinions here plainly show that Congress could not levy any tax on the bonds issued by the respondent or upon income derived therefrom. So to do would be an unwarranted interference with fiscal matters of the State—essentials to her existence. Many opinions explain and support this view. In *United States* v. *Railroad Company*, 17 Wall. 322, 329, this court said—

> "A municipal corporation like the city of Baltimore is a representative not only of the State, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure and may, through its legislature or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence. As a portion of the State in the exercise of a limited portion of the powers of the State, its revenues, like those of the State, are not subject to taxation."

See also *Pollock* v. *Farmers, &c. Co.*, 157 U. S. 429, 586; 158 U. S. 601, 630.

The power "To establish . . . uniform Laws on the subject of Bankruptcies" can have no higher rank or importance in our scheme of government than the power "to lay and collect taxes." Both are granted by the same section of the Constitution, and we find no reason for saying that one is impliedly limited by the necessity of preserving independence of the States, while the other is not. Accordingly, as application of the statutory provisions now before us might materially restrict respondent's control over its fiscal affairs, the trial court rightly declared them invalid.

If federal bankruptcy laws can be extended to respondent, why not to the State? If voluntary proceedings may be permitted, so may involuntary ones, subject of course to any inhibition of the Eleventh Amendment. *Matter of Quarles*, 158 U. S. 532, 535. If the State were proceeding under a statute like the present one, with

terms broad enough to include her, apparently the problem would not be materially different. Our special concern is with the existence of the power claimed—not merely the immediate outcome of what has already been attempted. And it is of the first importance that due attention be given to the results which might be brought about by the exercise of such a power in the future.

The especial purpose of all bankruptcy legislation is to interfere with the relations between the parties concerned—to change, modify or impair the obligation of their contracts. The statute before us expresses this design in plain terms. It undertakes to extend the supposed power of the Federal Government incident to bankruptcy over any embarrassed district which may apply to the court. See *Perry* v. *United States,* 294 U. S. 330, 353.

If obligations of States or their political subdivisions may be subjected to the interference here attempted, they are no longer free to manage their own affairs; the will of Congress prevails over them; although inhibited, the right to tax might be less sinister. And really the sovereignty of the State, so often declared necessary to the federal system, does not exist. *McCulloch* v. *Maryland,* 4 Wheat. 316, 430. *Farmers Bank* v. *Minnesota,* 232 U. S. 516, 526.

The Constitution was careful to provide that "No State shall pass any Law impairing the Obligation of Contracts." This she may not do under the form of a bankruptcy act or otherwise. *Sturges* v. *Crowninshield,* 4 Wheat. 122, 191. Nor do we think she can accomplish the same end by granting any permission necessary to enable Congress so to do.

Neither consent nor submission by the States can enlarge the powers of Congress; none can exist except those which are granted. *United States* v. *Butler,* decided January 6, 1936, 297 U. S. 1. The sovereignty of the State essential to its proper functioning under the Federal Constitution cannot be surrendered; it cannot be taken away by any form of legislation. See *United States* v. *Constantine,* 296 U. S. 287.

Like any sovereignty, a State may voluntarily consent to be sued; may permit actions against her political subdivisions to enforce their obligations. Such proceedings against these subdivisions have often been entertained in federal courts. But nothing in this tends to support the view that the Federal Government, acting under the bankruptcy clause, may impose its will and impair State powers—pass laws inconsistent with the idea of sovereignty.

The power to regulate commerce is necessarily exclusive in certain fields and, to be successful, must prevail over obstructive regulations by the State. But, as pointed out in *Houston, etc. Ry.* v. *United States*, 234 U. S. 342, 353, "This is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such, but that it does possess the power to foster and protect interstate commerce." No similar situation is before us.

The difficulties arising out of our dual form of government, and the opportunities for differing opinions concerning the relative rights of State and National Governments are many; but for a very long time this court has steadfastly adhered to the doctrine that the taxing power of Congress does not extend to the States or their political subdivisions. The same basic reasoning which leads to that conclusion, we think, requires like limitation upon the power which springs from the bankruptcy clause. *United States* v. *Butler, supra.*

The challenge to the validity of the statute must be sustained. The judgment of the Circuit Court of Appeals is reversed. The cause will be returned to the District Court for further action, consistent with this opinion.

Reversed.

power exists, there has been no attempt to exercise it. There is room at least for argument that within the meaning of the Constitution the bankruptcy concept does not embrace the states themselves. In the public law of the United States a state is a sovereign or at least a quasi-sovereign. Not so, a local governmental unit, though the state may have invested it with governmental power. Such a governmental unit may be brought into court against its will without violating the Eleventh Amendment. *County of Lincoln* v. *Luning*, 133 U. S. 529; *Hopkins* v. *Clemson College*, 221 U. S. 636, 645. It may be subjected to mandamus or to equitable remedies. See, e. g., *Norris* v. *Montezuma Valley Irrigation District*, 248 Fed. 369, 372; *Tyler County* v. *Town*, 23 F. (2d) 371, 373. "Neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the State alone by virtue of its sovereignty." *Hopkins* v. *Clemson College, supra.*

No question as to the merits of any plan of composition is before us at this time. *Abrams* v. *Van Schaick*, 293 U. S. 188. Attention, however, may be directed to the fact that by the terms of the statute (subdivision c (11)), the judge "shall not, by any order or decree, in the proceeding or otherwise, interfere with (a) any of the political or governmental powers of the taxing district, or (b) any of the property or revenues of the taxing district necessary in the opinion of the judge for essential governmental purposes, or (c) any income-producing property, unless the plan of readjustment so provides", and that "the taxing district shall be heard on all questions." These restrictions upon remedies do not take from the statute its quality as one affecting the "subject of Bankruptcies", which, as already pointed out, includes a readjustment of the terms of the debtor-creditor relation, though there are no assets to be distributed. On the other hand, the restrictions are important as indicating the care with which the governmental powers of the state and its subdivisions are maintained inviolate.

The statute is constitutional, and the decree should be affirmed.

The CHIEF Justice, Mr. Justice Brandeis and Mr. Justice STONE join in this opinion.

SUPREME COURT OF THE UNITED STATES.

No. 859.—October Term, 1935.

C. L. Ashton, et al., Petitioners,
vs.
Cameron County Water Improvement District No. One.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 25, 1936.]

Mr. Justice Cardozo, dissenting.

The question is a narrow one: Is there power in the Congress under the Constitution of the United States to permit local governmental units generally, and irrigation or water improvement districts in particular, to become voluntary bankrupts with the consent of their respective states?

Cameron County Water Improvement District Number One is a public corporation created by the laws of Texas. It has issued bonds for the construction of a canal system, which bonds are outstanding in the amount of $802,000. Default has been suffered to the extent of $147,000, either for principal or for interest, upon its obligations now matured. But its own indebtedness is only a part of the financial burden that oppresses it. The bonded debt of other municipalities is a superior lien upon the property in the District for $10,386,000, and accumulated interest. The population is mainly agricultural. The farmers have been unable by reason of the great depression to make a living from their farms, and unable to pay their taxes in appreciable amounts. The District has made diligent effort to enforce collections, but without success. When it has attempted to foreclose its liens, it has been compelled for lack of bidders to buy the lands in and pay the court costs. After buying the lands in, it has been unable to get rid of them, for they have been subject to other tax liens prior to its own. The defaults are steadily mounting. For the year 1932, they were 63%; for the year 1933, 88.9%. The average market value of lands in the District does not exceed $75 per acre; and the total bonded debt per acre, principal and interest, is approximately $100. In these circumstances little good can come of levying more taxes to pyra-

mid the existing structure. The remedies of bondholders are nominal, not real.

What is true of Cameron County Water Improvement District Number One is true in essentials of thousands of other public corporations in widely scattered areas. The hearings by committees of the Congress before the passage of the statute exhibit in vivid fashion the breadth and depth of the mischief which the statute was designed to remedy.[1] In January, 1934, 2019 municipalities, counties and other governmental units were known to be in default.[2] On the list, which was incomplete, were large cities as well as tiny districts. Many regions were included: 41 out of 48 states. Students of government have estimated that on January 1, 1933, out of securities to the extent of $14,000,000,000 issued by units smaller than the states, a billion were in default.[3] The plight of the debtors was bad enough; that of the creditors was even worse. It is possible that in some instances the bonds did not charge the municipalities or other units with personal liability. Even when they did, however, execution could not issue against the property of the debtor held for public uses,[4] and few of the debtors were the owners of anything else. In such circumstances the only remedy was a mandamus whereby the debtor was commanded to tax and tax again. *Rees* v. *City of Watertown,* 19 Wall. 107; *Merriwether* v. *Garrett,* 102 U. S. 472, 501.[5] The command was mere futility when tax values were exhausted. Often the holders of the bonds to the extent of ninety per cent or more were ready to scale down the obligations and put the debtor on its feet. A recalcitrant minority had capacity to block the plan. Nor was there hope for relief from statutes to be enacted by the states. The Constitution prohibits the states from passing any law that will impair the obligation of existing contracts, and a state insolvency act is of no avail as to obligations of the debtor incurred before its passage. *Sturges* v. *Crowninshield,* 4 Wheat. 122. Relief must come from Congress if it is to come from any one.

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[1] See Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 1868 and H. R. 5950, 1934, 73rd Cong., 2nd Sess.; Hearings before the House Committee on the Judiciary on H. R. 1670, etc., 1933, 73rd Cong., 1st Sess.

[2] See Senate Committee Hearings, *supra,* at p. 12.

[3] See the statistics gathered in 46 Harvard Law Review 1317.

[4] For a collection of the cases, see 3 McQuillin, Municipal Corporations, 2nd ed., § 1262.

[5] The cases are collected in 33 Columbia Law Review 28, 44.

The next step in the inquiry has to do with the power of the Congress to eradicate the mischief. Is the Act in question, adopted May 24, 1934, to continue for two years (§§ 78, 79 and 80 of the Bankruptcy Act of 1898, as amended by 48 Stat. 798; 11 U. S. C. §§ 301, 302, 303), and now extended to January 1, 1940 (P. L. 507, approved April 10, 1936), a law "on the subject of Bankruptcies" within Article I, Section VIII, Clause 4 of the Constitution of the United States? Recent opinions of this court have traced the origin and growth of the bankruptcy power. *Continental Illinois National Bank* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648, 668; *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 588. The history is one of an expanding concept. It is, however, an expanding concept that has had to fight its way. *Hanover National Bank* v. *Moyses*, 186 U. S. 181, 184; Charles Warren, Bankruptcy in United States History (1935), p. 9. Almost every change has been hotly denounced in its beginnings as a usurpation of power. Only time or judicial decision has had capacity to silence opposition. At the adoption of the Constitution the English and Colonial bankruptcy laws were limited to traders and to involuntary proceedings. An Act of Congress passed in 1800 added bankers, brokers, factors and underwriters. Doubt was expressed as to the validity of the extension (*Adams* v. *Storey*, 1 Paine 79, 82), which established itself, however, with the passing of the years. *Hanover National Bank* v. *Moyses, supra.* Other classes were brought in later, through the bankruptcy Act of 1841 and its successors, "until now practically all classes of persons and corporations are included." *Continental Illinois National Bank* v. *Chicago, Rock Island & Pacific Ry. Co., supra,* at p. 670. For nearly a century, voluntary proceedings have been permitted at the instance of the debtor as well as involuntary proceedings on the petition of creditors. The amendment, however, was resisted. The debates in Congress bear witness to the intensity of the feeling aroused by its proposal. Warren, *op. cit. supra,* at p. 72 *et seq.* For more than sixty years, the debtor has been able to compel a minority of his creditors to accept a composition if the terms have been approved by a designated majority as well as by the judge. This change like the others had to meet a storm of criticism in Congress and the courts. Warren, *op. cit. supra,* at pp. 44, 45, 118-120; *In re Klein,* reported in a note to *Nelson* v. *Carland*, 1 How. 265, 277; *Louisville Joint Stock Land Bank* v. *Radford, supra.*

Since the enactment of § 77 in March, 1933 (47 Stat. 1474; 11 U. S. C. § 205), a court of bankruptcy has been empowered to reorganize railroad corporations unable to pay their debts as they mature (*Continental Illinois National Bank* v. *Chicago, Rock Island & Pacific Ry. Co., supra*), and since the enactment of § 77 B in June, 1934 (48 Stat. 912; 11 U. S. C. § 207), a like jurisdiction has existed in respect of business corporations generally. The Act for the relief of local governmental units is a stage in an evolutionary process which is likely to be misconceived unless regarded as a whole.[6]

Throughout that evolutionary process, the court has hewn a straight path.[7] Disclaiming a willingness to bind itself by a cramping definition, it has been able none the less to indicate with clearness the main lines of its approach. In substance, it agrees with Cowen, J., who wrote: "I read the constitution thus: 'Congress shall have power to establish uniform laws on the subject of any person's general inability to pay his debts throughout the United States'" (*Kunzler* v. *Kohaus,* 5 Hill 317, 321), and with Blatchford, J., writing in the Matter of Reiman, Fed. Cas. No. 11,673, p. 496, that the subject of bankruptcy cannot properly be defined as "anything less than the subject of the relations between an insolvent or nonpaying . . . debtor, and his creditors, extending to his and their relief." See *Hanover National Bank* v. *Moyses, supra; Continental Illinois National Bank* v. *Chicago, Rock Island & Pacific Ry. Co., supra; Louisville Joint Stock Land Bank* v. *Radford, supra.* Such was Story's view also. "A law on the subject of bankruptcies in the sense of the Constitution is a law making

[6] Warren, Bankruptcy in United States History (1935), p. 9: "The trail [of the bankruptcy clause] is strewn with a host of unsuccessful objections based on constitutional grounds against the enactment of various provisions, all of which are now regarded as perfectly orthodox features of a bankruptcy law. Thus, it was at first contended that, constitutionally, such a law must be confined to the lines of the English statute; next, that it could not discharge prior contracts; next, that a purely voluntary law would be non-uniform and therefore unconstitutional; next, that any voluntary bankruptcy was unconstitutional; next, that there could be no discharge of debts of any class except traders; next, that a bankruptcy law could not apply to corporations; next, that allowance of State exemptions of property would make a bankruptcy law non-uniform; next, that any composition was unconstitutional; next, that there could be no composition without an adjudication in bankruptcy; next, that there could be no sale of mortgaged property free from the mortgage. All these objections, so hotly and frequently asserted from period to period, were overcome either by public opinion or by the Court."

[7] The Emergency Farm Mortgage Act of 1933 was condemned in Louisville Joint Stock Land Bank *v.* Radford, *supra,* because destructive of rights of property protected by the Fifth Amendment.

PSF: Supreme Court

Office of the Attorney General
Washington, D.C.

May 25, 1936.

Dear Mr. President:

The Supreme Court today handed down three favorable and two unfavorable decisions in cases to which the Government was a party.

The following cases were decided in favor of the Government:

In United States v. Knott, State Treasurer, the Court upheld the priority of claims of the United States against funds deposited with State authorities under State statutes by foreign corporations for the general security of local creditors.

United States v. Atlantic Mutual Insurance Company was a suit brought in the Court of Claims to obtain a contribution in general average by reason of the sacrifice of part of certain cargo belonging to the Philippine Government which was being carried on an Army transport when fire broke out on the vessel. The Court upheld the Government's contention that the claim arose when the ship arrived at its destination in January 1919, and that the suit, commenced in 1929, was barred by the six-year statute of limitations.

In Warner Bros. Pictures, Inc., et al. v. United States an appeal was taken to the Supreme Court by certain moving picture companies from a decree of the United States District Court for the Eastern District of Missouri dismissing without prejudice a suit in equity brought by the United States to enjoin the moving picture companies from conspiring to restrain interstate commerce in motion picture films in violation of the Sherman Anti-trust Act. The Court in a per curiam decision upheld a motion by the United States to affirm the decree of the District Court. The Government contended that the appeal was frivolous in view of the well-settled rule that a complainant in equity has an absolute right to dismiss his bill at any time before final decree in the absence of a showing that there would result to the defendants any prejudice other than the mere prospect of future litigation.

provision for persons failing to pay their debts." Story, Commentaries on the Constitution, § 1113, n. 3; cf. Warren, *op. cit. supra,* at p. 68. It is not necessary that the debtor have any property to surrender. One may resort to a court of bankruptcy though one has used up all one's property or though what is left is exempt. *Vulcan Sheet Metal Co.* v. *North Platte Valley Irrigation Co.,* 220 Fed. 106, 108; *In re Hirsch,* 97 Fed. 571, 573; *In re J. M. Ceballos & Co.,* 161 Fed. 445, 450. It is enough that in an omnibus proceeding between a nonpaying debtor on the one side and the creditors on the other, the debtor-creditor relation is to be readjusted or extinguished. Cf. Warren, *op. cit. supra,* at pp. 8, 144.

Cameron Water Improvement District Number One has no assets to surrender. If it shall turn out hereafter that there are any not exempt, the creditors may have them. Cameron Water Improvement District Number One is a debtor in an amount beyond its capacity for payment, and has creditors, the holders of its bonds, who are persuaded that a reduction of the debt will redound to their advantage. Thirty per cent of the creditors had signified their approval of a proposed plan of composition before the filing of the petition, and 66⅔ per cent must give approval before the judge can act.[8] Even then the plan will count for nothing unless the judge upon inquiry shall hold it fair and good. A situation such as this would call very clearly for the exercise by a court of bankruptcy of its distinctive jurisdiction if the debtor were a natural person or a private corporation. Is there anything in the position of a governmental unit that exacts a different conclusion?

The question is not here whether the statute would be valid if it made provision for involuntary bankruptcy, dispensing with the consent of the state and with that of the bankrupt subdivision. For present purposes one may assume that there would be in such conditions a dislocation of that balance between the powers of the states and the powers of the central government which is essential to our federal system. Cf. *Hopkins Federal Savings & Loan Association* v. *Cleary,* 296 U. S. 315; *United States* v. *California,* 297 U. S. 175. To read into the bankruptcy clause an exception or proviso to the effect that there shall be no disturbance of the federal framework by any bankruptcy proceeding is to do no more than has been done already with reference to the power

[8] For taxing districts other than drainage, irrigation, reclamation and levee districts, the requisite percentages are 51% and 75% respectively.

of taxation by decisions known of all men. *McCulloch* v. *Maryland*, 4 Wheat. 316. The statute now in question does not dislocate the balance. It has been framed with sedulous regard to the structure of the federal system. The governmental units of the state may not act under this statute except through the medium of a voluntary petition which will evince their own consent, their own submission to the judicial power. Even that, however, is not enough. By subdivision (k), which is quoted in the margin,[9] the petition must be accompanied by the written approval of the state, whenever such consent is necessary by virtue of the local law. There is still another safeguard. By subdivision (e) (6), the composition, though approved by the requisite majority, shall not be confirmed by the judge unless he is satisfied that "the taxing district is authorized by law, upon confirmation of the plan, to take all action necessary to carry out the plan." To cap the protective structure, Texas has a statute whereby all municipalities, political subdivisions and taxing districts in the state are empowered to proceed under the challenged Act of Congress, and to do anything appropriate to take advantage of its provisions. This statute became a law on April 27, 1935 (Texas, Laws 1935, c. 107), after the dismissal of the proceeding in the District Court, but before the reversal of that decision by the Court of Appeals. Being law at that time it was to be considered and applied. *United States* v. *Schooner Peggy*, 1 Cranch 103, 110; *Danforth* v. *Groton Water Co.*, 178 Mass. 472, 475, 476; *Robinson* v. *Robins Dry Dock & Repair Co.*, 238 N. Y. 271, 281. There are like statutes in other states. Arizona, Laws 1935, c. 17; California, Laws (Extra Session) 1934, c. 4; Florida, Laws 1933, c. 15878; Ohio, Laws (2nd Special Session) 1934, No. 77. In Texas, at all events, it is clear to the point of demonstration, that the filing of a voluntary petition by a political

[9] "(k) Nothing contained in this chapter shall be construed to limit or impair the power of any State to control, by legislation or otherwise, any political subdivision thereof in the exercise of its political or governmental powers, including expenditures therefor, and including the power to require the approval by any governmental agency of the State of the filing of any petition hereunder and of any plan of readjustment, and whenever there shall exist or shall hereafter be created under the law of any State any agency of such State authorized to exercise supervision or control over the fiscal affairs of all or any political subdivisions thereof, and whenever such agency has assumed such supervision or control over any political subdivision, then no petition of such political subdivision may be received hereunder unless accompanied by the written approval of such agency, and no plan of readjustment shall be put into temporary effect or finally confirmed without the written approval of such agency of such plans."

subdivision does not violate the local law or any local public policy. Petitioners are not the champions of any rights except their own. *Pabst-Brewing Sales Co.* v. *Grosscup*, May 18, 1936, — U. S. —; *Hatch* v. *Reardon*, 204 U. S. 152, 160, 161.

To overcome an Act of Congress invalidity must be proved beyond a reasonable doubt. *Ogden* v. *Saunders*, 12 Wheat. 213, 270; *The Sinking Fund Cases*, 99 U. S. 700, 718. Sufficient reasons do not appear for excluding political subdivisions from the bankruptcy jurisdiction if the jurisdiction is so exerted as to maintain the equilibrium between state and national power. Persuasive analogies tell us that consent will preserve a balance threatened with derangement. A state may not tax the instrumentalities of the central government. It may do so, however, if the central government consents. *Baltimore National Bank* v. *State Tax Commission of Maryland*, 297 U. S. 209. Reciprocally, the central government, consent being given, may lay a tax upon the states. Cf. *United States* v. *California, supra.* So also, interference by a state with interstate or foreign commerce may be lawful or unlawful as consent is granted or withheld. *In re Rahrer*, 140 U. S. 545; *James Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311; *Whitfield* v. *Ohio*, March 2, 1936, — U. S. —. The prevailing opinion tells us in summing up its conclusions that the bankruptcy power and the taxing power are subject to like limitations when the interests of a state are affected by their action. Let that test be applied, and the Act must be upheld, for jurisdiction is withdrawn if the state does not approve.

Reasons of practical convenience conspire to the same conclusion. If voluntary bankruptcies are anathema for governmental units, municipalities and creditors have been caught in a vise from which it is impossible to let them out. Experience makes it certain that generally there will be at least a small minority of creditors who will resist a composition, however fair and reasonable, if the law does not subject them to a pressure to obey the general will. This is the impasse from which the statute gives relief. "The controlling purpose of the bill is to provide a forum where distressed cities, counties and minor political subdivisions, designated in the bill as 'taxing districts', of their own volition, free from all coercion, may meet with their creditors under the necessary judicial control and assistance in an effort to effect an adjustment of their financial matters upon a plan deemed mutually advantageous. If a plan is

agreed upon by the taxing district and its creditors holding two-thirds [in some instances three-fourths] in amount of the claims of each class of indebtedness, and if the court is satisfied that the plan is workable and equitable, it may confirm the plan, and the minority creditors are bound thereby." Report No. 207, House Judiciary Committee, June 7, 1933. To hold that this purpose must be thwarted by the courts because of a supposed affront to the dignity of a state, though the state disclaims the affront and is doing all it can to keep the law alive, is to make dignity a doubtful blessing. Not by arguments so divorced from the realities of life has the bankruptcy power been brought to the present state of its development during the century and a half of our national existence.

The Act does not authorize the states to impair through their own laws the obligation of existing contracts. Any interference by the states is remote and indirect. Cf. *In re Imperial Irrigation District,* 10 F. Supp. 832, 841. At most what they do is to waive a personal privilege that they would be at liberty to claim. Cf. *Gunter* v. *Atlantic Coast Line R. Co.,* 200 U. S. 273, 284. If contracts are impaired, the tie is cut or loosened through the action of the court of bankruptcy approving a plan of composition under the authority of federal law. There, and not beyond in an ascending train of antecedents, is the cause of the impairment to which the law will have regard. Cf. *Howard Fire Insurance Co.* v. *Norwich & New York Transportation Co.,* 12 Wall. 194, 199; *Southern Pacific Co.* v. *Darnell-Taenzer Co.,* 245 U. S. 531, 533. Impairment by the central government through laws concerning bankruptcies is not forbidden by the Constitution. Impairment is not forbidden unless effected by the states themselves. No change in obligation results from the filing of a petition by one seeking a discharge, whether a public or a private corporation invokes the jurisdiction. The court, not the petitioner, is the efficient cause of the release.

The Act is not lacking in uniformity because applicable only to such public corporations as have the requisite capacity under the law of the place of their creation. *Hanover National Bank* v. *Moyses, supra,* at p. 190. *Stellwagen* v. *Clum,* 245 U. S. 605, 613. Capacity existing, the rule is uniform for all. *Ibid.*

No question is before us now, and no opinion is intimated, as to the power of Congress to enlarge the privilege of bankruptcy by extending it to the states as well as to the local units. Even if the

SUPREME COURT OF THE UNITED STATES.

No. 660.—October Term, 1935.

The United States of America, Appellant, *vs.* Elgin, Joliet and Eastern Railway Company.	Appeal from the District Court of the United States for the Northern District of Illinois.

[May 25, 1936.]

Mr. Justice McReynolds delivered the opinion of the Court.

Appellee, incorporated under the laws of Illinois and Indiana, has been an interstate common carrier by railroad since 1884. It operates the "Chicago Outer Belt Line," 195 miles long, which runs from a point on Lake Michigan, north of Chicago, around that city to South Chicago, Gary and Porter, south and east. This line connects and interchanges freight with every railroad entering Chicago and serves many industrial plants. Among them are certain large producers of steel and steel products, operated by corporations, sometimes called "Subsidiaries," all of whose shares belong to the United States Steel Corporation: Illinois Steel Company, American Bridge Company, American Sheet and Tin Plate Company, National Tube Company, American Steel and Wire Company, and Cyclone Fence Company. Transportation of products—raw, semi-finished and finished—to and from and amongst the plants of the six constitutes 60% of appellee's business. It files tariffs and complies generally with the Interstate Commerce Act and Commission regulations. During the years 1926-1930, its annual operating revenue exceeded $20,000,000.

The United States Steel Corporation, a holding—non-operating—corporation organized in 1901, then acquired and has ever since held, all shares of appellee, also all those of the producing companies.

By an Original Bill filed 1930 (amended 1932), the United States instituted this proceeding against appellee, sole defendant, in the District Court, Northern District of Illinois. They alleged that by

transporting articles manufactured, mined, produced, or owned by subsidiaries of the United States Steel Corporation, appellee violated the Commodities Clause of the Interstate Commerce Act (Act June 29, 1906, c. 3591, 34 Stat. 584, 585; U. S. C. A., Title 49, § 1 (8)), copied in the margin,[1] and asked for an injunction prohibiting such action.

After answer, voluminous evidence and trial, the court below made findings of fact and announced an opinion. It concluded—

Mere ownership by the United States Steel Corporation of all shares of both appellee and a producing subsidiary was not enough to show that products made or owned by the latter were articles or commodities produced by the former, or under its authority, or which it owned in whole or in part, or in which it had an interest, direct or indirect, and was forbidden to transport by the Commodities Clause.

Also, "no single piece of evidence taken alone, nor all taken together and considered as a whole warrant the inference that the defendant and the producing and manufacturing subsidiaries are under the domination, control, direction, and management of the Steel Corporation, in the sense that the defendant and the other subsidiaries are mere departments, branches, adjuncts, and instrumentalities of the Steel Corporation. The evidence fails to show that the defendant has any interest, direct or indirect, legal or equitable, in the articles or commodities which it transports for the subsidiaries of the Steel Corporation."

A final decree dismissed the Bill for want of equity and the cause is here by direct appeal (U. S. C. A., Title 49, § 45). Both conclusions are challenged and we are asked to reverse the decree and grant relief as originally prayed.

The Commodities Clause became part of the Interstate Commerce Act in 1906 (U. S. C. A., Title 49, § 1 (8)), and has re-

[1] From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

mained without material change. It was first interpreted here in *United States* v. *Delaware & Hudson Company,* (1909) 213 U. S. 366, 415, where, by Mr. Justice White, the Court said:

> "We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (a) When the article or commodity has been manufactured, mined, or produced by a carrier or under its authority, and, at the time of transportation, the carrier has not, in good faith, before the act of transportation, dissociated itself from such article or commodity; (b) When the carrier owns the article or commodity to be transported, in whole or in part; (c) When the carrier, at the time of transportation, has an interest, direct or indirect, in a legal or equitable sense, in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced or owned, etc., by a bona fide corporation in which the railroad company is a stockholder."

This construction has been accepted and followed in the later cases. *United States* v. *Lehigh Valley R. Co.,* 220 U. S. 257, 266; *United States* v. *Delaware, L. & W. R. Co.,* 238 U. S. 516, 526; *United States* v. *Reading Co.,* 253 U. S. 26, 62; *United States* v. *Lehigh Valley R. Co.,* 254 U. S. 255, 266.

Through Mr. Justice Lamar, the court said, in *United States* v. *Delaware, L. & W. R. Co.*—

> "But mere stock ownership by a railroad, or by its stockholders, in a producing company, cannot be used as a test by which to determine the legality of the transportation of such company's coal by the interstate carrier. For, when the commodity clause was under discussion, attention was called to the fact that there were a number of the anthracite roads which at that time owned stock in coal companies. An amendment was then offered which, if adopted, would have made it unlawful for any such road to transport coal belonging to such company. The amendment, however, was voted down; and, in the light of that indication of congressional intent, the commodity clause was construed to mean that it was not necessarily unlawful for a railroad company to transport coal belonging to a corporation in which the road held stock. United States ex rel. Atty. Gen. v. Delaware & H. Co., 213 U. S. 414, 53 L. ed. 851, 29 Sup. Ct. Rep. 527. For a stronger reason, it would not necessarily be illegal for the road to transport coal belonging to a corporation whose stock was held by those who owned the stock of the railroad company."

Notwithstanding the intent imputed to Congress by this opinion, announced in 1915, no amendment has been made to the Commodities Clause. We must, therefore, conclude that the interpretation of the Act then accepted has legislative approval.

It is now insisted that, although a railroad company may own the shares of a producing company and yet transport the latter's products without violating the Commodities Clause, if a holding company acquires the shares of both carrier and producer, then such transportation becomes illegal. The theory is that the subsidiaries of holding companies are necessarily no more than parts of it. Evidently, this is entirely out of harmony with the reasoning advanced to support the construction of the Act adopted in *United States* v. *Delaware & H. Co., supra;* also in direct conflict with the above quoted language from *United States* v. *Delaware, L. & W. R. Co.*

Considering former rulings, it is impossible for us now to declare as matter of law that every company all of whose shares are owned by a holding company necessarily becomes an agent, instrumentality, or department of the latter. Whether such intimate relation exists is a question of fact to be determined upon evidence.

Counsel for appellants submit that the record compels the inference of fact that appellee and the subsidiary producing companies are but departments of the United States Steel Corporation; and that, as in *United States* v. *Reading Co., supra,* we should find the carrier is violating the Commodities Clause. It is not claimed that this inference derives from any single fact, but out of the mass. The following portion of the opinion in *United States* v. *Reading Company* is heavily relied upon—

> "But the question which we have presented by this branch of the case [alleged violation of the Commodities Clause] is not the technical one of whether ownership by a railroad company of stock in a coal company renders it unlawful for the former to carry the product of the latter, for here the railroad company did not own any of the stock of the coal company. The real question is whether combining in a single corporation the ownership of all of the stock of a carrier and of all of the stock of a coal company results in such community of interest or title in the product of the latter as to bring the case within the scope of the provisions of the act."

And, having regard to this, they say—"The affirmative answer given in the *Reading* case is controlling here."

Obviously, what was there stated cannot be taken as declaration of an abstract principle; it had application to the relevant circum-

stances. Later (pp. 61-62) in the same opinion the essential ones are revealed—

> "All three of the Reading companies had the same officers and directors, and it was under their authority that the mines were worked and the railroad operated, and they exercised that authority in the one case in precisely the same character as in the other—as officials of the Holding Company. The manner in which the stock of the three was held resulted, and was intended to result, in the abdication of all independent corporate action by both the Railway Company and the Coal Company, involving, as it did, the surrender to the Holding Company of the entire conduct of their affairs. It would be to subordinate reality to legal form to hold that the coal mined by the Coal Company, under direction of the Holding Company's officials, was not produced by the same 'authority' that operated the Reading Railway lines."

If the evidence here showed the relationship between the holding company, the carrier, and the producing companies to be substantially as in the *Reading* case, that opinion well might be regarded as controlling. But there is material difference and we must look elsewhere for guidance.

Properly to appraise the situation now presented particular attention must be given to the following facts. All shares of appellee and the subsidiary producing companies have been owned by the United States Steel Corporation since 1901. The railroad has been under constant supervision by the Interstate Commerce Commission. "In The Matter of Alleged Rebates to the United States Steel Corporation", 36 I. C. C. 557, (1915). It functions as a separate corporate carrier under immediate control of its own directors, no one of whom is on the board of the holding company; it owns all necessary equipment, makes its own contracts, manages its own finances, serves its patrons without discrimination and apparently to their satisfaction. The lawfulness of the relationship between the holding company and subsidiaries was challenged in *United States* v. *United States Steel Corporation,* decided here in 1920, 251 U. S. 417. After long and thorough investigation and consideration, this court held the Anti-trust Act was not being violated. The present proceeding is one to prevent probable future unlawful conduct and not to punish acts long since completed, however reprehensible. "Our consideration should be of not what the Corporation had power to do or did, but what it has now power to do and

is doing." *United States* v. *United States Steel Corporation, supra,* p. 444.

The court below made definite findings of fact and upon them reached the conclusions stated above. Although criticized, and notwithstanding certain isolated acts may indicate undue control over the carrier at their dates, we think that the findings are essentially correct and support the decree. Instances of participation in the affairs of the appellee by the officers of the United States Steel Corporation, stressed by counsel, are relatively few; a material part of them occurred years ago—some of the more important in 1909. They are not adequate to support the claim that appellee must be regarded as the *alter ego* of its sole stockholder. The mere power to control, the possibility of initiating unlawful conditions is not enough as clearly pointed out in *United States* v. *Delaware & H. Co., supra.* That a stockholder should show concern about the company's affairs, ask for reports, sometimes consult with its officers, give advice and even object to proposed action is but the natural outcome of a relationship not inhibited by the Commodities Clause.

We find no adequate reason for disapproving the challenged decree and it must be

Affirmed.

The following cases were decided against the Government:

In United States v. Elgin, Joliet and Eastern Ry. Co. the question presented was whether the Railway Company, a wholly owned subsidiary of the United States Steel Corporation, violated the Commodities Clause of the Interstate Commerce Act in transporting commodities owned by producing subsidiaries of the Steel Corporation. The Commodities Clause prohibits a railroad company from transporting in interstate or foreign commerce commodities in which it has an interest, direct or indirect. The Court, in an opinion from which Justices Stone, Brandeis and Cardozo dissented, held that the evidence failed to show such a domination and control by the United States Steel Corporation of the affairs of the subsidiary railroad company as to make the latter a department or agency of the Steel Corporation. The dissenting opinion, rendered by Mr. Justice Stone, held that the evidence clearly showed domination and control of the railroad company by the Steel Corporation. Mr. Justice Stone significantly stated in his opinion that "If the commodities clause permits control such as is exhibited here, one is at a loss to say what scope remains for the operation of the statute." A copy of the majority and dissenting opinions is annexed.

In Morgan v. United States and the Secretary of Agriculture a number of suits, consolidated for the purpose of trial, were brought to restrain the enforcement of an order of the Secretary of Agriculture, under the Packers and Stockyards Act of 1921, fixing the maximum rates to be charged by market agencies for buying and selling livestock at the Kansas City Stock Yards. This Act provides that the Secretary may fix rates only after a "full hearing". The market agencies asserted that they did not receive a proper hearing because the Secretary made the rate order without having heard or read any of the evidence and without having heard the oral arguments or having read or considered the briefs which the agencies submitted. The Court, in deciding against the Government, held that under the statute the officer who makes the determinations must consider and appraise the evidence which justifies them. The Court said that this

> "duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear.
>
> "This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by

SUPREME COURT OF THE UNITED STATES.

No. 660.—October Term, 1935.

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[ ]

Mr. Justice Stone.

I think the judgment should be reversed.

The language of the commodities clause, read in the light of its legislative history, can leave no doubt that its purpose was to withhold from every interstate rail carrier the inducement and facility for favoritism and abuse of its powers as a common carrier, which experience had shown are likely to occur when a single business interest occupies the inconsistent position of carrier and shipper. See *United States* v. *Reading Co.*, 253 U. S. 26, 60, 61. Before the enactment of the commodities clause, Congress, by sweeping prohibitions, had made unlawful every form of rebate to shippers and every form of discrimination in carrier rates, service and facilities, injurious to shippers or the public. By the Sherman Act it had forbidden combinations in restraint of interstate commerce. But it did not stop there. The commodities clause was aimed, not at the practices of railroads already penalized, but at the suppression of the power and the favorable opportunity, inseparable from actual control of both shipper and carrier by the same interest, to engage in practices already forbidden and others inimical to the performance of carrier duties to the public. See *Delaware, L. & W. R. Co.* v. *United States*, 231 U. S. 363, 370; *United States* v. *Reading Co.*, *supra*.

It is not denied that the "indirect" interest of the carrier in the commodity transported, at which the statute strikes, may be effected through the instrumentality of a holding company which owns the stock both of the carrier and the company which manufactures and ships the commodity. This was definitely established by

the decision in *United States* v. *Reading Co., supra,* where it was held that the power of control through holding company ownership of all the capital stock both of an interstate rail carrier and a shipper producing the commodity carried, plus an active exercise of that control, are enough to make the transportation unlawful.

While it was recognized, as had been held in *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, that mere ownership, by a carrier or a shipper, of the stock of the other, does not call the statute into operation, the Court was careful to point out, pp. 62, 63, that "where such ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent or instrumentality or department of another company, the courts will look through the forms to the reality of the relation between the companies as if the corporate agency did not exist and will deal with them as the justice of the case may require." Domination in fact by a holding company both of the rail carrier and the producing shipper of commodities, in addition to its legal power to dominate them, is enough to bring the carrier within the prohibition of the commodities clause.

The only question for our decision is whether the complete power of the United States Steel Corporation, through stock ownership, to dominate both appellee and certain shippers over its lines, has been exercised sufficiently to exemplify the evil which the commodities clause was intended to prevent, and so to bring appellee within its condemnation. It is of no consequence that complaints of rebates by appellee to United States Steel Corporation subsidiaries have not been sustained, 36 I. C. C. 557, or that the Steel Corporation and its subsidiaries have been held not to infringe the Sherman Anti-Trust Act. *United States* v. *United States Steel Corp.,* 251 U. S. 417. The commodities clause does not forbid rebating or attempts to monopolize interstate commerce, which are dealt with by other statutes. It is concerned with transportation of commodities by a rail carrier where the carrier and the producer and shipper are so dominated by the same interest, through the exercise of power secured by stock ownership, as to make rebates, discriminations, attempts to monopolize and other abuses of carrier power, easy, and their detection and punishment difficult.

It is not important, as the court below thought, that in the relations between the Steel Corporation and its subsidiaries "there was a scrupulous recognition of the separate entities," or that all transactions between them were "in the form of transactions and communications between two separate and distinct corporations," or that the business and accounts of each subsidiary "were kept separate and distinct" from those of others. Nor is it of any moment, as this Court seems to imply, that the affiliates do not have the same officers and directors, and that some years ago they abandoned the practice of maintaining interlocking directorates.

Those familiar with present day methods of corporate control will not be so naive as to suppose that the complete domination in fact of its subsidiaries by a holding company owning all their stock is in any way inconsistent with scrupulous recognition of their separate corporate entities, or with the maintenance of separate accounts and distinct personnels of officers and directors. Every holding company presupposes a relationship between it and a distinct corporate entity and its power to control the latter. Where the issue is whether that power has been exercised, "courts will look through the forms to the realities of the relation between the companies as if the corporate agencies did not exist." Hence we are presently concerned with what is in fact done in the Steel Corporation's exercise of its power to control, not with the particular legal forms or methods under cover of which control may in fact be effected. And since we must look to its acts of control, in addition to its power acquired by stock ownership, as the decisive test, we must scrutinize what has occurred in the past as the best indication of the manner and extent of the use which may be made of the power in the future.

In appraising the Steel Corporation's acts of control over the appellee, it is of significance that the dominant interest in the inter-company relationship, unlike that in the earlier cases brought before the Court, is that of production, and not transportation. Appellee, although a common carrier, subject to public duties and responsibilities, is, in its relation to the Steel Corporation and its subsidiaries, but an appanage to their vast steel producing business. While the commodities clause makes no distinction between the one type of domination and the other, such control of a railroad is far more menacing to the public and to rival producers than is domination of producer interests by a carrier. When the

carrier interest predominates, extension of its transportation facilities beyond the demands of its producing affiliates, and even to their competitors, with resulting benefit to the public, may well ensue. But where the producing interest is dominant, and the carrier is chiefly engaged in transporting the commodities of producing affiliates, restricted or indifferent service to competing producers and to the public, tardy or inadequate extension of facilities, discrimination in furnishing service and facilities, are dangers especially to be anticipated.

In such a relationship, control of carrier capital accumulation, expansion and expenditure, is a peculiarly convenient and effective means of subordinating carrier public service to the interests of production, by restriction of carrier expansion which would benefit the public and competing producers, or by allowing it only under discriminatory conditions. It is with these general considerations in mind, especially pertinent to the present case, that its facts should be examined.

Since its formation in 1901 the Steel Corporation has owned all the capital stock of the appellee railroad and of the Illinois Steel Company, a manufacturing company which appellee serves. Through lease, in 1909, of the Chicago, Lake Shore and Eastern Railway line, and the acquisition of appurtenant trackage rights over another line, appellee secured and maintains direct transportation facilities between the Illinois Steel Company and mines and quarries, all subsidiaries of the Steel Corporation. Sixty per cent. of appellee's tonnage is furnished by Steel Corporation subsidiaries.

Although the Steel Corporation is exclusively a holding and not an operating company, its by-laws defining the president's duties provide that he "shall have general charge of the business of the corporation relating to manufacturing, mining and transportation." The record shows that this authority is exercised by close and constant supervision over the business and affairs of Steel Corporation subsidiaries, not through the formal proceedings of stockholders and directors meetings, but through conferences and correspondence taking place directly between the officers of the Steel Corporation and those of its subsidiaries.

From 1901 to 1920 there were on appellee's board of directors never less than four officers or directors of the Steel Corporation, selected from its most important officers. Since 1920 the appellee's board of directors has been selected by appellee's

president and elected by him acting as proxy for the Steel Corporation. He has likewise selected the officers, who have been elected by the Board at his suggestion. The record is replete with evidence, chiefly correspondence, showing the complete subservience of appellee's president to the officers of the Steel Corporation in matters of corporate policy. The subservience of appellee's board of directors to its president, and through him in turn to the Steel Corporation, is exemplified by appellee's settled practice from 1910 until the time of suit of entering into contracts without any previous approval by its board of directors. At its annual meeting of directors the contracts which have been previously entered into, and often have already been performed, are ratified and confirmed. This procedure was followed with respect to all contracts, some 2,313 in number, executed on behalf of appellee between 1910 and 1933.

Appellee's fiscal policy has for many years been dominated and rigidly controlled by the Steel Corporation. Dividends have been habitually declared and the amount of them fixed only after securing, by correspondence, the consent and approval of the officers of the Steel Corporation. The Steel Corporation draws to itself the surplus funds of its subsidiaries, including appellee, which are deposited with it, for its own use, often upon its specific request or demand, and at a rate of interest which it fixes. These funds are withdrawn by draft of the subsidiary, payable only upon acceptance by the Steel Corporation, and customarily upon notice given in advance. From 1920 to 1933 appellee's aggregate deposits with the Steel Corporation were $79,000,000, of which $32,000,000 were made at the request or demand of the Steel Corporation.

Since its formation the Steel Corporation has maintained under its direction and control a clearance account, by which monthly settlement is made of inter-company accounts among its various subsidiaries. All of appellee's settlements of such accounts, except freight charges and traffic claims, are cleared through this account. The account is managed by the controller of the Steel Corporation. Interest is charged or allowed on balances due in the account at a rate of interest fixed by the treasurer of the Steel Corporation. Terms of settlement are controlled by it and not by free bargaining of debtor and creditor.

By direction of the finance committee of the Steel Corporation, its subsidiaries, including appellee, are required to obtain in ad-

vance the approval of the committee of all expenditures for capital account and improvements in excess of a specified amount. From 1920 to 1932 the limit was $10,000, since which it has been $5,000. Since 1908 the officers of the Steel Corporation have issued from time to time, to all its subsidiaries, instructions outlining in detail the rules and procedure governing their application to the Steel Corporation for its approval of their expenditures for improvements. This requirement was not perfunctory. Failure to secure from the officers of the Steel Corporation, in advance, the approval of capital expenditures, brought from them by letter or telegram swift reminder of the neglect. Requests for approval of proposed expenditures have been the occasion for careful inquiry by the officers of the Steel Corporation as to their necessity and propriety. In recent years approximately 70 per cent. of appellee's total capital expenditures have been of the class requiring consent by the Steel Corporation.* Included were items directly affecting appellee's transportation service, such as the cost of rolling stock, procuring an adequate water supply for its engines, improvement of its right-of-way, and additional yard facilities.

With such minute and continuous control of capital outlays of appellee by an organization primarily interested in production rather than common carrier service, it is not surprising that the only expansion of appellee during the period of control has been its lease of the line of the Chicago, Lake Shore and Eastern Railway, a subsidiary of a Steel Corporation producing affiliate, the Illinois Steel Company, which it served almost exclusively, and the acquisition through this lease of a trackage privilege over the Chicago & Eastern Illinois Railroad, restricted to the hauling of products of producing subsidiaries of the Steel Corporation—an arrangement by which appellee raised its tonnage from subsidiaries of the Steel Corporation from 25% to 60%.

It was the chairman of the board of the Steel Corporation, not the officers of appellee, who had the deciding voice in determining whether the lease should be taken and who assumed active control of the negotiations for its acquisition. Again, in 1920, when the

*Out of an annual average capital expenditure by appellee of approximately $900,000, during each of the years from 1926 to 1930 inclusive, an average of over $600,000 annually required the prior approval of the Steel Corporation. In 1930, appellee made capital expenditures of $1,910,755, of which $1,315,773 required the approval of the Steel Corporation. Appellee's total capital expenditures from 1926 to 1930 amounted to $4,597,925, of which $3,153,817 required such approval.

trackage agreement was subject to cancellation by reason of the receivership of the Chicago & Eastern Illinois, it was the chairman of the board of the Steel Corporation who actively controlled the successful negotiation for a continuance of the agreement.

The record discloses many other forms of actual control of the business and affairs of appellee by the Steel Corporation which it is unnecessary to detail. It is enough that those mentioned, when examined in their setting, show with convincing force that the appellee railroad is in fact obedient to the dominating control of producers of commodities which it transports. In every instance when the Steel Corporation has conceived that it had any interest to subserve, appellee has willingly done its bidding. In none has there been any indication of a disposition to pursue any policy not at least tacitly approved by the Steel Corporation. The active and continuous control over appellee's finances and expenditures is alone sufficient to create a continuing danger of neglect and abuse of appellee's carrier duties in favor of the dominating production and shipping interest, a temptation and an opportunity which it was the purpose of the commodities clause to forestall. In addition, the Steel Corporation has exerted that power, in the acquisition of the Lake Shore lease and its appurtenant trackage rights, to secure special advantages for its producing subsidiaries. The trackage rights extend only to hauling their own product, not that of their rivals.

This relationship passes far beyond that which is normal between a railroad and its stockholders and establishes a control over appellee's policy as complete as though it were but a department of the Steel Corporation. If the commodities clause permits control such as is exhibited here, one is at a loss to say what scope remains for the operation of the statute. Whatever views may be entertained of the soundness and wisdom of the decision in *United States* v. *Delaware & Hudson Co., supra,* it neither requires nor excuses our reduction of the commodities clause to a cipher in the calculations of those who control the railroads of the country.

Mr. Justice BRANDEIS and Mr. Justice CARDOZO concur in this opinion.

PSF: Supreme Court

Office of the Attorney General
Washington, D.C.

June 1, 1936.

Dear Mr. President:

The decision of principal importance to the Government rendered by the Supreme Court at its concluding session of the term today was that in the New York Minimum Wage Law case (Morehead v. People ex rel. Tipaldo). By a five-to-four decision, the Court held the New York statute unconstitutional insofar as it related to the fixing of minimum wages for adult women. An analysis of the majority and dissenting opinions is attached.

In another case of importance (The Dixie Terminal Co. v. The United States), a certificate from the Court of Claims asking the advice of the Supreme Court, the Court sustained a motion of the Government to dismiss the certificate because improperly phrased. This case involves the question whether the holder of a liberty bond who refused to accept payment in legal tender currency of the face amount of the bond because of its claim that it should have been paid in gold is entitled to recover interest accruing after the date specified in the call for redemption.

The Court granted one petition for a writ of certiorari filed by the Government and denied one.

Out of the thirteen petitions for certiorari filed by opponents, the Court denied all but two petitions.

Respectfully,

Homer Cummings
Attorney General.

The President,
The White House,
Washington, D. C.

Analysis of the Opinions of the Supreme Court in the New York Minimum Wage Law Case (Morehead v. People ex rel. Tipaldo).

The Supreme Court today, in a five to four decision, held that the New York Minimum Wage Law of 1933, insofar as it related to the fixing of minimum wages for adult women, was unconstitutional.

In the majority opinion rendered by Mr. Justice Butler and concurred in by Justices Van Devanter, McReynolds, Sutherland and Roberts it was held that the New York Act was indistinguishable from the District of Columbia Minimum Wage Act of 1918, which was held unconstitutional by the Supreme Court in 1923. While the District of Columbia law required only that the Minimum Wage Law must be one adequate to supply a living wage, whereas the New York law added the element that the wage must also be one which was not less than a fair and reasonable value for the services rendered, the Court ruled that this did not render the Adkins decision distinguishable for the reason that that "decision and the reasoning upon which it rests clearly show that the State is without power by any form of legislation to prohibit, change or nullify contracts between employers and adult women workers as to the amount of wages to be paid." The Court said that "the dominant issue in the Adkins case is whether Congress had power to establish minimum wages for adult women workers in the District of Columbia. The opinion directly answers in the negative. The ruling that defects in the prescribed standard stamped that Act as arbitrary and invalid was an additional ground of subordinate consequence."

In an attempt to distinguish the Adkins case reference was made by the petitioner to the growing increase during recent years in the number of women wage workers, and attention was also called to the "Factual background" contained in the first section of the Act. Referring to its legislative history the Court said, however, that "The Act is not to meet an emergency; it discloses a permanent policy; the increasing number of women workers suggests that more and more they are getting and holding jobs that otherwise would belong to men", and that "It is plain that, under circumstances such as those portrayed in the 'Factual background', prescribing of minimum wages for women alone would unreasonably restrain them in competition with men and tend arbitrarily to deprive them of employment and a fair chance to find work."

The Court also alluded to its decisionssubsequent to the Adkins case holding unconstitutional the minimum wage statutes of Arizona and Arkansas and said that "in each case, being clearly of

opinion that no discussion was required to show that, having regard to the principles applied in the Adkins case, the state legislation fixing wages for women was repugnant to the due process clause of the Fourteenth Amendment, we so held and upon the authority of that case affirmed per curiam the decree enjoining its enforcement. It is equally plain that the judgment in the case now before us must also be affirmed."

In the dissenting opinion rendered by the Chief Justice, which was concurred in by Justices Brandeis, Stone and Cardozo, the Chief Justice held that the Adkins case was distinguishable in that the statute there involved, unlike the New York law, did not require that the "fair wage" correspond with the reasonable value of the services which the employee performed, a difference which the Chief Justice declared to be "a material one." The Chief Justice then said that in view of this distinction the question should be dealt with upon its merits.

After declaring that the validity of the New York statute must be considered in the light of the conditions to which the exercise of the protective power of the State was addressed, the Chief Justice made an extended reference to the "factual background" and said that

> "We are not at liberty to disregard these facts. We must assume that they exist and examine respondent's argument from that standpoint. That argument is addressed to the fundamental postulate of liberty of contract. I think that the argument fails to take account of established principles and ignores the historic relation of the State to the protection of women."

The Chief Justice said that while it was highly important to preserve the liberty of contract from arbitrary and capricious interference, "We have repeatedly said that liberty of contract is a qualified and not an absolute right" and that "The test of validity is not artificial. It is whether the limitation upon the freedom of contract is arbitrary and capricious or one reasonably required in order appropriately to serve the public interest in the light of the particular conditions to which the power is addressed." Applying this test the Chief Justice was of the opinion that there was "nothing in the Federal Constitution which denies to the State the power to protect women from being exploited by overreaching employers through the refusal of a fair wage as defined in the New York statute and ascertained in a reasonable manner by competent authority." The

> an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred."

In a case in which the Government was not technically a party but in which it filed a brief as amicus curiae (Ashton v. Cameron County Water Improvement District No. One) the Court by a five to four decision held the Municipal Bankruptcy Law of 1934 to be unconstitutional. This Act provided for readjustment of the debts of municipalities and other subdivisions of states to be binding on all creditors upon the approval of the bankruptcy court and two-thirds of the creditors. Mr. Justice McReynolds, for the majority, assumed the Act to be within the bankruptcy power of the federal government. He nevertheless declared the Act to be a forbidden invasion of the powers reserved to the states, whose control over the fiscal affairs of local government might be restricted. The Court held it immaterial that the Texas legislature had authorized proceedings under this Act, because the authorization impaired the obligation of contracts and because federal power cannot be enlarged by consent. Mr. Justice Cardozo, speaking for the minority which included the Chief Justice and Justices Brandeis and Stone, found that the expanding concept of bankruptcy included a governmental debtor. He assumed, for the present case, that the Act would be invalid if the statute dispensed with the consent of the state or the subdivision. But the Act seemed to him to show a sedulous care for the state's rights, and the Texas legislature had expressly consented to its terms, In taxation and commerce clause cases he found persuasive analogies for the exercise of power which would be invalid were it not for the consent of the sovereign (state or federal) said to be intruded upon.

The Government filed a brief defending the validity of the R. F. C. loan which was attacked as unconstitutional and as an indispensable element of the readjustment plan. The majority did not pass on the question and the minority accepted the contention that such questions could not be raised at this time. A copy of the majority and dissenting opinions is attached.

Chief Justice said:

> "When there are conditions which specially touch the health and well-being of women, the State may exert its power in a reasonable manner for their protection, whether or not a similar regulation is, or could be, applied to men. The distinctive nature and function of women - their particular relation to the social welfare - has put them in a separate class. This separation and corresponding distinctions in legislation is one of the outstanding traditions of legal history. The Fourteenth Amendment found the States with that protective power and did not take it away or remove the reasons for its exercise. Changes have been effected within the domain of state policy and upon an appraisal of state interests. We have not yet arrived at a time when we are at liberty to override the judgment of the State and decide that women are not the special subject of exploitation because they are women and as such are not in a relatively defenceless position.
>
> * * * *
>
> "If liberty of contract were viewed from the standpoint of absolute right, there would be as much to be said against a regulation of the hours of labor of women as against the fixing of a minimum wage. Restriction upon hours is a restriction upon the making of contracts and upon earning power. But the right being a qualified one, we must apply in each case the test of reasonableness in the circumstances disclosed. Here, the special conditions calling for the protection of women, and for the protection of society itself, are abundantly shown. The legislation is not less in the interest of the community as a whole than in the interest of the women employees who are paid less than the value of their services. That lack must be made good out of the public purse. Granted that the burden of the support of women who do not receive a living wage cannot be transferred to employers who pay the equivalent of the service they obtain, there is no reason why the burden caused by the failure to pay that equivalent should not be placed upon those who create it. The fact that the State cannot secure the

> benefit to society of a living wage for women employees by any enactment which bears unreasonably upon employers does not preclude the State from seeking its objective by means entirely fair both to employers and the women employed.
>
> "In the statute before us, no unreasonableness appears. The end is legitimate and the means appropriate. I think that the act should be upheld."

A separate dissenting opinion was rendered by Justice Stone. In this opinion, which was concurred in by Justices Brandeis and Cardozo, Justice Stone said that while he agreed with all the Chief Justice had said

> " * * * I would not make the differences between the present statute and that involved in the Adkins case the sole basis of decision. I attach little importance to the fact that the earlier statute was aimed only at a starvation wage and that the present one does not prohibit such a wage unless it is also less than the reasonable value of the service. Since neither statute compels employment at any wage, I do not assume that employers in one case, more than in the other, would pay the minimum wage if the service were worth less."

Justice Stone then stated that

> "The vague and general pronouncement of the Fourteenth Amendment against deprivation of liberty without due process of law is a limitation of legislative power not a formula for its exercise. It does not purport to say in what particular manner that power shall be exerted. It makes no fine-spun distinctions between methods which the legislature may and which it may not choose to solve a pressing problem of government. It is plain too, that, unless the language of the amendment and the decisions of this Court are to be ignored, the liberty which the amendment protects is not freedom from restraint of all law or of any law which reasonable men may think an appropriate means for dealing with any of those matters of public concern with which it is the business of government to deal. There is grim irony

> in speaking of the freedom of contract of those who, because of their economic necessities, give their service for less than is needful to keep body and sould together. But if this is freedom of contract no one has ever denied that it is freedom which may be restrained, notwithstanding the Fourteenth Amendment, by a statute passed in the public interest."

After referring to a number of cases in which the Court had sustained the power of legislatures to prohibit or restrict the terms of a contract, including the price term, in order to accomplish what the legislative body may reasonably consider a public purpose, Justice Stone said:

> "No one doubts that the presence in the community of a large number of those compelled by economic necessity to accept a wage less than is needful for subsistence is a matter of grave public concern, the more so when, as has been demonstrated here, it tends to produce ill health, immorality and deterioration of the race. The fact that at one time or another Congress and the legislatures of seventeen states, and the legislative bodies of twenty-one foreign countries, including Great Britain and its four commonwealths, have found that wage regulation is an appropriate corrective for serious social and economic maladjustments growing out of inequality in bargaining power, precludes, for me, any assumption that it is a remedy beyond the bounds of reason. It is difficult to imagine any grounds, other than our own personal economic predilections, for saying that the contract of employment is any the less an appropriate subject of legislation than are scores of others, in dealing with which this Court has held that legislatures may curtail individual freedom in the public interest.
>
> "If it is a subject upon which there is power to legislate at all, the Fourteenth Amendment makes no distinction between the methods by which legislatures may deal with it, any more than it proscribes the regulation of one term of a bargain more than another if it is properly the subject of regulation. No one has

> yet attempted to say upon what basis of history, principles of government, law or logic, it is within due process to regulate the hours and conditions of labor of women, * * * and of men * * * and the time and manner of payment of the wage * * * but that regulation of the amount of the wage passes beyond the constitutional limitation; or to say upon what theory the amount of a wage is any the less the subject of regulation in the public interest than that of insurance premiums * * * or of the commissions of insurance brokers * * * or of the charges of grain elevators * * * or of the price which the farmer receives for his milk, or which the wage earner pays for it (Nebbia v. New York, 291 U. S. 502)."

Referring to the declaration of the Court in the Nebbia case that

> "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."

Justice Stone said:

> "That declaration and decision should control the present case. They are irreconcilable with the decision and most that was said in the Adkins case. They have left the Court free of its restriction as a precedent, and free to declare that the choice of the particular form of regulation by which grave economic maladjustments are to be remedied is for legislatures and not the courts.

"In the years which have intervened since the Adkins case we have had opportunity to learn that a wage is not always the resultant of free bargaining between employers and employees; that it may be one forced upon employees by their economic necessities and upon employers by the most ruthless of their competitors. We have had opportunity to perceive more clearly that a wage insufficient to support the worker does not visit its consequences upon him alone; that it may affect profoundly the entire economic structure of society and, in any case, that it casts on every taxpayer, and on government itself, the burden of solving the problems of poverty, subsistence, health and morals of large numbers in the community. Because of their nature and extent these are public problems. A generation ago they were for the individual to solve; today they are the burden of the nation. I can perceive no more objection, on constitutional grounds, to their solution by requiring an industry to bear the subsistence cost of the labor which it employs, than to the imposition upon it of the cost of its industrial accidents. See New York Central R. R. Co. v. White, supra; Mountain Timber Company v. Washington, 243 U. S. 119.

"It is not for the courts to resolve doubts whether the remedy by wage regulation is as efficacious as many believe, or is better than some other, or is better even than the blind operation of uncontrolled economic forces. The legislature must be free to choose unless government is to be rendered impotent. The Fourteenth Amendment has no more embedded in the Constitution our preference for some particular set of economic beliefs than it has adopted, in the name of liberty, the system of theology which we may happen to approve."

PSF: Supreme Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
JUDGE CLARK

NEWARK, N.J. June 10, 1936

Honorable Franklin D. Roosevelt
The White House
Washington, D. C.

Dear Franklin:

You may possibly think it worth while to recall my letter to you of last August (I haven't bothered you with correspondence since!). In it I spoke of my thought that a sensible solution of our constitutional problem might be a commission--similar to the Australian one of 1929--to study our Constitution and those of the other great Federations and determine if the present structure of our's is currently adequate. The course of decision in the Supreme Court has rather, I think, borne out my prediction that such a study might be necessary. You will also have noticed that Senator Borah at the convention expressed the view that the heat of a political convention was not the forum for such a study.

If it is thought wise to make any definite platform recommendations in your convention, I am making bold to submit three suggestions.

(1) That the due process clause (both as binding the state and the nation) be submitted with a "provided that" addendum giving power to the state and nation to go as far

[PSF, Supr. Ct.]

as is desired in controlling minimum wages, etc. I suggest this in the form of a proviso in order that it may be easier to explain to the people that the due process clause was adopted originally for the protection of the many (the colored many for the 14th Amendment) and not for the advantage of the corporate few, as has been the twist given it by the Supreme Court. As you know, the historical exposition of this is readily available.

(2) The only reason for giving the Federal Government more power is to mitigate the evil consequence of diversity in those phases of our life where uniformity is essential. I have, therefore, drafted an amendment which is based on that principle. It reads:

1. Congress shall have power to pass laws making uniform throughout the United States or in any part thereof the laws of the several states affecting agriculture, crime, commerce, industry and labor.

2. This power shall be exercised only after hearings before and upon the written recommendation of uniform law commissioners designated by the individual states affected by the proposed legislation.

3. This amendment shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, and within seven years from the date of the submission hereof to the States by the Congress.

It is my idea that some such amendment would remove any

criticism on the ground of centralization and would permit regional legislation for purposes similar, for instance, to the Guffey Act in the coal regions. As you probably remember, every state in the Union has already legislation for the appointment of uniform law commissioners. That legislation defines the duties of the commission in this significant language:

> "It shall be the duty of said commissioners to examine the subjects of marriage and divorce, insolvency, the descent and distribution of property, the execution and probate of wills and other subjects, upon which uniformity of legislation in the various states and territories of the Union is desirable, but which are outside the jurisdiction of the congress of the United States; to confer upon these matters with the commissioners appointed by other states and territories for the same purpose; * * *".
> (P.L. N. J. 1909, p. 229)

In spite of the mandatory character of this adjuration, an examination of the uniform legislation enacted since the appointment of the uniform commissions in 1892 indicates how pitifully inadequate this method of securing uniformity has proved. We find that the majority of states are cold to most of the long list of laws submitted by the commissioners. Such manifestly essential criminal enactments as a uniform extradition law and a uniform machine gun act we find passed by only 15 and 8 states respectively and such even more manifestly

essential social legislation as the child labor act accepted by only one state.

(3) I repeat the suggestions of my letter of last August with respect to advisory opinions in the United States Supreme Court. It seems to me that this must be done to remove the unfair impression of your letter to the Congressmen, given by Republicans, with respect to the Guffey Coal Act. It is my recollection that among the ten states having such constitutional provisions is included Kansas!

I have been corresponding with and seeing Jim from time to time and hope to see him again next week.

Yours sincerely,

Bill

William Clark

PSF: Supreme Ct

DONALD R. RICHBERG
LAWYER

701-706
726 JACKSON PLACE
WASHINGTON, D.C.

TELEPHONE NATIONAL 8414

June 16, 1936.

Honorable Marvin H. McIntyre,
Assistant Secretary to The President,
The White House,
Washington, D. C.

Dear "Mac":

This product of my sick-in-bed sweat and "painstaking" thought is, I believe, well worth the President's reading when he is ready and free to tackle the platform-acceptance-speech-constitutional-questions.

I am hoping to be on my feet again soon and to be available if I can be of any service. But the appropriate time for consideration of this enclosure may come any time.

As ever,

D.R.R.

Dictated from Home.

Another non-Government case of interest which was decided by the Court is the State of Arizona v. The States of California, Colorado, Nevada, New Mexico, Utah and Wyoming. In this case the State of Arizona filed an original bill in the Supreme Court in which it sought a judicial apportionment among the States in the Colorado River basin of the unappropriated water of the river, with the limitation that the share of California shall not exceed the amount to which she is limited by the Boulder Canyon Project Act and by a statute of California, and with the proviso that any increase in the flow of water to which the Republic of Mexico may be entitled shall be supplied from the amount apportioned to California. The proposed bill of complaint charged that, notwithstanding the limitation upon the use of the water by California, certain California corporations, with the aid of the United States, proposed to divert from the river and use consumptively in California an aggregate amount of 14,330,000 acre feet annually, including that which the Secretary of the Interior has contracted to deliver, or 8,444,500 acre feet in excess of the amount which California is permitted to take by the Boulder Canyon Project Act and her own statute, and sufficient to use all but about 1,000,000 acre feet of the unappropriated annual flow of the river. Arizona asserted that she was damaged by the impending appropriations of water by California by reason of the fact that future reclamation of land in Arizona can be accomplished only by large scale projects, contemplating the irrigation of large areas to be operated and administered as a single unit, and, because of the great cost of diversion works and large expenditures required to establish such projects, it will be impossible to finance them "unless water for the irrigation of said land can be appropriated and unclouded, undisputed and incontestable rights to the permanent use thereof acquired at or prior to the time of constructing such works." The Court held unanimously that the suit could not be entertained because the United States, which had not been named as a defendant and had not consented to be sued, was an indispensable party. The Court said that

> "The 'equitable share' of Arizona in the unappropriated water impounded above Boulder Dam could not be determined without ascertaining the rights of the United States to dispose of that water in aid and support of its project to control navigation, and without challenging the dispositions already agreed to by the Secretary's contracts with the California corporations, and the provision as well of § 5 of the Boulder Canyon Project Act that no person shall be entitled to the stored water except by contract with the Secretary."

Memorandum for the President - in re Constitutional Issues

1. Having been laid up in bed for nearly two weeks, I have tried to make a careful analysis of critical constitutional issues. The results are incorporated in the attached document written in the form of a speech - containing many statements which could be used either in platform or speech-writing. I have not cramped clear expression by considerations of policy - so this is probably too candid and vigorous for unadulterated use. But it states a case that should be stated - so far as a necessary regard for popular prejudices and sacred cows may permit. I hope this may be of some use.

2. As to the platform it seems to me, in view of the republican - Landon declaration, a very desirable democratic position might be -

> "If recent pronouncements of the Supreme Court are to be regarded as fixing permanent limitations on the legislative powers of both state and federal governments, it will be necessary to seek such an amendment or amendments to the federal constitution as will restore to the legislatures of the several States and to the Congress of the United States, each within its constitutionally defined jurisdiction, the power to enact and to have enforced those laws which the respective legislative bodies shall from time to time find necessary in order adequately to regulate commerce, to protect public health and safety, to safeguard economic security, and to provide for the general welfare".

The reasons for this form of statement are too many for quick summary - but the purpose of it is, I hope, obvious.

Donald R. Richberg.

CONCERNING THE CONSTITUTION AND THE SUPREME COURT

Draft of a too-vigorous, but justified position

Many loose and reckless charges have been made, denouncing the New Deal for supposed violations of the Constitution. But most of those who repeat these charges cannot quote even one provision of the Constitution which they would claim has been violated; and no one can point out any act of any public official which has violated any plain requirement of the Constitution.

Most of those who are voicing their indignation at "unconstitutional" acts know so little about the law written in the Constitution that they are only repeating, without understanding, what some one else has asserted. The few who are better informed know that it is impossible to point to any language in the Constitution which lays down clearly a duty or a prohibition that has not been faithfully observed.

Therefore, the professional twisters of constitutional law resort to technical, refined constructions of general language, and to positive assertions that vague phrases can have but one meaning. By this device they are trying to convince the American people that the Constitution, as the twisters have rewritten and altered it, prohibits a great many acts which are, in fact, not prohibited, but which are expressly authorized in the Constitution.

It is high time to talk plainly about these constitutional questions, in language which anyone can understand even without a legal education.

The principal charges against New Deal law making are these:

The first charge is: that the Congress has delegated its legislative power to the President - thus permitting him to make the laws. It is asserted that any delegation of legislative power is prohibited by the Constitution.

The fact is that there is not a word in the Constitution which prohibits the Congress from delegating legislative power either to the President or to other administrative officials. It is true that in the Constitution all legislative powers are expressly "vested" in the Congress - so that no President could undertake of his own volition to make a law.

But when the Congress enacts a law which gives to the President broad powers to carry out the declared purposes of the Congress, it exercises the constitutional right of the Congress to decide how far it is necessary to write detailed requirements into a law. That power is essential to the exercise of legislative power; and neither the President nor the Supreme Court has been given the power or the right to refuse to enforce a law enacted by the Congress - on the ground that the Congress has not written a sufficiently detailed law to meet the executive or judicial approval.

Let me give a few homely examples: The Congress passes laws prohibiting and providing for the punishment of various crimes - but it does not define just what constitutes forgery or embezzlement - nor direct how an indictment shall be drawn, nor how a case shall be tried, nor how a prison shall be run. All these details are left to the executive and judicial officers.

The Congress passes a law directing the Interstate Commerce Commission to fix just and reasonable railroad rates, and another directing the Federal Trade Commission to stop unfair methods of competition. These Commissions administer these laws; and then the courts approve or disapprove of their methods of determining what are "just and reasonable rates", or "unfair methods of competition". But you have never read any opinion by a judge complaining that by his definition and application of such broad terms he was himself exercising an unconstitutional delegation of legislative power.

There is not one word in the Constitution which gives to any Court any authority to refuse to enforce an otherwise valid law on the ground that it delegates too much discretionary power to executive officials; and until January, 1935 the Supreme Court in all our history, although often besought to do so, had never refused to enforce a law on the ground that legislative power could not be delegated. It had never held that the power of the Congress to make laws depended on the direct exercise of that power to the full extent which the Court should decide to be necessary.

Of course, if any Congress should be so foolish or weak as to enact a law simply providing that the President or some executive commission should be authorized to enact all the laws found necessary, that would be, in reality, not an exercise, but an abdication of its constitutional authority. Such an attempted transfer of power from one branch of the government would be a real violation of the Constitution; but no action even resembling such an abdication of legislative power has ever been even considered by the Congress.

Every law enacted as a part of the New Deal has laid down clearly the purpose of the Congress, and has directed the executive to carry out that purpose by defined means and in accordance with defined policies. That is not simply the proper constitutional method, but it is also the only practical method, of law making in dealing with our complex national problems. It has been the method legally employed for generations - in providing for the application and enforcement of the major laws of the federal government.

It is a simple fact that the Constitution of the United States is not violated by a law, simply because it delegates discretionary powers to the executive. But it is also a fact that the Constitution is clearly violated whenever any Court refuses to enforce such a law, because that is the definitely prescribed duty of every court under the Constitution. The gravest question which has arisen in connection with New Deal legislation has not been the question as to whether the Congress unwisely delegated too much discretion to the executive department; but the much more serious question as to whether the federal courts, acting without authority derived from any express mandate of the Constitution, have violated the Constitution in refusing to enforce the laws enacted by the Congress in the exercise of the legislative power which is expressly vested in the Congress by the Constitution.

The second principal charge against the New Deal is: that the Congress has invaded the domain of State sovereignty in attempting to regulate local business. This charge is based upon the common, but mistaken, idea that the federal government is empowered to regulate only business activities covering more than one State, such, for example, as interstate transportation, or the sale of goods for delivery in another State.

The fact is that there is not a word in the Constitution forbidding the Congress to regulate the production or distribution of goods entirely within one State - nor forbidding the regulation of business transacted wholly within one State. It has been the rule of law long ago firmly established by the Supreme Court that wholly local business and wholly local transactions are subject to federal law to the full extent that such control is needed to enable the Congress to exercise its express power "to regulate commerce among the several States".

Let us consider a familiar example: If a group of meat packers in Chicago should meet and agree upon the number of hogs they would buy and the prices they would pay and the amount of bacon they would make and the prices they would charge, they would be indicted for violating the federal anti-trust law. Every transaction might be confined to the State of Illinois, hogs bought there, bacon made and sold there. Every packer might refrain from doing any business with anyone outside the State. But they would all be legally charged with violating a federal regulation of interstate commerce - because the effect of their wholly local transactions would be injurious to freedom of competition in commerce among the states.

Thus we see that the supreme law of the Constitution actually gives the Congress full power to regulate local business, including production and manufacturing, to the full extent necessary to protect and to promote commerce among the States. Since that legislative power is given to the Congress, it follows that the Congress alone has the right to decide what laws are necessary to fulfill its duty and how far it is necessary to regulate local transactions for that purpose.

It is, of course, true that if the Congress attempted to regulate matters of essentially local concern having no apparent or reasonable relationship to commerce among the States - as, for example, the height of buildings or the sanitary handling of garbage, there would be a clear stretching of federal authority beyond its reasonable limits. It may also be conceded that in any attempted federal regulation of such businesses as hotels, barber shops and restaurants, or local retail stores, the exertion of any federal authority might be regarded as unwarranted except as to a limited number of activities closely related to and definitely affecting commerce among the States.

There are, therefore, types of imaginary or possible federal regulation which might be either clearly or debatably outside the delegated federal power; and in such cases the Supreme Court might find itself compelled to hold that the Congress had exceeded its authority. But there was no such question involved when the Supreme Court decided that New Deal legislation regulating the live poultry industry, and the bituminous coal industry, and the railroad industry, was outside the power to regulate commerce, because the same Court had previously held that all these industries were subject to the federal power to regulate commerce.

If the Court had merely held that the NRA Code, or the Guffey Act, or the railroad pension law, were unreasonable exercises of the admitted federal power and, therefore, violated other requirements of the Constitution, we might disagree with the court but we could not charge the court with attempting itself to amend the Constitution and to nullify a clearly granted legislative power.

But when the Supreme Court undertook by sweeping pronouncements to deny the authority of the Congress to regulate the subject matter of manufacturing and mining and relations between employers and employees, on the ground that these were local activities beyond the reach of the power to regulate commerce among the States, then it became necessary to question the authority of the judicial branch of the government to undertake thus to control the discretionary exercise of the power of law-making which the Constitution conferred upon the legislative branch.

The grave question again arises as to where lies the greater wrong - in the unwise exercise of legislative power, or in the refusal of the judiciary to enforce the laws enacted by the Congress in the exercise of power expressly vested in the Congress by the Constitution?

The third principal charge against the New Deal is: that the Congress has invaded the domain of state sovereignty in attempting to provide for the general welfare. This charge is based on a long debated theory that the Congress was never given a specific power to pass legislation to provide for the general welfare - although the Constitution grants exactly that power in words so plain that even a child can understand them.

Indeed the very first power granted to the Congress reads as follows:

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States."

The Congress has been legislating under this power for nearly one hundred and fifty years. Shrewd lawyers have tried to argue that it did not mean anything - that it was only a general reference to other powers later defined - because certain private interests have always feared the vigorous exercise of this legislative authority to advance the common good. But the question was never presented to the Supreme Court for a definite decision until the AAA Case. Then in January, 1936, the Court ruled - without a dissenting voice - that this language meant exactly what it said: that is, that the Congress could enact laws under which taxes could be collected and expended to provide for the general welfare.

But after this clear statement the Court then undertook to deprive the Congress of ~~the heart~~ an essential part of its legislative power; that is, the right to determine what is needed to advance the general welfare, by asserting that this power belongs to the Court, a majority of which then decided that no "local business" could be regulated because that power was "reserved to the States".

There is not a word in the Constitution reserving to the States any power "to provide for the general welfare of the United States" and the court has held time and time again that no part of any power granted to the United States could possibly be held "reserved to the States". Of course, no law could possibly be passed by the federal government which affected the general welfare which would not directly or indirectly regulate a thousand local activities.

The grave question is again presented - not of the wisdom of New Deal legislation - but as to what shall be done to preserve, protect and defend the Constitution when the federal courts refuse to enforce the laws enacted by the Congress in the exercise of power expressly vested in the Congress by the Constitution?

It is no answer to this question to say that the Supreme Court has the last word. That is not true. The last word in the American government lies with the people. They have the right and duty to pass judgment upon every public official; and no public officer can be placed so high as to be free from responsibility to the people for the performance of a public trust. No power not legally conferred upon any public official can be exercised by him; and that rule applies to every official from the village policeman to the highest legislative, executive or judicial officer in the land.

If we are to debate over how the Constitution should be construed, let us do it in good temper with respect for the conscientious opinions of every responsible public servant. But if we are to attack individuals and to charge everyone who disagrees with our reading of the Constitution with being false to his oath of office - then let it be understood that no one in America is too exalted to escape that charge. When men disagree as to the meaning of the fundamental law that proceeds from the people, let it be clearly understood that the people have the final decision; and they can either change their law or change those officials who in their judgment misread the law. And no one is too exalted to be above that personal responsibility. The President, each member of the Congress and each Justice of the Supreme Court should be held equally responsible for the exercise of his authority, not merely/<u>responsible</u> to his private conscience, but/<u>also</u> to the will of the people in whose service he is employed.

What insolence of office would induce anyone to stand before the people and proclaim: "If you do not accept my interpretation of your law, you must change the law! You cannot change me. I am above the law"!

The Court today granted certiorari in the case of United States v. Wood, which involves the constitutionality of the Act of Congress removing the disqualification of Government employees and pensioners as jurors in the District of Columbia in cases in which the United States is a party.

The Court also denied two petitions for writs of certiorari filed by opponents.

Respectfully,

Attorney General.

The President,

The White House,

Washington, D. C.

We have heard many broad charges that men are seeking to become dictators in America - dictators either in politics or business - or in both. But the temper of the American people will not tolerate any variety of dictator either in or out of public office. And I challenge any man or party to stand up and openly demand that America accept any such dictatorship over the laws and public policies of our state and federal governments as some now claim to be the existing right of the only public officials of the United States who are appointed for life. Let it be always remembered that any public official who is not responsible to the people is a potential tyrant; and that when men appointed for life assume to exercise an irresponsible authority from which there is no appeal we are confronted by an actual and not an imaginary dictatorship.

If the opinions of the Supreme Court, whether right or wrong, are to be beyond discussion in this campaign, if the opinions of a bare majority must be accepted as though of divine authority; if we are to accept without right of protest the unrestrained control of public policy which has been exercised by the Supreme Court for the first time in history in the last two years - let us clearly understand what we are doing. Let us not be deceived. This is indeed the end of self-government in America. This is the overthrow of all our Constitutional safeguards with one blow. This is no stealthy encroachment upon the rights of a free people. This is simply the sweeping of all our traditions into the fire and the raising of but one issue in the campaign - which is - Shall we tolerate the expansion of the power of the Supreme Court into an unrestrained veto power upon all legislation which does not meet with the approval of a majority of the Justices?

There is no such power granted or implied in the Constitution. The granted powers of the Court were never intended to reach so far. It is, however, a fact that the necessary powers of the Court cannot be exerted lawfully without a continuing exercise of self-restraint by the Court itself upon its powers which are so generously conferred as to be readily capable of abuse. The failure of self-restraint on the part of a public official whose acts are subject to review is dangerous enough. But lack of self-restraint by officials whose acts are final and who are themselves not subject to popular election, is an intolerable offense in a republic. We can forgive those who err in full consciousness that their power may be taken from them; but we cannot be tolerant of the wrongful self-assertion of those who rely upon our inability to reverse their action, or to take away their powers, except by changing those provisions of our fundamental law which we do not wish to change - but which should be interpreted and applied so as to fulfill the will of the people for whom and by whom all our laws are made.

file personal

PSF: Supreme Ct.

THE WHITE HOUSE
WASHINGTON

Dec 27/36

Dear Mr. President:

Sam "Forsting"
with ideas anent
our Constitutional problems;
and has a plan
(of substance + approach)
I would like + talk
over with you when you
have the time.

Cordially

The President

Personal

THE ATTORNEY GENERAL
WASHINGTON

December 29, 1936.

971

My dear Mr. President:

The enclosed memorandum is a further explanation of a matter we recently discussed.

Under the law as it now exists a Circuit Judge, or a District Judge, after reaching the age of seventy and having served ten years, may either resign or retire and still receive his full salary for life. A Supreme Court Justice, under similar circumstances as to age and length of service, may resign but in that event his retirement salary might be cut off or reduced by the Congress. There is no provision for his retirement.

Congressman Sumners attempted to remedy this defect at the last session and informs me that he is going to renew the effort as soon as possible. I think his bill is meritorious as it would provide for the same status for all Federal Judges.

Sincerely yours,

Homer Cummings

The President,
The White House.

pc F. Lapsley 12

ADDRESS REPLY TO
"THE ATTORNEY GENERAL"
AND REFER TO
INITIALS AND NUMBER

DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

AH:cjs

December 28, 1936.

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Status of retired and resigned judges.

A circuit judge or a district judge upon reaching the age of 70, and after having served on the bench at least ten years, may either resign or retire and still receive his full salary for life. If he retires he is still considered to hold office and may render judicial services (U. S. Code, Title 28, Section 375). However, if he resigns, he no longer has his life tenure and his compensation may be reduced or entirely taken away from him by a subsequent Act of Congress. On the other hand, if he retires, he is still a judge and, therefore, has the protection of the constitutional life tenure and of the constitutional provision precluding a reduction of his salary.

A Supreme Court Justice is permitted to resign on full salary after reaching the age of 70, if he has served ten years on the bench, but he may not retire. The idea that Congressman Sumners has is to permit Supreme Court Justices to retire in the same way the circuit and district judges may retire, so that they would not lose the constitutional protection of life tenure and of the prohibition against the reduction of their salary.

If a Supreme Court Justice resigns under the law as it now stands, there is nothing to prevent Congress from cutting off or reducing his compensation (U. S. Code, Title 28, Section 375).

Respectfully,

Alexander Holtzoff

Alexander Holtzoff

Sen. Robinson's new bill

File for Mr. Durand.

PSF: Supreme Ct. Roosevelt.

PSF Supreme Court

personal

SEC. 1. Section 215 of the Judicial Code of the United States is hereby repealed and reenacted to read as follows:

Section 215. The Supreme Court of the United States shall consist of a Chief Justice and eight associate justices, any six of whom shall constitute a quorum; provided, however, the number of justices may be temporarily increased by the appointment of an additional justice, in the manner now provided for the appointment of justices, for each justice, including the Chief Justice, who has passed the age of seventy-five years, but no more than one appointment of an additional justice as herein provided shall be made in one calendar year, and when such additional justice, or justices, shall have been so appointed no vacancy shall be filled caused by the death, resignation or retirement of a justice, except the Chief Justice, unless the filling of such vacancy is necessary to maintain the number of members at not less than nine. The number of temporary appointments so made shall not, at any time, increase the total number of justices by more than two-thirds of the permanent membership of the court. If the number of members of the Supreme Court is in excess of nine not less than two-thirds of the membership shall constitute a quorum.

As soon as may be, and, in so far as possible, the territory of each circuit court of appeals shall have at least one member of the Supreme Court who, at the time of his appointment, shall be a bona fide legal resident of such territory. No appointment

PSF: Supreme Ct

of an additional justice, or to fill a vacancy, shall be made from the territory of any circuit court of appeals having a member of the Supreme Court who was a bona fide legal resident of such territory at the time of his appointment unless the number of members of the Supreme Court shall exceed the number of circuit courts of appeals.

SEC. 2. That Section 345 of Title 28 of the Code of Laws of the United States (section 238 Judicial Code) be amended to read as follows:

"A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise:

(1) Section 29 of Title 15.

(2) Section 682 of Title 18, where the decision of the district court is adverse to the United States.

(3) Section 380 of this title.

(4) So much of section 47 of this title as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

(5) Section 217 of Title 7. (Mar. 3, 1891, C. 517, section 5, 26 Stat. 827; Jan. 20, 1897, c. 68, 29 Stat. 492; Apr. 12, 1900, c. 191, section 35, 31 Stat. 85; Apr. 20, 1900, c. 339, section 86, 31 Stat. 158; Mar 3, 1909, c. 269, section 1, 35 Stat. 838; Mar. 3, 1911, c. 231, sections, 238, 244, 36 Stat. 1157; Jan. 28, 1915, c. 22, section 2, 38 Stat. 804; Feb. 13, 1925, c. 229, section 1, 43 Stat. 938.)"

(6) When any judge, or court, of the United States issues any restraining order, decree, judgment or injunction prohibiting any Federal official, or employee, or Federal agency, or any other person or agency from carrying out the provisions of, or acting under the provisions of any Federal law, a motion may be made by the United States in the United States Supreme Court, or an appeal may be taken by the United States directly to the United States Supreme Court to dissolve, modify, reverse or affirm, as the case may be, such restraining order, decree, judgment or injunction. Reasonable notice of such motion, or appeal, shall be given the opposing party, or parties, in such action, or proceeding, by causing to be served upon him, or them, a notice of such motion, or appeal, and the notice with certificate of an officer authorized to execute it contained thereon shall be filed with such motion or appeal. Such motion, or appeal, shall be filed within ten days from the date of the entry of the restraining order, decree, judgment or injunction by the inferior court. When such motion, or appeal, is filed in the Supreme Court it shall be the duty of the clerk of that court to forthwith notify the clerk of the inferior court to forward immediately to the Supreme Court the entire record in the case. When the motion, or appeal, has been disposed of upon request by the inferior court the original papers shall be returned to the clerk of that court. When such motion, or appeal, is filed in the Supreme Court it shall be given preferential consideration over all other causes not of like nature. The right to make such motion, or take such an appeal, shall apply to restraining orders, decrees, judgments or injunctions heretofore, or hereafter, entered or rendered.

SECTION 3. (a) An additional judge of a court of the United States may be appointed, in the manner now provided by law, and to the same court, for each judge, appointed to hold his office during good behavior, who has passed the age of seventy-five years.

(b) The number of judges of any such court shall be permanently increased by the number appointed thereto under the provisions of subsection (a) of this section. No more than judges shall be appointed thereunder, nor shall any judge be so appointed if such appointment would result in (1) more than two additional members so appointed to a circuit court of appeals, the Court of Claims, the United States Court of Customs and Patent Appeals, or the Customs Court, or (2) more than twice the number of judges now authorized to be appointed for any district or, in the case of judges appointed for more than one district, for any such group of districts.

(c) Three-fifths of the judges of each of the following courts shall constitute a quorum thereof; the United States Court of Appeals for the District of Columbia, the Court of Claims and the United States Court of Customs and Patent Appeals.

(d) An additional judge shall not be appointed under the provisions of this section when the judge who is of retirement age is commissioned to an office as to which Congress has provided that a vacancy shall not be filled.

SUPREME COURT OF THE UNITED STATES.

No. 859.—October Term, 1935.

C. L. Ashton, et al., Petitioners, vs. Cameron County Water Improvement District No. One. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 25, 1936.]

Mr. Justice McReynolds delivered the opinion of the court.

Respondent, a water improvement district embracing 43,000 acres in Cameron County, Texas, was organized in 1914 under the laws of that State. Claiming to be insolvent and unable to meet its debts as they matured, it presented to the United States District Court, December 5, 1934, an Amended Petition with plan for adjusting its obligations—$800,000 six percent bonds. This proposed final settlement of these obligations through payment of 49.8 cents on the dollar out of funds to be borrowed from the Reconstruction Finance Corporation at four percent.

The petition follows and seeks relief under the Act of Congress approved May 24, 1934, c. 345, §§ 78, 79 and 80, 48 Stat. 798; Title 11 U. S. C. A., §§ 301, 302 and 303.* It alleges that more than thirty percent of the bondholders had accepted the plan and ultimately more than two-thirds would do so. The prayer asks confirmation of the proposal and that non-assenting bondholders be required to accept it.

Owners of more than five percent of outstanding bonds appeared, said there was no jurisdiction, denied the existence of insolvency, and asked that the petition be held insufficient.

The trial court dismissed the petition for lack of jurisdiction. It held—

The petitioner is a mere agency or instrumentality of the State, created for local exercise of her sovereign power—reclamation of arid land through irrigation. It owns no private property and carries on public business only. The bonds are contracts of the

*Originally, this was limited to two years. By Act approved April 10, 1936, it was extended to January 1, 1940.

(c) As soon as may be the membership of each circuit court of appeals shall consist of one judge from each State included in the circuit and in the appointment of additional judges as herein provided, or in the filling of vacancies, no appointment shall be made from any State having a member of the court who is a bona fide legal resident of such State unless the number of judges exceed the number of states composing the circuit.

SEC. 4. (a) The Supreme Court shall have power to appoint a proctor. It shall be his duty (1) to obtain and, if deemed by the court to be desirable, to publish information as to the volume, character, and status of litigation in the district courts and circuit courts of appeals, and such other information as the Supreme Court may from time to time require by order, and it shall be the duty of any judge, clerk, or marshal of any court of the United States promptly to furnish such information as may be required by the proctor; (2) to investigate the need of assigning district and circuit judges to other courts and to make recommendations thereon to the Chief Justice; (3) to recommend, with the approval of the Chief Justice, to any court of the United States methods for expediting cases pending on its dockets; and (4) to perform such other duties consistent with his office as the court shall direct.

(b) The proctor shall, by requisition upon the Public Printer, have any necessary printing and binding done at the Government Printing Office and authority is conferred upon the Public Printer to do such printing and binding.

(c) The salary of the proctor shall be $10,000 per annum, payable out of the Treasury in monthly installments, which shall be in full compensation for the services required by law. He shall also be allowed, in the discretion of the Chief Justice, stationery, supplies, travel expenses, equipment, necessary professional and clerical assistance, and miscellaneous expenses appropriate for performing the duties imposed by this section. The expenses in connection with the maintenance of his office shall be paid from the appropriation of the Supreme Court of the United States.

SEC. 5. There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000, for the salaries of additional judges and the other purposes of this Act during the fiscal year 1937.

SEC. 6. When used in this act-

(a) The term "circuit court of appeals" includes the United States Court of Appeals for the District of Columbia,

(b) The term "circuit" includes the District of Columbia.

(c) The term "district court" includes the District Court of the District of Columbia, but does not include the district in any territory or insular possession.

SEC. 7. This act shall take effect on the thirtieth day after the date of its enactment.

BR Pvt
Private "Brandeis"

File
PSF: Supreme Court 1936

1936

Blank advised:

(a) Not to attempt any legislation with the open support of the President relating to the size or the functions of the Supreme Court at this session;

(b) Be careful not to throw things unnecessarily before the Court for remainder of this session;

(c) Let talk go on in the Congress on the arbitrariness of the Court with emphasis on decisions affecting states (North Dakota, Vermont cases);

(d) try to turn general indignation against courts into reform of federal lower court jurisdiction, taking away diversity of citizenship jurisdiction except in cases of provable prejudice, etc. (go back to situation before 1875);

(e) Norris and Johnson best situated and best qualified to undertake a program of lower court reform.

State, executed through this agency, and secured by taxes levied upon local property. Congress lacks power to authorize a federal court to readjust obligations, as provided by the Act. Also, the allegations of fact are insufficient.

The Circuit Court of Appeals took the cause, considered the points presented, and held that the allegations were adequate to show jurisdiction and to warrant introduction of evidence. Also that Congress had exercised the power "To establish ~~a uniform Rule of Naturalization and~~ uniform Laws on the subject of Bankruptcies, ~~throughout the United States,~~" granted by § 8, cl. 4, Art. 1 of the Constitution. Accordingly, it reversed the trial court and remanded the cause.

The Act of May 24, 1934 amended the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, by adding Chapter IX (three sections, 78, 79, 80), captioned "Provisions for the Emergency Temporary Aid of Insolvent Public Debtors and to Preserve the Assets thereof and for other Related Purposes."

Section 78 asserts an emergency rendering imperative further exercise of the bankruptcy powers. Section 79 directs that "in addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings for the relief of debtors, as provided in this chapter."

Section 80—long and not free from ambiguities—in twelve paragraphs (a to l) prescribes the mode and conditions under which, when unable to pay its debts as they mature, "any municipality or other political subdivision of any State, including . . . any county, city, borough, village, parish, town, or township, unincorporated tax or special assessment district, and any school, drainage, irrigation, reclamation, levee, sewer, or paving, sanitary, port, improvement or other districts" may effect a readjustment. A brief outline of the salient provisions, with some quotations, will suffice for present purposes.

The petition for relief must be filed in the District Court and submit plan for readjustment approved by creditors holding thirty percent of the obligations to be affected; also complete list of creditors. If satisfied that the petition is in good faith and follows the statute, the judge shall enter an approving order; otherwise, it must be dismissed. Creditors holding five percent of the indebtedness may appear in opposition.

"A plan of readjustment within the meaning of this chapter shall include provisions modifying or altering the rights of creditors generally, or any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; and may contain such other provisions and agreements, not inconsistent with this chapter, as the parties may desire."

Upon approval of the petition, creditors must be notified; if the plan is not seasonably accepted, extension may be granted, etc.

Hearings must be accorded. The judge, with its approval, "may direct the rejection of contracts of the taxing district executory in whole or in part." He may require the district to open its books; allow reasonable compensation; stay suits; enter an interlocutory decree declaring the plan temporarily operative, etc. "But [he] shall not, by any order or decree, in the proceeding or otherwise, interfere with any of the political or governmental powers of the taxing district, or any of the property or revenues of the taxing district necessary in the opinion of the judge for essential governmental purposes, or any income-producing property, unless the plan of readjustment so provides."

After hearing, the judge shall confirm the plan, if satisfied that it is fair, equitable, for the best interests of the creditors, does not unduly discriminate, complies with the statute, and has been accepted by those holding two-thirds of the indebtedness. Also, that expenses incident to the readjustment have been provided for, that both plan and acceptance are in good faith and the district is authorized by law to take all necessary action.

The provisions of the plan, after order of confirmation, shall be binding upon the district and all creditors, secured or unsecured. Final decree shall discharge the district from all debts and liabilities dealt with by the plan, except as otherwise provided.

"(k) Nothing contained in this chapter shall be construed to limit or impair the power of any State to control, by legislation or otherwise, any political subdivision thereof in the exercise of its political or governmental powers, including expenditures therefor, and including the power to require the approval by any governmental agency of the State of the filing of any petition hereunder and of any plan of readjustment, and whenever there shall exist or shall hereafter be created under the law of any State any agency of such State authorized to exercise supervision or control over the