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## RECENT STEPS IN GOVERNMENT REGULATION OF BUSINESS

GEORGE JARVIS THOMPSON

This survey will endeavor to gauge some of the more important advances in both state and federal government regulation of business, and, so far as possible, to point out the significant trends in that respect as they are developing beneath the supervening wartime regulation. It will be seen that regulation by the federal government continues to advance chiefly along two lines—the commerce power and the financial power, the latter taking the form of federal grants or loans.

At the outset it may be well to note that last year in *Olsen v. Nebraska*<sup>1</sup> the reconstructed Supreme Court of the United States specifically overruled that bulwark of the old constitutionalism, *Rebnik v. McBride*,<sup>2</sup> to uphold state regulation of fees and charges of employment agencies. This is the first direct scotching of the "affected with a public interest" line of cases of the doughty old quintet of the court, and, in view of the *Nebbia* case's<sup>3</sup> earlier repudiation of the basic premise, is significant now chiefly as a demonstration that the new era of constitutional doctrine marches.<sup>4</sup>

### *Transportation and Commerce*

In the fields of transportation and commerce the Transportation Act of

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<sup>1</sup>313 U. S. 236, 61 Sup. Ct. 862, 133 A. L. R. 1500 (1941), Notes (1942) 10 GEO. WASH. L. REV. 880; (1942) 40 MICH. L. REV. 743; (1941) 20 N. CAR. L. REV. 83.

<sup>2</sup>277 U. S. 350, 48 Sup. Ct. 545, 56 A. L. R. 1327 (1928).

<sup>3</sup>*Nebbia v. New York*, 291 U. S. 502, 54 Sup. Ct. 505, 89 A. L. R. 1469 (1934). See Hale, *The Constitution and the Price System: Some Reflections on Nebbia v. New York* (1934) 34 COL. L. REV. 401.

In *Kelly-Sullivan v. Moss*, 174 Misc. 1098, 22 N. Y. S. (2d) 491 (Sup. Ct. 1940), *aff'd without opinion*, 260 App. Div. 921, 24 N. Y. S. (2d) 984 (1st Dep't 1940), Notes (1940) 9 GEO. WASH. L. REV. 242; (1941) 19 N. CAR. L. REV. 212; a New York statute regulating charges of ticket brokers to 75 cents on each ticket was upheld on the ground that the *Nebbia* case had, in effect, though not explicitly, overruled *Tyson v. Banton*, 273 U. S. 418, 47 Sup. Ct. 426, 58 A. L. R. 1236 (1927), in which similar New York legislation had been held unconstitutional.

<sup>4</sup>For a résumé of the new constitutionalism, see Kennedy, *The Bethlehem Steel Case—A Test of the New Constitutionalism* I (1942) 11 FORDHAM L. REV. 133. Also see, Albertsworth, *The New Constitutionalism* (1940) 26 A. B. A. J. 865; Rottschaefter, *The Constitution and a Planned Economy* (1940) 38 MICH. L. REV. 1133; Hamilton, *Special Competence of the Supreme Court* (1941) 50 YALE L. J. 1319; CORWIN, CONSTITUTIONAL REVOLUTION, LTD. (1941).

1940 declared a national transportation policy designed to provide fair and impartial regulation of all modes of transportation subject to the Interstate Commerce Act, including therein for the first time interstate common and contract carriers by water, "to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the United States, of the Postal Service, and of the national defense."<sup>5</sup> The phrase, "as well as other means," may point the way to further coordination with air transportation<sup>6</sup> when that latest transportation medium comes into its own in the post-war era. In bringing under unified regulation these heretofore fiercely competitive land and water carriers, the Act seeks to guard against favoritism by stipulating that the regulation be so administered as to recognize and preserve the advantages of each type of transportation.<sup>7</sup>

Recent regulatory development in this field is characterized by apparently divergent viewpoints of the Congress and of the United States Supreme Court as to the desirability of further extending the *Shreveport* doctrine permitting regulation of intrastate transportation by federal administrative bodies so far as deemed necessary to eliminate discrimination against and

<sup>5</sup>54 STAT. 952, 49 U. S. C. note preceding § 1.

<sup>6</sup>See Cushman, *Independent Regulatory Commissions*, pp. 403 at 404 *et seq.*, 415-6. See also Smith, *infra* note 7.

<sup>7</sup>The statute further directed the President to appoint a special Board of Investigation and Research. TRANSPORTATION ACT 1940, § 302 (a) and (b), Title III, Part I (54 STAT. 952, 49 U. S. C. c. I, Introductory note).

The function of the Board, as stated in U. S. GOVERNMENT MANUAL, Fall, 1942, 418, is "to make investigations of transportation problems and to report its conclusions and recommendations as to national transportation policy to the President and to Congress. Under the statute the Board is directed to investigate and report upon the following subjects:

"1. The relative economy and fitness of railroad, motor vehicle, and water carriers for transportation service, in order to determine the type of service for which each form of carrier is particularly fitted or unfitted, and the methods by which each form of carrier can and should be developed so that there may be provided a national transportation system adequate for the needs of commerce, the Postal Service, and the national defense.

"2. The extent to which these carriers are the beneficiaries of public aid, through grants of property or funds, extension of credit, or other means, in excess of adequate compensation to [from?] the public.

"3. The extent to which these carriers are taxed by Federal, State, and local governmental units.

"The Board is further authorized to investigate or consider any other matters relating to railroad, motor vehicle, or water carriers which it deems important to investigate for the improvement of transportation conditions and to effectuate the national transportation policy declared in the Interstate Commerce Act, as amended."

See address by Nelson Lee Smith, Chairman of the Board of Investigation and Research, "The New Transportation Board and Its Work" (1942) 9 I. C. C. PRACTITIONERS' J. 552.

The existence of the Board was extended by Presidential Proclamation June 26, 1942, to September 18, 1944.

other adverse effects of state regulation upon interstate commerce.<sup>8</sup> The Congress expressly provided against the application of this doctrine in the Federal Motor Carrier Act of 1935,<sup>9</sup> and as to water carriers in the Transportation Act of 1940.<sup>10</sup> On the other hand, the Supreme Court recently applied the doctrine in two cases: (1) to uphold power of the Secretary of Agriculture to fix minimum prices for milk produced and distributed within a single state where the state prices tended to compete with those fixed by the federal government in interstate commerce;<sup>11</sup> and (2) to sustain the paramount authority of the Federal Power Commission to grant a certificate of public convenience and necessity to a natural gas pipe line company seeking to engage solely in wholesale intrastate distribution of natural gas bought from an interstate pipe line corporation because of the buyer's ability to obstruct the stream of interstate commerce.<sup>12</sup> This last case also illustrates

<sup>8</sup>Houston, East & W. Tex. Ry. Co. v. United States, 234 U. S. 342, 34 Sup. Ct. 833 (1914). By § 416 Transportation Act of 1920 adding § 13 (4) to the Interstate Commerce Act [49 U. S. C. § 13 (4)] the Commission was given power to remove unjust discrimination by intrastate rates against interstate commerce by prescribing minimum intrastate rates. The constitutionality of this legislation was upheld in Railroad Comm. of Wis. v. Chicago, B & Q R.R., 257 U. S. 563, 42 Sup. Ct. 232, 22 A. L. R. 1086 (1922); New York v. United States, 257 U. S. 591, 42 Sup. Ct. 239 (1922); United States v. Louisiana, 290 U. S. 70, 54 Sup. Ct. 28 (1933).

<sup>9</sup>49 STAT. 543, 49 U. S. C. 301 *et seq.*, I. C. A. Part II § 201 *et seq.*

<sup>10</sup>54 STAT. 931, I. C. A. Part III, § 303 (k), 49 U. S. C. § 903 (k), reads, "Nothing in this chapter shall authorize the Commission to prescribe or regulate any rate, fare, or charge for intrastate transportation, or for any service connected therewith for the purpose of removing discrimination against interstate commerce or for any other purpose."

But Congress did resort to the *Shreveport* or adverse competition doctrine in the Bituminous Coal Act of 1937. See *infra* note 67.

<sup>11</sup>United States v. Wrightwood Dairy Co., 315 U. S. 110, 62 Sup. Ct. 523 (1942), Notes, (1942) 42 COL. L. REV. 694; (1942) 40 MICH. L. REV. 694; (1942) 20 TEX. L. REV. 612; (1942) 8 U. OF PITTS. L. REV. 139.

The Wrightwood Dairy Company was a milk handler in the Chicago area which purchased all its milk from state producers and sold only to local consumers, so there was no intermingling of this local milk with milk from without the state. The case required the defendant to comply with the terms of U. S. Secretary of Agriculture's Order No. 41, fixing minimum prices to be paid producers for milk which "is in the current of interstate or foreign commerce, or directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof." The Court said the legislative history indicated the purpose of Congress to exercise the interstate commerce power to the full extent in this field.

For a converse case enforcing state minimum price of milk in sale to United States Army Camp, see *infra* note 20.

This is a logical extension of the power of the federal government to fix prices of goods sold in interstate commerce recently recognized in United States v. Rock Royal Co-operative, 307 U. S. 533, 59 Sup. Ct. 993 (1939) as to milk, and Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, 60 Sup. Ct. 907 (1941) as to coal.

See upholding state minimum price milk regulation as to sales to federal government, *infra* note 20.

<sup>12</sup>Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U. S. 498, 62 Sup. Ct. 384 (1942), Notes (1942) 27 CORNELL L. Q. 399; (1942) 30 ILL. BAR. J. 250, reversing the Illinois Supreme Court which had upheld the State Public Service Com-

that federal legislative regulation of intrastate business is wafting further and further on the stream-of-commerce theory applied in the famous National Labor Relations Board cases upholding federal regulation of the right to collective bargaining with respect to manufacturing businesses and public utilities located entirely within one state.<sup>13</sup> An important case in this development, one resorting to both the stream-of-commerce and the competition theories, is *United States v. Darby*,<sup>14</sup> decided last year. That case sustained the constitutionality of the Federal Fair Labor Standards Act<sup>15</sup> as applied to prohibit movement in interstate commerce of goods manufactured wholly intrastate, but under substandard labor conditions as defined by the Act, when intended or expected to move in whole or in part in interstate commerce according to the normal course of business—and this, though the goods, lumber and its products, were in no way deleterious in themselves nor frowned upon by state law. The court pointed out:<sup>15a</sup> “The motive and purpose of the present regulation is plainly to make effective the congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows.”<sup>16</sup> Broad as the doctrine of the *Darby* case may seem to be, it was markedly extended in the late case of *Kirschbaum v. Walling*<sup>17</sup> to sustain the application of the Fair

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mission in requiring said intrastate wholesale natural gas corporation to procure a state certificate of public convenience and necessity, now declared unnecessary.

<sup>13</sup>National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 Sup. Ct. 615, 108 A. L. R. 1352 (1937), and related cases collected and discussed in (1937) 22 CORNELL L. Q. 568; and Magruder, *A Half Century of Legal Influence Upon the Development of Collective Bargaining* (1937) 50 HARV. L. REV. 1071, at 1101-4.

<sup>14</sup>312 U. S. 100, 61 Sup. Ct. 451, 132 A. L. R. 1430 (1941). Also see *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 61 Sup. Ct. 524 (1941) likewise sustaining the wage-hour law.

<sup>15</sup>52 STAT. 1060, 29 U. S. C. § 201 *et seq.*

<sup>15a</sup>312 U. S. at 115, 61 Sup. Ct. at 457 (1941).

<sup>16</sup>Contrast the statement of Mr. Justice Frankfurter in the *Kirschbaum* case *infra* note 17, 62 Sup. Ct. at 1120: “Moreover, in one of its intermediate stages, the measure [FLSA] incorporated the Shreveport doctrine, . . . in that it was specifically made applicable to intrastate production which competed with goods produced in another state. S. 2475, 75th Cong., 3d Sess., as recommitted Dec. 17, 1937, § 8 (a). But, as reported by the House Committee on Labor, this provision was deleted. S. 2475, *supra*, as reported April 21, 1938; See H. Rep. 2182, *supra*.”

<sup>17</sup>*Kirschbaum v. Walling*, — U. S. —, 62 Sup. Ct. 1116, 1120 (1942). Roberts, J., dissented.

The United States Supreme Court has refused to review a decision holding that an ice manufacturing company which made and sold its product within one state to interstate railroads for use as a refrigerant of foods in operation of interstate trains was subject to said wage-hour law (FLSA). *Hamlet Ice Co., Inc. v. Walling*, 127 F. (2d) 165 (C. C. A. 4th 1942). This trend to extend the coverage of the Act was carried to the point of holding an employer subject to its provisions though unaware that the goods produced were transshipped into interstate commerce. *Cullum v. Stevens*, 5 Wage & Hour Rep.

Labor Standards Act to engineers, firemen, elevator men, porters, janitors, carpenters, and similar employees of a landlord engaged solely in the operation and maintenance of a loft building, the tenants of which produced large quantities of goods for interstate commerce. The general objective of "the New Constitutionalism" in this field was distinctly revealed by Mr. Justice Frankfurter, writing for the Court, when he announced as the basis of decision "the statutory definition of employees 'engaged in commerce or in the production of goods for commerce', construed as the provision must be in the context of the history of federal absorption of governmental authority over industrial enterprise."<sup>17a</sup> [Italics supplied.]

In the *Darby* case the Court again emphasized that, "It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states."<sup>18</sup> Does this emphasis signify the beginning of the sup-

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304, 46 Fed. Supp. 73 (N. D. Tex. 1942), approved in Note (1942) 56 HARV. L. REV. 1139.

For a résumé of cases on the basic issue of what is commerce within the FLSA, see Note (1942) 90 U. OF PA. L. REV. 842. (Interstate Commerce and the Fair Labor Standard Act of 1938.)

See *Overnight Motor Transportation Co. v. Missel*, — U. S. —, 62 Sup. Ct. 1216 (1942), upholding application of overtime wage and liquidated damage provisions of FLSA in favor of interstate motor common carrier's employee who acted as a rate clerk and performed other incidental duties, none of which were connected with safety of operation. Roberts, J., dissented.

On the other hand, *Walling v. A. H. Belo Corporation*, — U. S. —, 62 Sup. Ct. 1223 (1942), held that since there is nothing in the Act which bars an employer from contracting with his employees to pay them the same wages after the Act became effective that they received previously, so long as that rate equals or exceeds the minimum required by the Act, such mutually satisfactory rate may be deemed the regular rate of pay for the purpose of measuring the time-and-a-half pay for overtime work. Reed, Black, Douglas and Murphy, JJ., dissented on the ground that the employment contract contained a guaranty clause of \$40 for a 54½ hour week, which was in excess of the statutory maximum hours for a work week, and modified the full operation of the time-and-a-half overtime clause of the wage contract in a way inimical to the operation of the statute.

<sup>17a</sup>— U. S. — at —, 62 Sup. Ct. 1116 at 1120.

As this issue goes to press, the epoch-making decision of *Wickard v. Filburn*, — U. S. —, 63 Sup. Ct. 82 (1942), has been handed down, by a unanimous court, holding that the commerce power supported the imposition of a federal penalty on a farmer for wheat grown on his own farm for home consumption in excess of his farm quota under the Agricultural Adjustment Act, [52 STAT. 31, 7 U. S. C. § 1281 *et seq.*, as amended 1941, 55 STAT. 203, 7 U. S. C. (Supp. No. 1) § 1340], though said excess wheat was definitely not intended, expected, or believed destined for movement in interstate commerce. The case is significant in extending the federal commerce power to govern marketing as well as production and transportation of a basic agricultural commodity, and the regulation of demand as well as supply. It carries the adverse-effect theory to the point that the possessor of home-grown excess wheat violates that policy in that he deprives the national market of a potential consumer. Further, said excess, though grown for home use, added to the national oversupply of wheat, thus potentially tending to defeat the purpose of Congress in maintaining a nation-wide reasonable price wheat market.

<sup>18</sup>312 U. S. at 114, 61 Sup. Ct. at 457. See *Seven Cases v. United States*, 239 U. S. 510, 514, 36 Sup. Ct. 190 (1916); *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 427, 61 Sup. Ct. 291 (1940).

planting of state police power areas by a pseudo-delegated federal police power? Consider the 5-4 decision in *Cloverleaf Butter Co. v. Patterson*,<sup>19</sup> decided last February. It was there held that certain sections of the federal Internal Revenue Code, defining process or renovated butter, fixing a poundage tax thereon and empowering the Secretary of Agriculture to regulate the inspecting, storage, and marketing thereof, superseded the state police power to seize and condemn such materials brought into the state in interstate commerce. Only a small part of the butter stock there involved was destined for shipment to other states, but the Court took the view that the state act was impliedly superseded by the federal act, although the latter made no provision for seizure and condemnation. Even Chief Justice Stone, who has pushed far the extension of federal regulation, was disturbed, and dissented on the ground that federal legislation should not be held lightly to override state police power statutes, particularly where, as here, these statutes might properly be construed to supplement the Congressional action by providing for the seizure and condemnation which the federal statute omitted.<sup>20</sup> On the other hand, in *California v. Thompson*,<sup>21</sup> state regulation which required licenses for travel bureaus and agencies arranging for interstate transportation of passengers for hire by automobile was upheld in spite of the Federal Motor Carrier Act. This was on the grounds that the federal act had not wholly superseded state regulation since it expressly excepted casual or occasional travel, the type of transportation involved, and, also, since the state act applied equally to interstate and intrastate transportation. This decision by Chief Justice Stone specifically overruled *DiSanto v. Pennsyl-*

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<sup>19</sup>315 U. S. 148, 62 Sup. Ct. 491 (1942). *Criticized* in Note (1942) 28 VA. L. REV. 822 as an unwarranted extension of "supersedure without conflict."

<sup>20</sup>*Compare* *Alabama v. King & Boozer*, 314 U. S. 1, 62 Sup. Ct. 43 (1941), Notes (1941) 40 MICH. L. REV. 457; (1941) 28 VA. L. REV. 251, 278, from the same state, in which the court greatly narrowed the constitutional immunity of the United States by upholding the state sales tax as assessed against a contractor engaged in building an army cantonment on a cost plus basis even though said tax increasing the cost was by the terms of the contract passed on directly to the federal government.

What will the court say of the conflict of immunities of the federal and state governments in such a case as *Penn Dairies v. Milk Control Comm.*, — Pa. Super. —, 24 A. (2d) 717 (1942), Note (1942) 90 U. OF PA. L. REV. 966, upholding Pennsylvania Milk Control Commission's minimum price on milk sold to the United States Army, Indian-town Cap Military Reservation, in the face of federal statutes requiring such government contracts to be let only on competitive bids?

Perhaps this will be answered in the review granted by the United States Supreme Court of *Pacific Coast Dairy, Inc. v. Dep't of Agriculture of California*, 19 Cal. (2d) 818, 123 P. (2d) 442 (1942), which sustained application of state minimum price as to milk sold to a United States Government military post.

<sup>21</sup>313 U. S. 109, 61 Sup. Ct. 930 (1941), Note (1941) 27 VA. L. REV. 1095. For the conflict on the validity of state regulation of travel bureau agents under the police power, see Note (1942) 30 GEORGETOWN L. J. 404, approving *Ex parte Garland*, 32 Tex. Cr. Rep. 36, 154 S. W. (2d) 834 (1941), which denied the right of state regulation because said business was both innocent and private. *Sed quare!*

*vania*,<sup>22</sup> which had denied the constitutionality of state legislation requiring a license for selling steamship tickets to or from foreign countries, thereby giving effect to his own dissenting opinion in the latter case. The Transportation Act of 1940, however, has amended the Federal Motor Carrier Act to bring within its coverage such casual or reciprocal transportation of persons or property when offered, furnished, or arranged for by a broker, as in the above case, thus superseding the state power when and to the extent it is made effective.<sup>23</sup>

### *Transmission of Natural Gas and Electricity*

The commerce clause also has been used to extend government regulation through the Federal Power Commission over the interstate transportation of natural gas and transmission of electric energy for sale at wholesale to local distributing public utilities under the 1935 amendment to the Federal Power Act<sup>24</sup> and the Natural Gas Act of 1938.<sup>25</sup> While, by the terms of these Acts, Congress voluntarily has refrained from undertaking to regulate either local production or local distribution of electric energy or natural gas, this may furnish but a temporary respite, since in the light of the recent stream-of-commerce cases previously mentioned, there seems no constitutional obstacle to complete federal regulation when desired.<sup>26</sup> Perhaps a significant straw on the pathway to the future is the exemption of all forms of governmental enterprises engaged in such interstate transmission and sale of electricity. To meet the immediate mischief which called it into being, the Electric Act carefully provided that federal regulation should extend only to matters not subject to state regulation.<sup>27</sup> Rather surprisingly, it also ex-

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<sup>22</sup>273 U. S. 34, 47 Sup. Ct. 267 (1927). Holmes, Brandeis, and Stone, JJ., dissented.

<sup>23</sup>I. C. A. Part II § 203 (9); 49 U. S. C. 303 (9) as amended 1940, 54 STAT. 921. By order of March 21, 1942, the I. C. C. extended its Motor Carrier regulation over this area in part, but the effective date thereof was postponed to Nov. 1, 1942. *Ex parte* No. M.C.-35, 11 U. S. LAW WEEK, § 2, p. 2030 (July 14, 1942).

<sup>24</sup>16 U. S. C. § 824 *et seq.*

<sup>25</sup>15 U. S. C. § 717 *et seq.* See Preston, *Regulation of the Natural Gas Industry* (1939) 45 W. VA. L. Q. 250.

<sup>26</sup>May an entering wedge have been Chief Justice Stone's prominent citation in the recent *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, *supra* note 12, of *Pennsylvania Gas Co. v. Public Service Comm. of N. Y.*, 252 U. S. 23, 40 Sup. Ct. 279 (1920), holding interstate transmission of natural gas continued to the consumer's burner tip though that case was supposed to have been largely supplanted by *East Ohio Gas Co. v. Tax Comm. of Ohio*, 283 U. S. 465, 51 Sup. Ct. 499 (1931), Note (1931) 41 YALE L. J. 304. The latter case declared that the interstate character of natural gas transmission ceased when the pressure was stepped down and the gas turned into local systems of distribution, and expressly disapproved the doctrine of the *Pennsylvania Gas* case. See Note (1942) 27 CORNELL L. Q. at 402.

<sup>27</sup>*Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U. S. 83, 47 Sup. Ct. 294 (1927). See, for the former situation, Howard, *Gas and Electricity in Interstate Commerce* (1934) 18 MINN. L. REV. 611, 683.

empted all existing lawful state regulation of exportation of hydro-electric energy across a state line.<sup>28</sup> In addition, there is the provision in the old Federal Power Act, now Part I,<sup>29</sup> for temporary use by the government of navigable water licensee power projects, for the purpose of manufacturing nitrates, explosives, or munitions of war or for any other purpose involving the national safety upon payment of just compensation. The Power Act of 1935, regulating electric utility companies engaged in interstate commerce, envisaged a permanent program to this end. It expressly charged the Federal Power Commission, in order to assure an abundant supply of electric energy throughout the United States, to divide the country into regional districts for the voluntary interconnection and co-ordination of facilities for the generation, transmission and sale of electric energy, subject to reasonable opportunity for each state commission to present its views and recommendations.<sup>30</sup> It is fortunate these acts were passed before the present war era, as it prepared the power industry to meet the present-day need by providing for temporary connection and exchange of facilities and service as between electric transmission enterprises both within and without the jurisdiction of the commission in such a way as will best meet the emergency and serve the public interest.

The Rural Electrification Administration is another and most active channel for spreading government regulation within the states.<sup>31</sup> One of the most successful of the New Deal experiments, the R.E.A. entered an almost wholly undeveloped field of great economic and social possibilities with a 10-year program based on a loan fund of hundreds of millions of dollars.<sup>32</sup>

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<sup>28</sup>16 U. S. C. § 824. The wording of this exemption indicates that Congress takes over, however, all subsequent regulation of exportation of hydro-electric energy to other states. The Act (§ 824-a) expressly confers on the Federal Power Commission the regulation of the transmission of electric energy to a foreign country. For a discussion of United States Supreme Court cases upholding state taxation on natural gas and electric power destined for export to other states, see, Howard, *loc. cit. supra* note 27 at 696 *et seq.*

<sup>29</sup>16 U. S. C. § 809. In *United States v. Appalachian Electric Power Co.*, *supra* note 18, it was held that waters capable of becoming navigable by improvements are subject to national planning and control in the broad regulation of commerce granted to the federal government; therefore, a hydro-electric corporation wishing to erect a dam thereon must get a license from the Federal Power Commission.

<sup>30</sup>16 U. S. C. § 824 (a). For a discussion of the effect of the extensive formation of regions for federal administrative purposes on the traditional distribution of governmental power between the nation and state, see Fesler, *Federal Use of Administration Areas* (1940) 207 *THE ANNALS, AM. ACAD. OF POL. & SOC. SCIENCE* 111. The subject of this volume of the *ANNALS* is, "Intergovernmental Relations in the United States."

<sup>31</sup>First established by executive order, May, 1935, and later made an independent agency by the Rural Electrification Act of 1936 (7 U. S. C. § 901 *et seq.*; 49 *STAT.* 1363), it was transferred to the Department of Agriculture by the Government Reorganization Plan, No. II, July 1, 1939.

<sup>32</sup>The original Act provided a loan fund of \$400,000,000 to be expended at the rate

The result is that with electricity available to some 10% of the farms of the country in 1934, it has now been brought to nearly 35% of them.<sup>33</sup>

The R.E.A. functions in three ways: (1) by lending funds to finance rural electrification; (2) by line building; and (3) by activities designed to protect the government's investment. There are no grants of funds, but only loans, either to build a system, or to furnish consumer equipment and appliances.<sup>34</sup> These loans are not made to individuals but to public utilities,<sup>35</sup> public bodies and cooperatives, preference being given to public sponsored or cooperative enterprises. The federal program has exerted considerable influence on private utilities by stimulating renewed interest in this type of service, resulting in sharply accelerated utility construction in rural areas, and by demonstrating on a large scale the practicability of less expensive but fully adequate types of line construction and equipment for rural service. The chief development, however, has been through rural electric cooperatives organized under state laws.

Up to this year, New York had enacted no special rural electric cooperative law, but merely authorized public bodies to accept federal aid to meet the depression emergency. New York, together with New Jersey and five other states, has been among the small minority regulating R.E.A. cooperatives as public utilities.<sup>36</sup> Many states, particularly in the deep south, have adopted cooperative statutes drawn by the R.E.A., which not only exempt those cooperatives from local public utility commission regulation, but abjectly abdicate to federal regulation. Thus, the Rural Electrification Authority Act of Tennessee<sup>37</sup> empowers this newly created type of public corporation to contract with "any federal agency," defined as "the United States of

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of \$40,000,000 a year. The success of the project led to an advance by the Reconstruction Finance Corporation of \$100,000,000 additional in 1939, and \$60,000,000 additional for the years 1941 and 1942, and \$10,000,000 for the fiscal year ending June 30, 1943.

<sup>33</sup>See U. S. GOVERNMENTAL MANUAL, Fall, 1942, p. 318; R. E. A. REPORT, 1941, p. 1.

<sup>34</sup>System loans must not only be reasonably secured, but must be self-liquidating and amortized over a maximum period of 25 years; whereas wiring and appliance loans must be amortized within 5 years. Interest is charged at rates paid by the United States on specified long-term indebtedness, averaging a little less than 3%. See U. S. GOVERNMENTAL MANUAL, Fall, 1942, p. 318; R. E. A. REPORT, 1940, p. 4; and 7 U. S. C. §§ 904, 905.

<sup>35</sup>The New York State Gas & Electric Corporation has been aided in rural electrification in southern central New York by R.E.A. See R. E. A. REPORT, 1940, Table 4, p. 44.

<sup>36</sup>The other five states were Kansas, Kentucky, Maryland, Virginia, and West Virginia. R. E. A. REPORT, 1941, p. 15. Some of these states have modified the Commission jurisdiction. See *infra* note 39.

<sup>37</sup>TENN. CODE ANN. (Williams, 1934) §§ 3708.26 *et seq.*, at § 3708.27 (10). Going even further is the Virginia Electric Cooperatives Act, 1936, § 3 (i) defining "Federal Agency" to mean "the United States of America, Tennessee Valley Authority, the Federal Administrator of the Rural Electrification Administration and any and all other authorities, agencies, and instrumentalities of the United States of America, heretofore or hereafter created."

America, the President of the United States, Tennessee Valley Authority, the Public Works Administration, and any and all other authorities, agencies and instrumentalities of the United States of America." The Act further empowered such cooperatives, "in connection with such contract to stipulate and agree to such covenants, terms and conditions as the governing body may deem appropriate, including, but without limitations, covenants, terms and conditions with respect to resale rates, financing and accounting methods, services, operation and maintenance practices and manner of disposing of the revenues."<sup>38</sup> A few states, while following the Tennessee statute in general, have preserved some jurisdiction in the state public utilities commission.<sup>39</sup> Most states have granted these R.E.A. cooperatives extensive tax exemption too. The New York Rural Electric Cooperative Law of 1942<sup>40</sup> goes far in substituting a \$10 "license fee in lieu of all other franchise, excise, income, and corporation taxes whatsoever," not only for state but also foreign electric cooperatives,<sup>41</sup> and further exempts both types from jurisdiction of the Public Service Commission.<sup>42</sup> It permits mortgaging or pledging franchise, property, revenues and income without authorization of the members upon such terms and conditions as the Board of Directors shall determine to secure any indebtedness to the United States or any federal agency or instrumentality.<sup>43</sup> This would seem to be as rank though not as frank an abdication to federal regulation as the Tennessee Act. The true significance of this is brought out by a North Carolina case which enjoined, on a taxpayer's suit, the construction of a municipal hydro-electric plant and distribution system, pursuant to a resolution of the defendant city, whereby it accepted a Federal Power Commission project license under agreement to

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<sup>38</sup>TENN. CODE ANN. (Williams, 1934) §§ 3708.37, 3708.96.

<sup>39</sup>Indiana, Kansas, Kentucky, Maine, Maryland, Missouri, New Hampshire, and Virginia.

<sup>40</sup>C. 566, effective April 29, 1942; c. 77-A Consolidated Laws. In a memorandum expressing his pleasure in approving the Act, Governor Lehman said it would make possible formation of farmers' rural electric cooperative corporations, and would bring electric service to 45,000 unserved farms in the state at low interest rates and on liberal financing terms offered by the Rural Electrification Administration.

Connecticut and Maine adopted the model R.E.A. Cooperative Act, 1941.

<sup>41</sup>*Id.* § 66. By § 41, "Any foreign non-profit or cooperative corporation supplying or authorized to supply electric energy and owning or operating electric transmission or distribution lines in an adjacent state may construct or acquire extensions of such lines in this state within an area no point of which is more than ten miles from the boundary line of this state and operate such extensions, provided that," such corporation file with the department of state a designation of the secretary of state as its agent to accept service of process.

<sup>42</sup>*Id.* § 67.

<sup>43</sup>*Id.* § 61 (a). But any other disposition or encumbering of a substantial portion of the property of such cooperative must be approved by a majority vote at a meeting of members. § 61 (b). Nearly all states more wisely require a vote of members for any incumbering or other disposition of the cooperative property.

abide by all the conditions and provisions of the Federal Power Act, as this would vest complete control in the federal agency, which would be unlawful in absence of special authorization by the state legislature.<sup>44</sup> This federal aid bait is like an insidious narcotic from which the states that rushed into the T.V.A. program of public ownership and operation, by buying up or duplicating existing private utilities, have begun to awaken only to find that they have killed the goose that laid the golden egg of taxes necessary to support state institutions.<sup>45</sup> Such wholesale tax exemption for R.E.A. cooperatives simply shifts more of the tax load to the average home owner who pays for general protection, whereas the R.E.A. consumers would pay but a trifle more in price for a definite and valuable direct service.<sup>46</sup> If the cooperative movement is to dominate our post-war economy, as it promises to do, it must shoulder its share of the tax burden.

<sup>44</sup>McGuinn v. High Point, 217 N. C. 449, 8 S. E. (2d) 462, 128 A. L. R. 608 (1940).

<sup>45</sup>This was finally recognized by the Authority and Congress. Barnes, *T.V.A. Tax Hangover* (1940) 25 PUB. UTILITIES FORTNIGHTLY 527, wherein is reproduced at p. 530, T.V.A. Chairman Morgan's, *The T.V.A.'s Position on Tax Replacements* from the CONG. REC., Jan. 4, 1940, p. 105. See Anderson, *T.V.A., Some Tennessee Problems* (1940) 16 TENN. L. REV. 304, 307. The original T.V.A. Act of 1933, [May 18, 1933, c. 32, § 13, 48 STAT. 66, 16 U. S. C. 831 (1)], provided that 5% of the gross proceeds received from the sale of hydro-electric power in Alabama and Tennessee should be available for payments in lieu of taxes. The Sparkman-Norris Act [June 26, 1940, c. 432, § 39, 54 STAT. 626, 16 U. S. C. 831 (b)], attempted to avoid injustice against other states in which the Authority functions by providing for payments in lieu of taxes on all property allocated to power, an amount equal to what would have been paid had the property been privately owned. For an excellent statement of the problem, see Pond, *The Value and Importance of Exempt Real Estate in the United States* (1940) 18 TAX MAG. 416. As to the application of the act, see ANNUAL REPORT OF THE TENNESSEE VALLEY AUTHORITY (1941) pp. 22-24.

The extensive tax exemption of the New York Rural Electric Cooperative Act, and the exemptions of acts of other states, seems to go beyond that which the R.E.A. has been willing to defend in the face of the above experience. See R. E. A. REPORT, 1940, p. 23; *id.* 1941, p. 18, where emphasis is placed upon taxation based on earning power.

In Wisconsin, by Laws 1941, c. 199, an annual license fee of 3% gross revenues from sales to members was imposed on electric cooperative associations.

<sup>46</sup>It might be well to recall in this connection, *Booneville v. Maltbie*, 272 N. Y. 404, 4 N. E. (2d) 209 (1936), upholding the right of a municipality owning and operating an electric lighting plant to charge rates which would give it a fair return on the value of property used and useful in the public service, thus acquiring a profit above bare cost of operation for general municipal purposes with resultant reduction in the general municipal tax.

The people of New York approved this policy by Constitutional Amendment 1938, Art. 3, § 18 which reads: "The legislature shall pass no bill, resolution or other measure prohibiting any municipal corporation operating a gas, electric or water public utility service from making and receiving, in addition to an amount equivalent to taxes which the said service, if privately owned, would pay to such municipal corporation, a fair return on the value of the property used and useful in such public utility service, over and above costs of operation and necessary and proper reserves, or prohibiting the use of the profits resulting from the operation of a public utility service for the payment of expenses or obligations incurred by such municipal purposes, or prohibiting the use of such profits for the payment of refunds to consumers."

Cf. *State v. Lincoln County Power Dist. No. 1*, — Nev. —, 111 P. (2d) 528 (1941); *Shirk v. Lancaster*, 313 Pa. 158, 169 Atl. 557, 90 A. L. R. 688 (1933).

*Regulation of Production of Oil and Gas*

The National Natural Gas Act of 1938, regulating interstate transportation and wholesale of natural gas, has been mentioned.<sup>47</sup> The regulation of the non-solid fuels—oil and natural gas—presents a difficult problem. As in the solid fuel or coal field, there are two aspects to the problem: (1) production and conservation, and (2) transportation and marketing.

Under the view prevailing prior to the National Labor Relations Board cases that, like manufacturing, production of oil and gas was not commerce,<sup>48</sup> regulation of the first phase, production and conservation, was left to the states. Voluntary restriction of output by the large producers and individual state conservation statutes proved ineffective to quell the independent over-supply and price cutting with "hot" or "contraband" oil. State regulation took the form of an Interstate Oil Compact (1935) for conservation of oil and gas. All important oil states except California and Illinois have enacted conservation and apportionment statutes in support of the compact.<sup>49</sup> Congress cooperated at once by backing the Compact with the Connally Hot Oil Act.<sup>50</sup> This act prohibited transportation in interstate commerce of "contraband oil," which is defined as that produced, transported or withdrawn from storage in excess of the amounts permitted under state laws or regulations, and authorized the President of the United States to prescribe regulations for its enforcement. He has conferred this authority upon the Secretary of the Interior, who exercises it through the Petroleum Conservation Division of his department.<sup>51</sup> The United States Supreme Court has liberally supported the several states and the federal government in enforcing the oil production and conservation laws and regulations.<sup>52</sup>

<sup>47</sup>See *supra* p. 7.

<sup>48</sup>See *Carter v. Carter Coal Co.*, 298 U. S. 238, 56 Sup. Ct. 855 (1936), which declared the Bituminous Coal Conservation Act of 1935 unconstitutional, and *Hope Natural Gas Co. v. Hall*, 274 U. S. 284, 47 Sup. Ct. 639 (1927), sustaining a West Virginia production tax on natural gas.

<sup>49</sup>Congress, as required by the U. S. CONST. Art. I, § 10, ¶ 3, approved the compact Feb. 16, 1935. See Colby, *The Law of Oil and Gas* (1942) 30 CAL. L. REV. 245, 266 *et seq.*

<sup>50</sup>15 U. S. C. § 715 *et seq.*

<sup>51</sup>See this explained in *United States v. Gilliland*, 312 U. S. 86, at 90, 61 Sup. Ct. 518, at 521 (1941), and U. S. GOVERNMENT MANUAL, Fall, 1942, p. 271. By executive order, May 28, 1941, Secretary of the Interior Ickes was designated Petroleum Coordinator for National Defense, and by letter of April 20, 1942, the President approved the designation of the office as "Office of Petroleum Coordinator for War." U. S. GOVERNMENT MANUAL, Fall, 1942, p. 271.

<sup>52</sup>This is exemplified by *United States v. Gilliland*, *supra* note 51, upholding the applicability of § 35 of the Federal Criminal Code as to verified reports falsely and fraudulently filed in purported compliance with regulations of the Secretary of the Interior under the "Hot Oil" Act.

In aid of state regulation the court upheld an Oklahoma statute which authorized a state commission to determine the limits of an oil pool, to divide it into appropriate

Since the Federal Hot Oil Act operates only as to oil coming from states having conservation and apportionment statutes, the non-compliance of California and Illinois has weakened seriously the compact plan, and supplies an excuse to the federal government to take over the whole field under the broadened concept of interstate commerce to cover all industries which produce or manufacture goods expected ultimately to move in interstate commerce in the normal course of business. The courts have not hesitated to apply the National Fair Labor Standards Act to the oil and gas industry.<sup>53</sup>

Though this system of production control obviously conflicts with the anti-trust laws, it has been insulated against them by skillful collaboration with Congress, such as Congressional ratification of the Interstate Oil Compact, Congressional appropriations to support the gathering of market demand data by the United States Bureau of Mines, and the effective enforcement of state quotas by the Connally Hot Oil Act.<sup>54</sup>

It is the oil transportation field which presents the most significant recent developments. The Hepburn Amendment of 1906 declared oil pipe lines to be common carriers under the Interstate Commerce Act,<sup>55</sup> and this was upheld in 1914 in the *Pipe Line Cases*.<sup>56</sup> Aside from filing tariffs and reports with the Interstate Commerce Commission, these lines owned and controlled by subsidiaries of the major oil producing companies have continued much as before, carrying only oil sold to or produced by them or by their asso-

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tracts or units and to limit the number of wells per unit, even when that prohibited a landowner from driving a well on his own land, where he was permitted a fair share in the oil and gas produced in the wells within the unit space (10 acres). *Patterson v. Standolind Co.*, 305 U. S. 376, 59 Sup. Ct. 259 (1939) *appeal dismissed on other grounds*.

It also has sustained a fixed barrel allowable production per well as a "reasonable proration" to afford greater protection to the odd lot owners on the margin of the pool. *R.R. Comm. v. Rowan & Nichols Oil Co.*, 311 U. S. 570, 614, 61 Sup. Ct. 343 (1941).

The Louisiana Conservation Law of 1940, exemplifying the most modern methods of scientific regulation will make new law in this field. See Metzger, *The Administrative Process in the Regulation of Oil and Gas Production in Louisiana* (1941) 16 *TULANE L. REV.* 91.

<sup>53</sup>See *Warren-Bradshaw Drilling Co. v. Hall*, — U. S. —, 63 Sup. Ct. 125 (1942), applying the Fair Labor Standards Act in favor of employees of a rotary drilling firm which contracted with owners or lessees of oil lands to drill holes to an agreed-upon depth short of the oil-sand stratum, though on reaching that depth the driller moved on and the well was completed by a "cable drilling" rig and crew. The Court held that since some of the oil ultimately produced normally entered pipe lines for interstate transportation, the preliminary rotary drilling constituted a "process or occupation necessary to the production of oil" with the intention, expectation or belief that any oil produced would, in part at least, move in interstate commerce. Also see *Fleming v. Rex Oil & Gas Co.*, 43 F. Supp. 950 (W. D. Mich. 1941) (oil pumpers), and Note (1941) 20 *TEX. L. REV.* 204.

<sup>54</sup>Comment (1942) 51 *YALE L. J.* 608 (Proration of Petroleum Production).

<sup>55</sup>34 *STAT.* 584, 49 U. S. C. § 1 (1).

<sup>56</sup>234 U. S. 548, 34 Sup. Ct. 956 (1914).

ciated corporations.<sup>57</sup> There was little objection, however, for the unparalleled increase in the use of oil and gas led to an enterprising expansion of the private pipe-line systems frequently anticipating our national needs, and at prices for crude oil which would seem generally to have been reasonable. Up to 1939, there had been but one complaint dealt with by the Commission relating to transportation rates and service.<sup>58</sup> Under the comparative freedom of this regime, private enterprise has built up a pipe line system which is the envy of the world and a bulwark in our national defense, not only without a cent of cost to the government, but while actually paying tremendous taxes, national, state, and local. This was the situation, when in the face of an impending involvement in World War II, Assistant United States Attorney-General Arnold, burst forth with a scheme to bring about divorcement of oil pipe lines from the refinery-owner relation to be achieved either by direct litigation or by Congressional action.<sup>59</sup>

The litigation argument is based on the old *New Haven* case,<sup>60</sup> decided by Mr. Justice White a few months before the Hepburn Amendment in 1906, which held that a railroad contracting to sell its own coal and deliver it over its own line at a loss if the filed freight tariff was included in the cost, could not absorb such loss as dealer; that this constituted transportation at less than the filed rates in violation of the Interstate Commerce Act, as it then stood. The complete answer to this argument would seem to be that since the very amendment which four months later brought the oil pipe lines under federal regulation also introduced the Commodities Clause<sup>61</sup> and expressly limited it to rail carriers, the Congress thereby adopted a definite public policy against applying the doctrine of the *New Haven* case, as well as the Commodities Clause, to this new field. This is borne out by the subsequent failure of Congress to extend the Commodities Clause to the oil pipe lines, and further by the fact that it did not extend the Commodities Clause to interstate motor carriage under the Federal Motor Carrier Act of 1935, nor as to water carriers by the Transportation Act of 1940. Moreover, it inserted no such prohibition when dealing directly with the interstate transportation of petroleum products in the Connally Act of 1935, nor in either the Electric Power Act of 1935 or the Natural Gas Act of 1938.

Under these circumstances, such a divorcement, if desirable, should be

<sup>57</sup>2 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1931) pp. '96 *et seq.*

<sup>58</sup>Black, *Oil Pipe Line Divorcement by Litigation and Legislation* (1940) 25 CORNELL L. Q. 510, 511; Sharfman, *op. cit. supra* note 57 at 98.

<sup>59</sup>Black, *loc. cit. supra* note 58 at 511.

<sup>60</sup>*New Haven R.R. v. Interstate Commerce Commission*, 200 U. S. 361, 26 Sup. Ct. 272 (1906).

<sup>61</sup>Interstate Commerce Act § 1 (8), 49 U. S. C. § 1 (8).

sought as it constitutionally may be, by Congressional action, for it is primarily an economic and national defense problem. This disconcerting attack from our own government so discouraged private pipe line expansion that in the face of the mounting threat of war Congress was compelled to intervene and enact the National Defense Pipe Line Construction Act of July 30, 1941,<sup>62</sup> empowering the President to aid in the building or completion of such pipe lines for transportation of petroleum products by granting the power of eminent domain and financial assistance to private enterprises or governmental agencies. With that change in government attitude has come a gratifying progress in pipe line expansion.<sup>63</sup>

### *Regulation of Production and Marketing of Coal*

In the "hard-fuel" field, bituminous coal has been subjected to comprehensive government regulation under the Commerce Clause. The Bituminous Coal Act of 1937<sup>64</sup> is substantially the Bituminous Coal Conservation Act of 1935,<sup>65</sup> stripped of its labor provisions of maximum hours, minimum wages and collective bargaining features which led to its being declared unconstitutional in the *Carter*-case,<sup>66</sup> as a regulation of production rather than commerce. The later Act governs producers and wholesale distributors with respect to the sale and distribution of bituminous coal by regulation of prices and trade practices, not only in interstate commerce, but, by express adoption of the *Shreveport* doctrine, also in the intrastate coal business if that tends to undermine the interstate regulation.<sup>67</sup> In the light of the labor cases, especially the *Darby* decision,<sup>68</sup> there is no doubt that the original Coal Act would now be declared constitutional. The 1937 Act has been sustained by the United States Supreme Court<sup>69</sup> in spite of resort to the taxing power to herd all the producers into the Bituminous Coal Code by granting exemption to those who become code members from the 19½% tax on the value of the

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<sup>62</sup>55 STAT. 610, 15 U. S. C. Introductory note preceding § 715.

<sup>63</sup>By October 1, 1941, three of these National Defense Pipe Lines had been authorized: (1) from Baton Rouge, La., to Greensboro, N. C., (2) St. Joe, Fla., to Chattanooga, Tenn., and (3) South Portland, Me., through North Troy, Vt., to Montreal, Canada—the first two gasoline lines and all built by private oil companies. June 11, 1942, the War Production Board approved immediate construction of a 550 mile, 24 inch crude oil pipe line from Texas to Illinois which is expected to be completed by Dec. 1, 1942. 3 VICTORY, No. 24, p. 5 (1942).

<sup>64</sup>50 STAT. 72, 15 U. S. C. §§ 828 *et seq.*

<sup>65</sup>49 STAT. 991, 15 U. S. C. §§ 801 *et seq.*

<sup>66</sup>298 U. S. 238, 56 Sup. Ct. 855 (1936), Notes (1936) 34 MICH. L. REV. 1167; (1936) 16 B. U. L. REV. 922; (1936) 50 HARV. L. REV. 307.

<sup>67</sup>50 STAT. 83, 15 U. S. C. § 834.

<sup>68</sup>*Supra* notes 13 and 14.

<sup>69</sup>*Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 60 Sup. Ct. 907 (1940); *Gray v. Powell*, 314 U. S. 402, 62 Sup. Ct. 326 (1941), Note (1942) 40 MICH. L. REV. 1093.

coal at the mine, and though the Court in the *Carter* case had declared the similar 15% tax to be a coercive penalty rather than regulation.<sup>70</sup> Originally enacted for but four years, the life of the Act has been extended for another three years to April, 1943.<sup>71</sup> The Bituminous Coal Commission which first administered the Act has been superseded by the Bituminous Coal Division of the Department of the Interior.<sup>72</sup>

The anthracite coal industry has been studying the possibility of similar state or federal regulation. It has been asserted that no action has been taken to this end, because an anthracite cartel embracing about 98% of the operators has been established under a wage contract with the United Mine Workers of America, and managed by a committee of operators and miners which meets weekly with a representative of the State of Pennsylvania to decide the amount of anthracite the market will absorb at a "fair" profit. This overall figure is broken down into allotments to the specific mines, under sanction of a penalty of deduction of any excess production from future allotments, thus avoiding the evil of over-production. Economically beneficial though the purpose of this device may be, it comes perilously near a conspiracy in restraint of trade in interstate commerce in violation of the Sherman Act.<sup>73</sup>

For the national defense, Secretary of the Interior Ickes, has been appointed by executive order, coordinator of both solid and non-solid fuels. Last January an overall War Resources Council was established to formulate a definite war program for the Interior Department.<sup>74</sup>

<sup>70</sup>*Supra* note 66 at 289, 310. In former Act, 15 U. S. C. § 803; in Act of 1937, 15 U. S. C. § 830 (b).

<sup>71</sup>55 STAT. 134, 15 U. S. C. 849. When the Bituminous Coal Act of 1937 was about to expire April 27, 1941, Professor Eugene V. Rostow, in an article, *Bituminous Coal and the Public Interest* (1941) 50 YALE L. J. 541, severely criticized the act, its administration and practical effects, on the ground that it simply created a government monopoly for benefit of both the mine owners and the miners at the consumer's expense, and advocated that it be allowed to lapse. His colleague, Professor Walton Hamilton, father of the ideology behind this and other New Deal experiments, vigorously objected in a reply article, *Coal and the Economy—A Demurrer* (1941) 50 YALE L. J. 595, asserting that only a regulated economy by government agency or authority can convert "an agglomeration of operations into an articulate industry." Rostow's reply, *Joinder in Demurrer* (1941) 50 YALE L. J. 611, at 620, closes with the surprisingly apt quotation [from ROBBINS, *THE ECONOMIC BASES OF CLASS CONFLICT* (1939) p. 44]: "Our present relapse into the methods of medieval monopoly is not progress, but reaction."

<sup>72</sup>By the amendment of 1941, 55 STAT. 134, § 2, 15 U. S. C. 852, the former office of Consumers Council of the Commission has been revived, apparently as an independent agency under the title "Office of the Bituminous Coal Consumers Counsel."

<sup>73</sup>Rostow concludes "no better illustration could be found of a trade union engaged in restraint of trade within the test of *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 60 Sup. Ct. 982 (1940)," *Bituminous Coal and the Public Interest* (1941) 50 YALE L. J. at 543n; Note (1941) 50 YALE L. J. 787.

<sup>74</sup>U. S. GOVERNMENT MANUAL, Fall, 1942, p. 279.

*Regulation of Radio Broadcasting*

There has been much agitation during the past year over expansion of federal regulation in the radio broadcasting field. Message service by wire or wireless, technically, but quite innocently, termed "transmission of intelligence" in contrast to broadcasting, has been regulated by the government since 1910. The Federal Communications Act of 1934<sup>75</sup> brought both kinds of service under the jurisdiction of the Federal Communications Commission, and with unique vision included radio transmission of energy, with all its intriguing possibilities in a United Nations' victorious post-war future.

Congress, in enacting the F.C.A. stated a policy, inevitable in view of the nature of radio broadcasting, to assume federal control of all the channels of interstate and foreign radio transmission in order to make available to all the people of the United States a rapid, efficient, nation-wide and world-wide radio communication service.<sup>76</sup> To this end it empowered the Commission to license broadcasting stations "from time to time as public convenience, interest or necessity requires," but for not longer than three years, such license to be for the use and not the ownership of the frequency allotted. Most licenses have been granted for not over six months, and only within the past two years have a few been for a year.<sup>77</sup> The Supreme Court has held that this policy is intended to make possible well-nigh unrestricted experimentation by the Commission in development of radio broadcasting.<sup>78</sup> In other words, one accepting a license and building up his station in reliance thereon does so at his peril. Even the lowly "HAM", whose amateur broad-

<sup>75</sup>48 STAT. 1064, 47 U. S. C. § 151 *et seq.* As to jurisdiction over transmission of energy by radio, see 47 U. S. C. §§ 152 (a), 153 (d).

<sup>76</sup>50 STAT. 189, §§ 1, 2; 47 U. S. C. §§ 151, 152. See symposium by experts on the radio industry and its regulation by the government, entitled *Radio: The Fifth Estate* (1935) 177 THE ANNALS, AM. ACAD. OF POL. & SOC. SCIENCE; *New Horizons in Radio* 1941, 213 *id.*

<sup>77</sup>47 U. S. C. 301, 307 (d), 309 (b). See Ethridge, *The Government and Radio* (1942) 213 THE ANNALS, AM. ACAD. OF POL. & SOC. SCIENCE, 109, 112; Fly, *Regulation of Radio Broadcasting in the Public Interest*, *id.* at 102. Brown and Reed, *loc. cit. infra*, note 80 at 255. On power of F.C.C. to deny license to compete in international radio transmission, see *Mackay Radio & Teleg. Co. v. Federal Communications Comm., et al.*, 97 F. (2d) 641 (App. D. C. 1938), Note (1938) 24 CORNELL L. Q. 277; Penstone, *Meaning of Term "Public Interest, Convenience or Necessity" under Communications Act of 1934 as Applied to Applications for Licenses to Construct New Broadcasting Stations* (1941) 9 GEO. WASH. L. REV. 873.

<sup>78</sup>Federal Communications Comm. v. Sanders Bros. Radio Station, 309 U. S. 470, 60 Sup. Ct. 693 (1940). And see to like effect under the Radio Act of 1927, *Federal Radio Comm. v. Nelson Bros. Bond & Mtge. Co.*, 289 U. S. 266, 53 Sup. Ct. 627, 89 A. L. R. 406 (1933), sustaining withdrawal of license from two Illinois broadcasting stations which had expended large sums in building up an admittedly satisfactory service and conferring that frequency on a much inferior Indiana station on the ground other good services were available in the Illinois area and the Indiana area needed more service. The latter case was criticized in Note (1933) 42 YALE L. J. 1274.

casts may extend beyond his state or interfere with other radio communications, must procure a federal license, so that intrastate regulation by the government is here almost complete.<sup>79</sup>

The present controversy relates to the extent the Federal Communications Commission lawfully may exercise detailed supervision over chain broadcasting station affiliation, advertising contracts and program selection. Since only a limited number of stations can operate on a standard broadcast band, the Federal Communications Commission attempts so to allocate them geographically as to provide adequate nation-wide service. There are almost 900 broadcasting stations in the country, the greater number of which are associated with some one of the four great networks.<sup>80</sup>

The Commission, in carrying out its mission of assuring freedom of competition in the radio broadcasting field, has objected to certain terms in the contracts between the individual stations and the networks.<sup>81</sup> To correct this, the Commission last year issued regulations denying licenses to stations whose affiliate contracts: (a) were for a longer term than two years, (b) were exclusive, (c) granted more than a limited time option, (d) did not give right of rejection of unsatisfactory network programs, and (e) restricted freedom as to rates for time not required for network programs. In addition, the regulations prohibited single ownership and control of more than one network.<sup>82</sup> How far the matter will be pushed *in flagrante bello* remains to be seen.

The Federal Communications Act also imposes on the Commission the technical duties of providing "transmission standards," that is, to adopt engineering rules to govern types of transmitters and their operation. In practical effect, this regulates the kind of apparatus used for radio trans-

<sup>79</sup>48 STAT. 1081, 47 U. S. C. 301 (d).

<sup>80</sup>N.B.C. (National Broadcasting Co.), C.B.S. (Columbia Broadcasting System), M.B.C. (Mutual Broadcasting Co.), and the new Blue Network, recently dissociated from N.B.C. at the order of the Commission. See Brown and Reed, *Regulation of Radio Broadcasting* (1932) 27 CORNELL L. Q. 249.

<sup>81</sup>Especially as to duration of the contract; time option call on the local stations; time allocation for network advertising; and exclusive tie-up contracts. See Brown and Reed, *loc. cit. supra* note 80 at 251 *et seq.*; Hettinger and Porter, *Radio Regulation: A Case Study in Basic Policy Conflicts* (1942) 221 THE ANNALS, AM. ACAD. OF POL. & SOC. SCIENCE, 122, 129.

<sup>82</sup>Brown and Reed, *loc. cit. supra* note 80, 252 *et seq.*; Hettinger and Porter, *loc. cit. supra* note 81, and Note (1941) 12 AIR L. REV. 301.

The Supreme Court has held that the promulgation of these regulations by Order of May 3, 1941, amended Oct. 11, 1941, and by the Minute of Procedure, Oct. 31, 1941 (set forth 62 Sup. Ct. at 1204-5) constituted such an order as was reviewable by suit in equity under 47 U. S. C. § 402 (a), and the Urgent Deficiencies Act, 28 U. S. C. § 47, before they actually became operative. *Columbia Broadcasting System, Inc. v. United States, et al.*, — U. S. —, 62 Sup. Ct. 1194 (1942), Note (1942) 56 HARV. L. REV. 121. See Miller, *Legal Aspects of the Chain Broadcasting Regulations* (1941) 12 AIR L. REV. 293.

mission.<sup>83</sup> The Commission is awake to its public responsibility in administering this tremendous power. To that end it has guarded against an adoption of rules which would freeze the technical development at an unsatisfactory stage, or stifle the normal operation of competitive forces in the broadcasting field.<sup>84</sup> This is illustrated in its attitude toward the three great inventions which feature current radio development:

(1) F.M., or frequency modulation, which improves upon our present A.M. (amplitude modulation) by reducing station interference and static.<sup>85</sup> It became of age May 20, 1940, when the Commission authorized its use on a commercial basis.

(2) Television,<sup>86</sup> for which about the same time, the Commission refused to adopt standards owing to the danger of freezing technical development at the then prevailing levels of performance. This restricted commercial, as distinguished from experimental, television until such time as the probabilities of basic research had been fairly explored. You may recall the outcry of dictatorship which arose, but it is questionable whether, had this ruling been otherwise, there could have been a demonstration of color television to the public as early as September 4, 1940. The various manufacturers would have been so engaged in market competition to sell their reception sets, as then developed, that experimental research would have had a severe setback.<sup>87</sup>

(3) Facsimile, or instantaneous and permanent broadcast recording of printed matter. Combined with F.M. it makes possible multiplexing, that is, the simultaneous transmission and reception of sound and facsimile broadcasts. This latest development tried in the fire of war undoubtedly will return to civilian use highly perfected.<sup>88</sup>

Long before Pearl Harbor, the President wisely began to revamp the Communications Commission for the vital part it must play in the nation at war, and when the time came it was organized to meet the emergency.<sup>89</sup>

<sup>83</sup>48 STAT. 1065, 47 U. S. C. §§ 153 (b), 303 (e), 354; U. S. GOVERNMENT MANUAL, Fall, 1942, p. 429.

<sup>84</sup>Fly, *loc. cit. supra* note 77, at 104-5.

<sup>85</sup>Craven, *Radio Frontiers*, 213 THE ANNALS, AM. ACAD. OF POL. & SOC. SCIENCE 125-6 (1941); Armstrong, *Frequency Modulation and Its Future Uses*, *id.* at 153; Hettinger, *Organizing Radio's Discoveries for Use*, *id.* at 170, 177; Brown and Reed, *loc. cit. supra* note 80, at 264.

<sup>86</sup>Engstrom, *Recent Developments in Television*, 213 THE ANNALS, *supra* note 85 at 130.

<sup>87</sup>Hettinger, *loc. cit. supra* note 85, at 174.

<sup>88</sup>Craven, *Radio Frontiers*, *loc. cit. supra* note 85; Hogan, *Facsimile and Its Future Uses*, *id.* at 162; Hettinger, *loc. cit. supra* note 85, at 170, 172.

<sup>89</sup>The first step was the creation by executive order of the Defense Communications Board with Chairman Fly of the F.C.C. as chairman, and this has been renamed the Board of War Communications. This body is assisted by a labor advisory committee and by an industrial advisory committee, composed of leaders in their respective branches

*Regulation by "Consent Decrees"*

In recent years there has arisen a new type of regulation of business by the Anti-trust Division of the United States Department of Justice in the form of prosecutions commonly ending in "consent decrees."<sup>90</sup> "The Division apparently now requires the party consenting to the decree to offer 'constructive proposals which are in the public interest and which go beyond what the law requires.' Through the 'concurrent use of civil and criminal remedies,' the Division seems to contemplate a kind of enforcement through barter, in which the defendants will submit voluntarily to greater restrictions than could be imposed through ordinary litigation, in return for the Division's recommendation to the proper court that criminal proceedings be *nolle prossed*."<sup>91</sup> And unbelievable as it may sound, this program was persisted in despite the outbreak of war. Finally, by March 20, 1942, the continuance of these prosecutions had become so patently contrary to the national interest and security that the President approved a joint memorandum signed by the Secretaries of War and of the Navy, and by the United States Attorney-General, and Assistant Attorney-General Arnold of the Anti-trust Division, specifically recognizing the injurious effect of this policy. The memorandum provided that at the request of either of the above Secre-

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of the communications field. U. S. GOVERNMENT MANUAL, Fall, 1942, pp. 58, 430.

<sup>90</sup>Sometimes these decrees are entered simply after a complaint brought by the government; again after indictment of the defendant, or in course of trial. See Katz, *The Consent Decree in Anti-trust Administration* (1940) 53 HARV. L. REV. 415.

<sup>91</sup>Isenbergh and Rubin, *Anti-trust Enforcement Through Consent Decrees* (1940) 53 HARV. L. REV. 386, 388, *citing* Dep't of Justice Release, May 18, 1938, Report, Att'y Gen. 1938, 306. See also Report, Att'y Gen. 1939, at 41.

In the automobile finance cases which ended in the consent decrees recently before the Supreme Court in the *Chrysler* case, *infra*, District Judge Geiger, presiding at the trial in Milwaukee, Wis., courageously objected to the bludgeoning of the defendants by pressing criminal charges while negotiations for a consent decree were proceeding and, therefore, dismissed the grand jury before indictments had been returned.

The characteristically forceful language of Mr. Justice Holmes in an analogous situation would seem appropriate: "Any one who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire [citation], and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. . . . The investigations and complaints seem to have been only on hearsay or suspicion—but, even if they were induced by substantial evidence under oath, the rudimentary principles of justice that we have laid down would apply. . . ." Federal Trade Comm. v. American Tobacco Co., 264 U. S. 298, 305-7, 44 Sup. Ct. 336, 337, 32 A. L. R. 786 (1924).

In *Chrysler Corporation v. United States*, — U. S. —, 62 Sup. Ct. 1146 (1942), granting modification of a consent decree at the government's request over the other party's objection, Justices Frankfurter and Reed dissented. *Cf.* *United States v. Radio Corp. of America*, 46 Fed. Supp. 654 (D. C. Del. 1942), refusing on the basis of the dissent in the *Chrysler* case to modify or vacate such a decree solely upon the Attorney General's statement that it no longer served the public interest, and asserting the terms of such decrees bound the government as well as the defendant.

taries "stating that in his opinion the investigation, suit, or prosecution will seriously interfere with the war effort," such investigations or prosecutions should be suspended so long as they might interfere with war production, if no actual fraud upon the government was involved.<sup>92</sup> After considerable difficulty and delay, a number of such stay or suspension orders have been granted by the federal district courts, but, strangely, usually upon the joint recommendation of both the Secretary of War and the Secretary of the Navy.<sup>93</sup>

Pursuant to a provision in this memorandum, Congress was requested to, and did, enact the recent statute suspending the running of the statute of limitations on violations of the anti-trust laws until June 30, 1945,<sup>94</sup> or until such earlier time as Congress by concurrent resolutions, or the President, may designate. Indeed, Congress went even further, and provided that whenever, after consultation with the Attorney General, the Chairman of the War Production Board finds and certifies in writing that the doing or omitting to do any act or thing in compliance with his written request or approval is requisite to the prosecution of the war, no prosecution or civil action shall be commenced with reference thereto under the anti-trust laws, or the Federal Trade Commission Act.<sup>95</sup> Notwithstanding these sensible and patriotic measures, the national government as late as the autumn of 1942, bewildered the public by instituting and pressing an anti-trust suit against the Associated Press, oldest and most extensive of our news gathering agencies.<sup>96</sup> The Associated Press was simply carrying on its business as it had done, and as had been regarded as legal,<sup>97</sup> for the entire fifty years of the Sherman Act,

<sup>92</sup>The memorandum and the President's written approval appear in 10 U. S. LAW WEEK, § 2, pp. 2621-2622, Mar. 31, 1942.

<sup>93</sup>For instances of such stays or suspensions, see, 10 U. S. LAW WEEK, § 2, pp. 2720, 2867 (1942); 11 U. S. LAW WEEK, § 2, pp. 2108, 2204.

<sup>94</sup>Approved Oct. 10, 1942, c. 589, 77th Cong. 2d Sess., U. S. Code Congressional Service, 1942, No. 9, p. 1219.

See Congressional Comment, *id.* at 1527, stating: "The date is selected because it is 6 months after December 31, 1944, which has been used by Congress as the estimated date of the termination of the war and it is felt that the suspension should continue 6 months after termination of the war."

<sup>95</sup>Act for Mobilization of Small Business Concerns in War Production, Public L. 603, c. 404, § 12, 77th Cong., 2d Sess. (approved June 11, 1942). See 10 U. S. LAW WEEK, (Statute Section) June 9, 1942, p. 4 for text. The Attorney General must report operations under the statute to Congress every 120 days, and certificates of the W.P.B. Chairman are to be published in the Federal Register.

<sup>96</sup>The complaint was filed in U. S. District Court, Southern Dist. of N. Y., and charged that the by-laws of the Associated Press excluding from membership competitors of existing members, and requiring member papers to furnish local news exclusively to it, illegally restrained and monopolized interstate commerce in news; to which was added a further charge of acquisition by the A.P. of the stock of Wide World Photos, Inc., a competing news-picture service. 11 U. S. LAW WEEK, § 2, p. 2203 (Sept. 15, 1942).

See *The Press in the Contemporary Scene* (1942) 219 THE ANNALS, AM. ACAD. OF POL. & SOC. SCIENCE; Siebert, *Legal Developments Affecting the Press*, *id.* at 93.

<sup>97</sup>That such a news gathering and distributing agency is not a public utility owing

and there was no charge of defrauding the government; therefore, why such an attack in the midst of war and contrary to the distinct policy of Congress expressed in the above acts? Indeed, the case would seem to fall directly within the mischief denounced by the joint memorandum that, "In the present all-out effort to produce quickly and uninterruptedly a maximum amount of weapons of warfare, such court investigations, suits, and prosecutions unavoidably consume the time of executives and employees of those corporations which are engaged in war work. In those cases we believe that continuing such prosecutions at this time will be contrary to the national interest and security. It is therefore something which we seek to obviate as quickly as possible."<sup>98</sup> Surely the world-wide, rapid and accurate garnering of information for our government and our people may be fairly classed as an essential weapon of modern warfare, and it would seem the patriotic duty of the Department of Justice to secure a stay of such proceedings on its own initiative. Instead, the Court denied the defendant's motion for a stay.

### *Conclusion*

Looking back over this survey, the outstanding feature is that the steady advance of federal regulation of business continues beneath the surface of emergency war-power measures. Every citizen should keep in mind the protective values of peacetime constitutional limitations, and be alert to secure their observance as soon as possible after attainment of a victorious peace.

No truth has been more clearly demonstrated in the history of all nations than the deadening paralysis of over-concentration of political rule, coupled with economic domination of business enterprise, and thereby, too, of employment. That way lies economic-power politics, which has always spelled bloody politics—only those in power eat. Can an America so centralized escape the very fate from which it now seeks to deliver other nations, and become the one shining exception on the pages of history?

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a duty to serve all papers on demand was long ago held: *State v. Associated Press*, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151, 81 Am. St. Rep. 368 (1901); *Matthews v. Associated Press*, 136 N. Y. 333, 32 N. E. 981 (1893). And see *International News Service v. The Associated Press*, 248 U. S. 215, 39 Sup. Ct. 68, 2 A. L. R. 293 (1918); *Thorp & Annette v. General News Bureau, Inc.*, 242 App. Div. 330, 275 N. Y. Supp. 41 (1st Dep't 1934). *Contra*: *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 56 N. E. 822, 48 L. R. A. 568, 75 Am. St. Rep. 184 (1900).

<sup>98</sup>10 U. S. LAW WEEK, § 2, p. 2621 (Mar. 31, 1942).