



1941

JOINDER IN DEMURRER

EUGENE V. ROSTOW

Follow this and additional works at: <https://digitalcommons.law.yale.edu/ylj>

Recommended Citation

EUGENE V. ROSTOW, *JOINDER IN DEMURRER*, 50 *YALE L.J.* (1941).
Available at: <https://digitalcommons.law.yale.edu/ylj/vol50/iss4/3>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law Journal by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

JOINER IN DEMURRER

By EUGENE V. ROSTOW

IN the tradition of Doctor and Student—and Walton Hamilton is one of those who helped school me in it—an argument never comes to an end. The classical sequence is not Question and Answer, but Question and further Question, until Truth is finally trussed up and labelled. My learned and respected teacher has responded to my argument in the approved scholastic manner, by saying that if its statements “were translated from the categorical to the inquisitorial,” he would be tempted to concur. In the workaday world, however, some questions must be answered categorically, for the here and now, at least, if not for the centuries. A statute expires. Should it be renewed? Professor Hamilton says of the Coal Act, “Wait, to see how an interesting experiment works out.” Yet, for all his scholar’s reservations, he gives a categorical blessing to the official position of the Coal Division, that the Coal Act be reenacted unchanged for at least two more years.

The issue between us appears to be joined in this pattern: The thesis of my paper was that at the present time (the coal industry being prosperous), and for as long a period in the future as public and private enterprise can maintain conditions of high employment in the society at large, there is no call and no excuse for the minimum price program of the Bituminous Coal Act of 1937. The Act does not serve the needs of the industry, nor yet the public interest, in terms of any and all the available theories about the recent history of bituminous coal, since it does not provide for control of production, and, by raising prices, serves to worsen the competitive position of coal in relation to other fuels. In good times, the Act is an unnecessary subsidy to coal operators, and in bad times it cannot prevent a disastrous fall in profits, production and employment. Professor Hamilton’s reply, as I understand it, is that in good times or bad, the coal industry must have minimum prices, or it will relapse into a socially dangerous condition which he describes variously as “disorder” or “death.”

The explanation he offers in support of his position runs in two independent cycles. The first of his arguments has the form of a syllogism. Professor Hamilton asserts that there must be “control” over industries in situations where “the market” cannot “be trusted to work out the details of order.” “The” market—“whose positive agency of control is competition”—can “properly” “perform its reputed office” only when the industry in question satisfies a certain checklist of “conditions.” These conditions “must be met,” or a “control” established. The conditions are declared on page 596.

“A standard commodity, a free and open market, an increase in unit expense with mounting volume, an obliging absence of the com-

plexities brought by multiple products, a series of costs for skills and materials which are not themselves reflections of price—these are primary requisites. But others are almost as essential—an industry open to newcomers; want of patents and other legal sanctions with which to fence about closed domains; a freedom from private government through price leadership or an intricate array of trade practices; an institution of bankruptcy which promptly liquidates the obsolescent venture.”

The minor premise neatly follows. The coal industry does not satisfy any such catechism of conditions; coal prices are set in thousands of private bargains, without uniformity, and with reference only to the particular circumstances of particular buyers and sellers. Q.E.D., says Professor Hamilton, “a public control must replace the market as the agency of industrial order.”

As one freshly accused of faith and not works,¹ may I mildly retort, *tu quoque?* Whatever else Professor Hamilton's argument may be, it is not taking “principle and example” from the same “plane,” sternly cabined by the facts about coal. Out of what hat did Professor Hamilton pull his checklist of conditions, and why is it a checklist? Why does the failure or not of the coal industry to satisfy such conditions prove anything at all about the need for minimum price fixing? Agreed that coal is sold very much as Professor Hamilton says it is. My argument is explicitly based on a recognition of that fact. Why should the price practices of the coal industry be changed, and why particularly should they be changed in the way the Coal Division has changed them? Should the mine realizations of coal operators be higher than they are now, even though the coal industry does not fully match an arbitrary checklist of economists' conditions?

1. An accusation to which I enter as vigorous a denial as I may. My effort has been to define every concept used in the analysis of the coal situation with concrete reference to the circumstances of the industry, and then to use the term only in the defined sense. To be sure, there are no “facts” apart from “theories” about them. But there are more and less realistic theories about facts. It is hard to see how one can criticize the economic policy of our coal arrangements without analyzing what the public is getting for its money—*i.e.*, the relation of coal costs and coal prices of various kinds. If some of those conceptions are “empty boxes,” they should be eliminated; but I don't think the inquiry itself, into how much coal costs, can be avoided. The very general and unparticularized charges brought against the economic arguments of my article are reminiscent of broadsides in the famous battle of the “Institutionalists” against the “Neo-classicists,” in which Professor Hamilton has long been a conspicuous figure. Certainly Mr. Hamilton's charges are not specifically directed at the issues raised in the article. For example, I don't think I ever mentioned a “marginal mine” or “increasing cost” (see page 600, note 7), nor, to my mind, is there any need of “reconciling” marginal analysis and overhead costs; on the contrary, marginal analysis offers a powerful device for explaining the roles of overhead costs in actual experience.

I do not understand Professor Hamilton's faith in "order" and "symmetry" as goals for policy desirable in themselves. The words are peppered throughout his article, but they seem to have a private meaning which he nowhere fully explains, and which does not clearly appear from the context of his argument. At one point, he does give the concept a fairly plain meaning: "A potential output, impatient for release, exerts its constant pressure towards industrial disorder." The sentence seems to say that industrial "disorder" is connected with competition which reduces prices. But why is it "disorderly" to have coal operators sell coal at prices as low as they choose to go? In good times, like the present, they make profits despite their price practices; in bad times, such practices tend to keep output and employment somewhat higher, relatively, than is the case in industries where rigid prices put the whole burden of depression on employment. And, in good times and bad alike, the highly competitive price practices of the coal business give the community assurance that its physical resources are being used more fully than in industries whose organization is less competitive.

A floor under prices (all considerations of the regional allocation of business apart) cannot prevent a fall in the demand for coal, and a fall in profits, during periods of industrial inactivity. If the Hamiltonian concept of "order" in the coal industry, represented by the Bituminous Coal Act of 1937, does not mean the maintenance of profitable conditions in the industry during bad times, what does it mean? A general interchange among coal operators of knowledge about coal prices and classifications, as represented in the mimeographed schedules of minimum prices? Such knowledge, says Professor Hamilton, would be a "boon to the coal business." It is difficult to see why or how. The information services of trade associations, and the price filing devices of the NRA codes, have now been generally recognized as techniques used in many circumstances for keeping prices up and output down. Is this what Professor Hamilton means by a "boon to the coal business"? And why should such a "boon" be a boon to the public interest?

Another cycle of argument to explain why minimum prices are needed in the coal industry, in good times and in bad, is contained in Part II of Professor Hamilton's demurrer. This argument rests on a conception as undefined as the principal term of the Checklist Syllogism in Part I. Professor Hamilton starts Part II with the proposition that my analysis of the problems of the industry is inadequate. "To me his items are only manifestations of an industrial disorder which runs much deeper." This deeper disorder is a tendency of operators to "overshoot" their marks, whenever they become prey to a "recurrent excess of zeal." The wartime expansion after 1917, says Professor Hamilton, is an instance, but only an instance, of this tendency.² It seems to me, to use Professor

2. I might call attention here to the fact that I do not hold the views attributed to me at this point of Professor Hamilton's argument. On the contrary, I expressly repudiat-

Hamilton's phrase, that such a view "rather trustfully" reads a pattern of economic theory into the tangled events of bituminous coal history. My argument was that unique circumstances of interregional competition for coal business, and not a recurring impulse among "economic men" to overshoot their marks, accounted for the unique coal troubles of the twenties. Unlike the case of agriculture, the absolute demand for coal did not fall off; the industry was demoralized by another factor, interregional competition based on disparities in wages and freight rates.

I find Professor Hamilton's "recurrent excess of zeal" theory (which should be compared with Pigou's related views) as remote from the facts of the coal industry as he finds mine to be. Professor Hamilton reacts sharply against my statement that, on the whole, production in old mines is expanded, and new mines are opened, when operators anticipate that their enlarged revenues will cover their enlarged operating costs; he much prefers to say that coal operators "readily and hastily plunge into production" when "the anticipation is no more than the thought of picking up a little loose change; most of what comes in goes into wages." I'll follow General Johnson's example and eat this bulky periodical if the substance of Professor Hamilton's statement differs from that of mine.³ From this premise, Professor Hamilton's argument proceeds in a straight march: mines "readily and hastily plunge into production," and our bank-

ed the Brookings' over-shooting-the-mark theory of events during the early twenties, as a simplification of what actually happened.

Of course, as Professor Hamilton has somewhere remarked, a review is a matter of chance, and one who writes should blame only himself if he has failed to communicate to a careful reader. But I cannot resist denying some of the eloquent charges which Professor Hamilton distills by generalizing from a single instance. I was writing about the affairs of the coal industry; I do *not* believe, as charged on page 596, that a program of expansion requires that "all" restraints, "all" trade barriers, "all" elements of structure too rigid to bend be cleared away; my point was that there is no reason in view of the organization of *the coal business* for adopting a policy other than anti-trust enforcement with respect to commercial restrictions, as contrasted with those inherent in the wage structure. Moreover, the dire charge on page 609 is a gross canard, and hits a little below the belt, in two particulars. Doesn't the accusation that I cherish "a deep-seated distrust of a public agency as an instrument for the distribution of wealth" fall flat when directed against an Article which advocates the direct expenditure of funds in many enterprises—*i.e.*, the direct distribution of wealth—by agencies of government? The issue is not one of principle, but of particular cases. I am not convinced that minimum price fixing in the coal industry serves a useful social purpose. I don't quite see how that position implies that I harbor a Freudian malevolence against tax-gatherers and their work. Furthermore, I did *not* choose the regulation of utilities as an example of the failure of restriction schemes; whatever the shortcomings of state regulation in the utilities field, such monopolies must be controlled. I directed attention rather to our negative experience with restriction schemes under NRA, and in raw materials and agriculture.

3. In the light of this part of Professor Hamilton's argument, what happens to his rather dashing charge that unused coal reserves cannot be compared to the unused capacity of existing mines? If new mines are opened as quickly as Professor Hamilton says, surely my comparison applies *a fortiori*.

ruptcy system does not drive them out of business soon enough.⁴ Operators can accommodate their costs to market conditions, and keep on producing, so long as they can pay the wages and freight rates they have to pay — and here some flexibility may be achieved, in whittling costs to suit prices. I thought I said exactly that; in any event, I quite agree that production is carried forward in times of falling prices beyond the point at which full overhead costs are earned. From this it apparently follows that “recurring excesses of zeal” among operators will lead “not merely” to “overcapacity” but to disorder.

If this is really Professor Hamilton’s “deeper” reason why the Coal Act should be renewed, I must reiterate my dissent both from the analysis and from the conclusion. In the first place, the Act does nothing to prevent these Hamiltonian “excesses of zeal” — on the contrary, it encourages them, by raising prices, and setting up no barrier to the expansion of production in existing mines, or to the entry of new mines into production. Here one may quote Professor Hamilton against himself; he once said, of another proposal for “ordering” the coal business: “These proposals show that the failure of the Commission is a failure of analysis. If the coal industry is to be made orderly, there must be a control of capacity.”⁵ But there are more general reasons for opposing Professor Hamilton’s too-facile “zeal” theory. Professor Hamilton’s argument applies, expressly, to any industry in which there are many independent producers, each producing a small share of the total production. Is he then saying that in our society we cannot afford to have industry competitively organized? Isn’t Professor Hamilton’s theory a speculative projection into the future of an abstract notion of business men’s behavior and an abstract and mechanical theory of trade fluctuations?⁶ Professor Hamilton’s use of such blunted analytical tools comes, I suggest, from his failure to enrich his price studies by reviewing them in the perspective of the literature about trade fluctuations. Is there any real reason, in the light of the past and present of the coal business, now to expect the number of mines to become “excessive”? Excessive in relation to what? If the demand for coal is maintained by the maintenance of a high rate of industrial activity, and if wage rates are firmly stabilized, why should the number of mines become excessive? Professor Hamilton’s prophecy does not fit the pattern of events in the past, and there is little concrete

4. Professor Hamilton sounds this note at three points at least in his article. Here, I think, our disagreement is profound. The reproach to the bankruptcy system, to my mind, is that it intervenes too soon (*i.e.*, when an enterprise fails to pay interest on its bonds or their equivalent), not, as Professor Hamilton contends, too late in the history of a particular enterprise. Why abandon equipment which can be used to produce coal at prices which more than cover operating costs, *i.e.*, wages, power, physical maintenance, etc.?

5. HAMILTON & WRIGHT, *A WAY OF ORDER FOR BITUMINOUS COAL* (1928) 95.

6. See HABERLER, *PROSPERITY AND DEPRESSION* (1939 ed.) 128, 134-136, and c. 6.

reason for supposing that it will be realized in the future. During the twenties, coal mining capacity became excessive in the wake of the inter-regional competition of that time; it became generally redundant, on a large scale, during the thirties, *after* the depression, occasioned by other factors, had caused an absolute decline in demand for coal, and not before.

At less abstract and hypothetical levels of argument, Professor Hamilton relies mainly on consideration for the welfare of mine labor as a reason for seeking renewal of the Act. The unionization of the fields, he says, is not enough to protect labor, at least in bad times; in this view the officials of the United Mine Workers concur. The opinion of the union on the desirability of minimum prices is somewhat weakened by the record of that agency in sticking to its doctrinaire theory of labor economics without regard to the course of events. The union believes in ever higher money wages, and in coal prices high enough to pay them. That position was an important factor in the interregional competition of the twenties; it is the basic plank of the anthracite cartel now in operation. High money wages have encouraged the mechanization of mines, and the replacement of miners by machinery. The seven-hour day now prevails, and the union wants to make it a six-hour day. Professor Hamilton once said of this proposal: "The workers must choose between rather better livings for a smaller number of workers, and the retention of more workers on lower wages."⁷ One should approach the demand of the union for minimum prices, as the essential condition for the preservation of its wage standards, in the light of Professor Hamilton's warning. It may be that collective bargaining and a high level of industrial activity cannot alone protect labor against exploitation; at present, Professor Hamilton concedes, the profitable condition of the industry gives hope to labor, "but the enlarged ability to pay derives in no small part from the price schedules recently promulgated by the Bituminous Coal Division."⁸ If investigation should bear out this conclusion, the obvious remedy for the protection of wage standards is direct regulation of wages. Such regulation would be easier to enforce and cheaper to administer than the regulation of prices. Both parties to a violation of minimum price schedules are anxious to conceal the violation; but a worker victimized, if backed by a strong union and a fair enforcement tribunal, has no incentive to submit. The enforcement of minimal wage scales, unlike the enforcement of minimum prices, thus might easily survive a depression. Furthermore, the setting of minimum wages, either

7. HAMILTON & WRIGHT, *A WAY OF ORDER FOR BITUMINOUS COAL* (1928) 105.

8. This proposition is open to some doubt. If production during 1940 is broken down by quarters, it appears, paradoxically enough, that the first three quarters were 25% ahead of the corresponding period of 1939, but that in the fourth quarter, during which minimum prices were established, production was 6% below that of the fourth quarter of 1939, despite the accelerating pace of the rearmament boom.

under state statutes or under the Fair Labor Standards Act, has not involved a rigmarole of investigation as elaborate, or as irrelevant, as that under the Bituminous Coal Act.

Professor Hamilton goes further, into a risky argument of analogy. "The pricing process is of a character with those of wage-making and rate-fixing between which it is pent in. In fact all three are pricing processes. If a general oversight is necessary in respect to two of these three aspects which are interlocked, its necessity seems apparent for the third." Not at all. Wage fixing is undertaken for the social protection of the worker, and that policy should go forward, as Professor Hamilton indicates, to wipe out other means of exploiting labor — company stores, wages in scrip, and so on. Freight rates are the charges of monopoly, and control over such prices is needed for reasons which do not obtain in the highly competitive economy of coal prices.

In the end, Professor Hamilton's plea for the Act, despite its qualities as a general denial, turns out really to be a demurrer, or at least a defense of confession and avoidance. Higher prices are to be charged for coal, he admits, and the coal industry is to be given a larger share of the national income, although higher prices are a subsidy which does not promise to prevent the recurrence of disaster in the coal industry, either in good times or in bad. But this grant to the coal operators is justified for two reasons. In the first place, he says, it is not a charge against consumers, since only 20 per cent of all coal "finds its way into the household bin." Among other coal consumers, "the cost of power is a microscopic item in the retail price of the good." This is a great deal like the defense of the bastard child in one of Captain Marryat's novels: "But, Sir, it's such a little one." It is under any circumstances a curious argument. If the average of mine realizations for coal is increased 10 or 11 cents, as the Coal Division hopes,⁹ between \$45,000,000 and \$50,000,000 will have been withdrawn from the pockets of the rest of the community for the benefit of coal people. There has been no compensating increase in the total amount of money, and the transaction is simply a change in the way an existing fund is allocated. To say that the subsidy hurts no one because it may not fall directly on the householding consumer defies all our experience with indirect taxation, as well as the rules of arithmetic. If the arrangement be judged on its merits, as a subsidy, its claim for justification appears doubtful. Is there a social reason to want the coal companies rather than the railroads to present good balance sheets? Do we want investors attracted to coal mining, and new equipment put into mines, rather than into railroads, utilities or manufacturing industry generally? The fact that the subsidy is made so indiscriminately, and at the expense of groups who may deserve as well of the

9. 3 ANN. REP. UNDER THE BITUMINOUS COAL ACT OF 1937 (1940) 4-5.

Treasury as coal operators, subtracts from its possible merit as a subsidy to redress the bargaining position of the coal men.

But Professor Hamilton advances another count in his plea. Higher prices and the powers of the Division will work in the public interest, he says, in several noteworthy ways: the Division may control interfuel competition, it may conduct research and fight the good fight for conservation. But neither the Act nor its administration contribute anything substantial in such worthy directions. Price fixing is not a necessary condition to the carrying on of research in the uses of coal; nor does it contribute at all to the public interest in conservation. A higher return permits, but surely does not "promise," a "more efficient exploitation" of coal reserves. The only way to get conservation is to work for conservation, by detailed mining regulations and inspections. Higher profits are no shortcut to conservation. As for interfuel competition, Secretary Ickes has on several occasions pointed out that the system of price control represented in the Coal Act will have to include both oil and gas before the Division can hope to control the competition among substitute fuels.

All in all, I don't find Professor Hamilton's article a persuasive answer to the questions which seem to me immanent in our coal experience. Perhaps the most striking feature of his argument is the absence from it of a detailed defense of the particular statute about to expire, as compared with other possible remedies for the ills of the industry. He does not fully discuss the cost provisions of the Act, the absence of controls over production, the possibilities of using the English or German models for control, or the desirability of the Allen Bill, the industry's proposal for its own salvation through private monopoly. Does Professor Hamilton think it wise, expedient or necessary to amend the Coal Act of 1937? Would he have a usable maximum price provision written into the statute? Would he change the statutory language about the coordination of coal prices? In answer to these questions, he tells us simply to renew the Act. It is not enough of an answer, in view of the affirmative disadvantages of the Act, and the cumulative policy towards the control of business routine which it represents. "Our present relapse into the methods of medieval monopoly is not progress but reaction."¹⁰

10. ROBBINS, *THE ECONOMIC BASIS OF CLASS CONFLICT* (1939) 44.