

5-1-1972

The Evolution Of The Fair Labor Standards Act

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Robert N. Willis, *The Evolution Of The Fair Labor Standards Act*, 26 U. Miami L. Rev. 607 (1972)
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THE EVOLUTION OF THE FAIR LABOR STANDARDS ACT

ROBERT N. WILLIS*

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I. INTRODUCTION

The Fair Labor Standards Act of 1938 (FLSA)¹ was the original anti-poverty law, enacted by Congress as the country was struggling out of the throes of the Great Depression.² To stimulate the devastated economy, wage and hour controls were placed upon employment of the nation's work force, resulting in a minimum wage floor³ and a maximum hours limitation⁴ on the workweek. The premise that the FLSA's main

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1. 52 Stat. 1060 (1938), as amended, 29 U.S.C. §§ 201-19 (1970) [hereinafter cited as FLSA].

2. See Donahue, *Underpinning the Poverty Program—The Wage & Hour Act Three Decades Later*, N.Y.U. 20TH ANN. CONF. ON LABOR 59, 59-61 (1967) [hereinafter cited as Donahue].

3. 52 Stat. 1060 (1938), as amended, 29 U.S.C. § 206 (1970). Originally the hourly minimum wage was \$.25 per hour, but currently it is \$1.60 per hour. Bills were introduced in the 92d Congress which provided for \$2.00 and \$2.20 per hour minimum wage floors. H.R. 7130 and S. 1861, 92d Cong., 2d Sess. (1972).

4. 52 Stat. 1060 (1938), as amended, 29 U.S.C. § 207 (1970). The Congress established a maximum hours per week standard with overtime payment provisions. These standards were intended as an inducement to employers to hire additional workers in avoidance of the penalty payment of the extra time and a half for overtime work. In the year immediately preceding the enactment of the FLSA, a congressionally desired prohibition of overtime work hours was clearly evident in labor standards legislation, most notably The National Industrial Recovery Act, Act of August 30, 1935, 49 Stat. 991, *repealed by* Act of April 26, 1937, 50 Stat. 90; and The Walsh-Healey Public Contracts Act, 49 Stat. 2036 (1936), as amended, 41 U.S.C. §§ 35-45 (1970). The continuation of this prohibition of work hours in excess of the applicable maximum was made an objective of the proposed, and subsequently enacted, fair labor standards legislation in 1937. S. REP. No. 884, 75th Cong., 1st Sess. 7 (1937).

thrust was directed at alleviating the Depression's destitution of the nation's workers was reiterated as recently as 1966. During deliberations on the proposed 1966 amendments to the FLSA, the Senate Committee on Labor and Public Welfare commented:

The Fair Labor Standards Act was enacted in 1938 to meet the economic and social problems of that era. Low wages, long working hours and high unemployment plagued the Nation, which was then in the midst of an unprecedented depression. The policy of the act, as set forth therein, was to correct and as rapidly as practicable to eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers.⁵

Although the FLSA has been amended many times through the years,⁶ the congressional purpose of the Act,⁷ like those of many other social laws, has remained anchored in the commerce clause.⁸ It is under the guise of the broad commerce powers that the gradual, consistent extension of the coverage of the Fair Labor Standards Act has been and will continue to be accomplished.

From its inception, the courts have applied the FLSA to employees

5. SENATE COMM. ON LABOR AND PUBLIC WELFARE, FAIR LABOR STANDARDS AMENDMENTS OF 1966, S. REP. NO. 1487, 89th Cong., 2d Sess. 1 (1966).

6. 52 Stat. 1060 (1938), as amended by the Act of August 9, 1939, 53 Stat. 1266; Reorganization Plan No. II of 1939, § 404, 53 Stat. 1436; the Act of June 26, 1940, §§ 3(c)-(f), 54 Stat. 615; the Act of October 29, 1941, 55 Stat. 756; Reorganization Plan No. 2 of 1946, 60 Stat. 1095; the Portal-to-Portal Act of 1947, 61 Stat. 84; the Act of July 20, 1949, 63 Stat. 446; the Fair Labor Standards Amendments of 1949, 63 Stat. 910; Reorganization Plan No. 6 of 1950, 64 Stat. 1263; the Fair Labor Standards Amendments of 1955, 69 Stat. 711; the American Samoa Labor Standards Amendments of 1956, 70 Stat. 1118; the Act of August 30, 1957, 71 Stat. 514; the Act of August 25, 1958, 72 Stat. 844; the Act of August 28, 1958, § 22, 72 Stat. 948; the Act of July 12, 1960, 74 Stat. 417; the Fair Labor Standards Amendment of 1961, 75 Stat. 65; the Equal Pay Act of 1963, 77 Stat. 56; and the Fair Labor Standards Amendments of 1966, 80 Stat. 830. See 29 U.S.C. §§ 201-19 (1970).

7. 29 C.F.R. § 776.1 (1969) provides:

The Congressional policy under which employees "engaged in commerce or in the production of goods for commerce" are brought within the general coverage of the act's wage and hours provisions is stated in section 2 of the act. This section makes it clear that the Congressional power to regulate interstate and foreign commerce is exercised in this act in order to remedy certain evils, namely, "labor conditions detrimental to the maintenance of the minimum standards of living necessary for health efficiency, and the general well being of workers" which Congress found "(a) causes commerce and the channels and instrumentalities of commerce to be used to perpetuate such labor conditions among the workers of the several states; (b) burdens commerce and the free flow of goods in commerce; (c) constitutes an unfair method of competition in commerce; (d) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce, and (e) interferes with the orderly and fair marketing of goods in commerce."

Part 776 of title 29 of the Code of Federal Regulations comprises the *Interpretative Bulletin on the General Coverage of the Wage and Hours Provisions of the Fair Labor Standards Act of 1938* (revised). This guide will be referred to in many instances throughout this article.

8. U.S. CONST. art. I, § 8.

"engaged in interstate commerce" or "in the production of goods for" such commerce. Each one of these broad coverage areas contains its own standards for FLSA application. In 1961⁹ and 1966,¹⁰ the FLSA's coverage was extended to include certain "enterprises," thus enlarging the protection of the Act to 61% of the approximately 73,000,000 member work force.¹¹ The most recent extension of the Act's coverage was proposed in the United States Senate during its 1971 term.¹² Therefore, the trend toward inevitable expansion of the FLSA's coverage throughout the economy is easily recognizable.

It would seem reasonable that since this law has been in existence since 1938, and since its terms are fairly clear, the volume of litigation would decline as employers became more familiar with the Act's coverage formulas. But to the contrary, there is more litigation each year at the federal district court level arising under the FLSA than in any other area of labor relations law. The purpose of this article is to focus upon the case law development of the Fair Labor Standards Act from the time of its enactment to the present,¹³ with minor emphasis on the Act's amendments. This case review concentrates on FLSA decisions of the United States Supreme Court. Scattered case reports of particular significance from the federal courts of appeals are also included, with emphasis on the opinions of the Court of Appeals for the Fifth Circuit. Because of lingering agricultural predominance, inappreciable unionization, large black population, child labor abuses, and retaliation by recalcitrant employers, the southern regions have accumulated the largest number of yearly FLSA violations.¹⁴ As a direct result, the Fifth Circuit is confronted with the greatest number of FLSA case appeals.

II. THE PAST

A. *Constitutionality of the 1938 Act*

Virtually all controversial and socially oriented laws must pass constitutional muster soon after their enactment. The Fair Labor Standards Act is no exception, and it holds the dubious distinction of having even

9. 29 U.S.C. §§ 203(r)-(s) (Supp. III, 1961), *amending* 29 U.S.C. § 203 (Supp. IV, 1938).

10. 29 U.S.C. §§ 203(r)-(s) (1970), *amending* 29 U.S.C. §§ 203(r)-(s) (Supp. III, 1961).

11. *See, e.g.,* Minimum Wage and Maximum Hour Standards Under the Fair Labor Standards Act—Economic Effects Studies Submitted to Congress 26 (1969).

12. S. 1861, 92d Cong., 1st Sess. § 2 (1971). At the time this article went to press, this bill, with amendments, was allowed to die in committee in the 92nd Congress.

13. There have been surprisingly few articles written on the coverage problems of the FLSA. *See generally* Dodd, *The Supreme Court and Fair Labor Standards, 1941-45*, 59 HARV. L. REV. 321 (1946) [hereinafter cited as Dodd]; George and Lambert, *Wage-Hour Coverage of the Fair Labor Standards Act*, 36 MINN. L. REV. 454 (1952) [hereinafter cited as George and Lambert]; Leiter, *Coverage Confusion Under the F.L.S.A.*, 13 LAB. L.J. 139 (1962) [hereinafter cited as Leiter].

14. *See* Ross, *The Operation of the Wage and Hour Law in North Carolina and the South*, 30 N.C.L. REV. 248 (1952).

the constitutionality of an amendment questioned.¹⁵ *United States v. Darby*¹⁶ presented the first Supreme Court challenge to the Act's constitutionality.¹⁷ Section 15 of the FLSA¹⁸ prescribes activities prohibited by the Act, and requires compliance and the maintenance of records demonstrating compliance by those employers subject to the Act's provisions. The government indictment had charged various violations of section 15, to which the defendant-employer in *Darby* had countered with challenges to the Act's constitutionality. The federal district court quashed the indictment on the ground that the Act's regulation of intra-state manufacture was unconstitutional; a direct appeal was taken to the Supreme Court.

From the facts in *Darby*, the Court found the constitutional issues to be whether Congress could prohibit the interstate shipment of lumber derived from the labor of workers not paid or employed in accordance with the minimum wage or maximum hour statutory mandates; and whether Congress could prohibit the very employment of *Darby's* workers under substandard conditions. Following the reiteration of judicial precedents, attesting to the expansive congressional power to control commerce, and Congress' motive that public policy prohibited the interstate distribution of goods produced under substandard labor conditions, the Court held that it was within the constitutional authority of Congress to regulate such interstate commerce. The Court also resolved that the commerce power enabled Congress to appropriately constrain such intra-state activities which affected this legitimate regulation of interstate commerce.¹⁹

In *Wickard v. Filburn*,²⁰ the Court elucidated the scope of Congress' commerce clause powers. This decision gathered the theories of previous Supreme Court jurists²¹ and molded them into a united exposition of

15. See notes 103-110 *infra* and accompanying text.

16. 312 U.S. 100 (1941).

17. See Dodd, *supra* note 13, at 322-24. See also *Opp Cotton Mills v. Administrator*, 312 U.S. 126 (1968), for the Court's determination that Congress had constitutionally delegated its powers to the Administrator of the Wage and Hour Division of the U.S. Department of Labor and had not set forth proper and sufficient administrative agency directives.

18. 52 Stat. 1060 (1938), as amended, 29 U.S.C. § 215 (1970).

19. The Court stated:

There remains the question whether such restriction on the production of goods for commerce is a permissible exercise of the commerce power. The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulations of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

United States v. Darby, 312 U.S. 100, 118 (1941), *overruling* *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

20. 317 U.S. 111 (1942). This case involved the constitutionality of the Agricultural Adjustment Act of 1938, 52 Stat. 30 (1938), one of numerous "New Deal" acts based upon the commerce clause.

21. See opinions of Chief Justice Marshall in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196-97 (1842); Justice Holmes in *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905); Justice Hughes in *Houston, E. & W.T. Ry. v. United States* [Shreveport Rate Cases], 234 U.S.

controlling principles. This return to the potentially limitless construction of the federal commerce power of *Gibbons v. Ogden*²² was based on the economic effect of the activity sought to be federally regulated:

[E]ven if . . . activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'²³

It readily appeared that certain terms utilized by the Court in expressing this reasoning were capable of varying constructions.²⁴ This capability has permitted many constitutional challenges in FLSA litigation where coverage was in issue. Notwithstanding this buffeting, the Court's potentially limitless sustention of federal power through the commerce clause in the *Filburn* case has stood the test of time.

B. Scope of "Traditional" Coverage

1. EMPLOYEES "ENGAGED IN COMMERCE"

*Walling v. Jacksonville Paper Co.*²⁵ was the first case to reach the Supreme Court which sought a construction of the term, "engaged in commerce." It is therefore the case from which all subsequent court decisions in this particular sector of FLSA coverage stem. The respondent in that case was a wholesale distributor of paper products. It operated several branches in Florida which received goods from interstate commerce for distribution entirely within the state. The reception and distribution of these goods were handled in three fairly well-settled patterns. In one pattern, goods specifically ordered for a special group of customers were consigned to the branch warehouses for checking upon entering the state and then were delivered to the customer. In another pattern, goods were ordered which had been approximated upon the recurrent needs of certain customers by virtue of a contract or understanding for supplies. These goods were then sold to these customers in accord with their needs. The third pattern covered goods which were held as stock-in-trade and which were sold in a piecemeal manner to any customer.

342, 351 (1914); Chief Justice Stone in *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942).

22. 22 U.S. (9 Wheat.) 1 (1842). This decision is the landmark treatment of the boundless reach of the commerce clause. See Light, *The Federal Commerce Power*, 49 VA. L. REV. 717 (1963). For an extensive history of this case, see Mann, *The Marshall Court: Nationalization of Private Rights and Personal Liberty From the Authority of the Commerce Clause*, 38 IND. L.J. 117 (1963).

23. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

24. For example, see subsequent judicial construction of the terms "local" and "substantial economic effect" in *Enterprise Box Co. v. Fleming*, 125 F.2d 897 (5th Cir. 1942).

25. 317 U.S. 564 (1943) [hereinafter cited as *Jacksonville Paper Co.*].

The Wage-Hour Administrator contended that respondent's employees were within the FLSA's coverage and sought an injunction against violations of the Act. The federal district court held that the Act was not applicable to these employees. The Fifth Circuit Court of Appeals reversed, and determined that all the employees who handled the goods in their interstate arrival were engaged in commerce.²⁶ Those employees who handled those goods under special order until they were actually delivered to the intended customers were also held to be covered by the Act. The Supreme Court affirmed the Fifth Circuit decision in part, but it established a much broader standard of coverage:

It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce. There is no indication . . . that, once the goods entered the channels of interstate commerce, Congress stopped short of control over the entire movement of them until their interstate journey was ended. No ritual of placing goods in a warehouse can be allowed to defeat that purpose. The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer "in commerce" within the meaning of the Act [I]f the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain "in commerce" until they reach those points. Then there is a *practical continuity of movement* of the goods until they reach the customers for whom they are intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce.²⁷

The Court concluded that the determination of this "in commerce" coverage demanded an analysis of the variety of business transactions and the courses of the goods which moved in the economy. Under this test, the employees who distributed goods under the first two patterns were found to be covered by the FLSA. The third-distribution-pattern employees were not within the Act's protection because the path of those goods was of a general nature and lacked the particularity necessary to show they had remained in interstate commerce. The Court held that since the Act did not cover all activities which "affected" commerce, these essentially local distribution activities were not covered. It emphasized the point that the Act's coverage turned upon the activities of the employee, not those of the employer, by stating, "[i]f a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established by the test we have

26. *Fleming v. Jacksonville Paper Co.*, 128 F.2d 395 (5th Cir. 1942).

27. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567-68 (1943) (emphasis added). Cf. *Galbreath v. Gulf Oil Corp.*, 413 F.2d 941 (5th Cir. 1969).

described, he is covered by the Act."²⁸ This decision clearly illustrated the determination of the Supreme Court to give this remedial social legislation a sweeping interpretation to achieve the objectives expressed by Congress. This liberal interpretation of the FLSA by the courts has continued through the past thirty years.²⁹

Notwithstanding its comprehensive interpretation of the FLSA's coverage in *Jacksonville Paper Co.*, the Supreme Court made it clear that there were definite coverage limits. In a companion case to *Jacksonville Paper Co.*, *Higgins v. Carr Brothers Co.*,³⁰ the employer was a wholesaler who sold interstate produce solely to local merchants. An employee, working as a night shipper and distributing truck driver, had claimed that he was entitled to FLSA minimum and overtime wages. The Supreme Court affirmed the state court's finding that interstate commerce had ceased with the delivery of these goods to the complainant's employer. The employee had argued that the employer's competitive position with interstate wholesalers, bound by FLSA standards, was enhanced by his ability to undersell them, resulting in an unfair method of commercial competition. The Court said that such an argument would have been relevant if Congress had extended the Act's coverage to activities "affecting" commerce, as was done with the National Labor Relations Act,³¹ but that the FLSA's coverage was more narrowly confined. Thus, by various means of judicial construction, the courts have refrained from extending FLSA coverage to the outlying areas "affected" by interstate commerce.³²

28. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 572 (1943). In this regard, see *United States v. Rosenwasser*, 323 U.S. 360, 362-63 (1945), for the premise that it was Congress' intention "to include all employees [engaged in interstate commerce or in the production of goods for same] within the scope of the Act unless specifically excluded."

29. See, e.g., *Mitchell v. C & P Shoe Corp.*, 286 F.2d 109 (5th Cir. 1960), where the court analogized the first two *Jacksonville Paper Co.* distribution patterns to the chain shoe store warehouse operation in this case. The warehouse held the shoes, which had arrived via interstate commerce, before delivering them only to the employer's own retail stores. The court found unbroken continuity of commerce and FLSA coverage for all warehouse employees.

30. 317 U.S. 572 (1943).

31. See 29 U.S.C. §§ 152(7), 160(a) (1970), amending 29 U.S.C. § 151 (Supp. I, 1935).

32. This restraint is clearly illustrated by *Sucrs. De A. Mayol & Co. v. Mitchell*, 280 F.2d 477 (1st Cir. 1960). This decision was a refinement of the *Jacksonville Paper Co.* determination concerning the third pattern of distribution, i.e., that distribution not covered by the Act due to its essentially local character. The *Sucrs. De A. Mayol Company* was a distributor and importer of hardware, building supplies, and furniture in Puerto Rico. There was no problem in tracing the continuation of commerce through local customer delivery, because it was established that the interstate commerce ended at the employer's warehouse. The court was confronted with the question of "[w]here, within the warehouse, the goods come to rest in such a way as to terminate the flow of commerce." *Id.* at 480. The court relied upon an earlier decision, *Domeneck v. Pan American Standard Brands, Inc.*, 147 F.2d 994 (1st Cir. 1945), and its utilization of the "state of rest" doctrine. Following this guide, the court held: "[T]he mingling [of the incoming goods from interstate commerce] with other goods in the warehouse is the event which brings about a state of rest and this occurs when the goods have been placed in their intended destination as stock." *Sucrs. De A. Mayol & Co. v. Mitchell*, 280 F.2d 477, 480-81 (1st Cir. 1960). Therefore, the receiving, checking

In keeping with decisions which held that the FLSA's coverage would not be stretched to the full extent of Congress' commerce powers, the Supreme Court limited FLSA inclusion to employees whose activities were actually involved with interstate commerce or so closely related to such commerce as to be a part of it.³³ The Court held this to be the proper test for resolution of the issue of an employee's engagement in interstate commerce for FLSA purposes in *McLeod v. Threlkeld*.³⁴ In that case, the Court was confronted with the coverage question of one who had been employed to prepare and serve meals to railroad maintenance workers. Confining itself solely to consideration of the employee's activities, the Court concluded that this preparation and service of food was too remote from commerce for inclusion within the Act.³⁵

Dissenting, Justice Murphy predicted a day of more expansive coverage in his call for a more liberal construction of the Act.³⁶ The majority test, however, whether an employee's work is an essential part of the stream of interstate or foreign commerce has become a device consistently used for "in commerce" coverage under the FLSA.³⁷ However, the nar-

and storing clerks were covered by the Act. See Davisson, *Coverage of the Fair Labor Standards Act*, 41 MICH. L. REV. 1060, 1067-72 (1943), for an historical account of the "state of rest" doctrine.

While this "state of rest" doctrine is recognized as a restraint on the extension of FLSA coverage, its application has by no means been uniform among the courts of appeals. Compare *Mitchell v. Royal Baking Co.*, 219 F.2d 532 (5th Cir. 1955), with *Shultz v. National Elec. Co.*, 414 F.2d 1225 (10th Cir. 1969).

33. See 29 C.F.R. § 776.9 (1969).

34. 319 U.S. 491 (1943).

35. Not all employees of a genuine producer of goods for commerce are considered to be themselves engaged in such production. If they are employed solely in connection with any local operations of the producer independently of his productive enterprise; or in some dispensable or collateral activity not directly essential to the productive function, they are not entitled to the wages and hours benefits of the Act.

George and Lambert, *supra* note 13, at 475-76.

36. *McLeod v. Threlkeld*, 319 U.S. 491, 498-502 (1943). In arriving at its decision, the majority of the Court relied heavily upon a coverage approach of the Federal Employers' Liability Act. Justice Murphy vigorously disagreed with what he termed a narrow interpretation of FELA coverage. He stated that since the employees' activities in question were connected with transportation, the Court's narrow interpretation frustrated the intended liberal application of the FLSA recognized in the *Jacksonville Paper Co.* decision. Justice Murphy contended that the better interpretation of the FELA principles analogous to FLSA coverage had been set forth in his opinion for the Court in *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943).

In *McLeod*, Justice Murphy's concern was the Court's apparent differentiation in FLSA coverage of transportation activities and other fields of covered employee activities. He argued that this decision established a double standard of coverage, amounting to judicial discrimination among the different areas of employment.

Subsequent history of the consistent broadening of FLSA coverage in the courts has supported the general rationale of Justice Murphy's dissent, though not his reliance on the FELA. See notes 43-46 *infra* and accompanying text.

37. See *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943 (2d Cir. 1959), where the Court of Appeals for the Second Circuit concluded that the duties of a mail and shipping clerk, as well as a part-time chauffeur, were essential to the operation of a foreign steamship service. Such activities had been performed for several steamship lines by an employee of the principal passenger and ticket agency. The fact that this employee had not been

row application by the Court, evidenced in this case, has not been followed.³⁸

a. Employees as "a part of commerce's instrumentalities"

The usual conception of employee activities in the "instrumentalities" area is that they are one step removed from direct "in commerce" activities. Thus, the ties to commerce are somewhat more tenuous. In some cases, an understanding of the courts' struggle to locate the proper causal connections between the employees' activities and commerce, while staying within the boundaries imposed by the judiciary upon the FLSA's coverage, requires an intricate tracing of Supreme Court decisions.

*Overstreet v. North Shore Corp.*³⁹ created the basic design which has been adhered to in this area of employees' activities pertaining to interstate commerce instrumentalities. The employees in question were engaged in the operation and maintenance of a toll road and drawbridge over a navigable waterway. Together, these devices constituted a medium for the interstate movement of goods and persons between Fort George Island, Florida, and U.S. Highway No. 17. The Court recited the principle that although Congress had not intended to regulate all industries and occupations "affecting" commerce, they had intended to extend federal control throughout the farthest reaches of interstate commerce's channels. The Court then analogized the practical coverage approach of the Federal Employer's Liability Act⁴⁰ to that of the FLSA.⁴¹ The Court concluded:

employed directly by one of the steamship lines (but by their agent) was dismissed by the court on the basis that the deciding factor was the employment tasks of the employee, not his employer. Thus, the FLSA was held to cover this employee. *See also* Willmark v. Wirtz, 317 F.2d 486 (8th Cir. 1963). Willmark Service System, Inc. conducted a "shopping service" for mercantile establishments, which consisted of investigations of the sales employees and reports to the stores on the findings. The court held Willmark's employees constituted an integral portion of its nationwide business and were directly related to its interstate trade; therefore FLSA coverage was appropriate.

38. *See* note 46 *infra* and accompanying text.

39. 318 U.S. 125 (1943) [hereinafter cited as *Overstreet*].

40. The Court turned to an FELA case for its rationale in the principal case:

[T]he case of *Pedersen v. Delaware, L. & W.R. Co.*, 229 U.S. 146, held that an employee who was injured while carrying bolts to be used in repairing a railroad bridge over which interstate trains passed was engaged in interstate commerce within the meaning of the Liability Act. It was pointed out that tracks and bridges were indispensable to interstate commerce and "that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it."

Overstreet v. North Shore Corp., 318 U.S. 125, 129 (1943) (citation omitted).

41. The Court reasoned:

The Federal Employers' Liability Act and the Fair Labor Standards Act are not strictly analogous, but they are similar. Both are aimed at protecting commerce from injury through adjustment of the master-servant relationship, the one by liberalizing the common law rules pertaining to negligence and the other by eliminating substandard working conditions. We see no persuasive reason why the scope of employed or engaged "in commerce" laid down in the *Pederson* and related cases, cited above, should not be applied to the similar language in the Fair Labor Standards Act, especially when Congress in adopting the phrase "engaged

The operational and maintenance activities of petitioners are vital to the proper functioning of these structures as instrumentalities of interstate commerce. . . . The work of each petitioner in providing a means of interstate transportation and communication is so intimately related to interstate commerce "as to be in practice and in legal contemplation a part of it" . . . and justifies regarding petitioners as "engaged in commerce" within the meaning of the Fair Labor Standards Act.⁴²

During the time period in which the expansion of FLSA protection was made in the area of interstate commerce instrumentalities, each liberation was challenged as an "exception to the rule" rather than being "accepted as the rule," as in many cases today. Due to these challenges, the reason for the court's early reliance upon the FELA can be divined. In the past, the Court had pointed to similar coverage constructions in FELA cases. As FELA coverage expanded, the Court accordingly expanded FLSA coverage. However, as the liberalization of FLSA coverage continued to grow at a faster rate than FELA coverage did, the Court's reliance upon the FELA correlation lessened until finally it reached the point of repudiation.

This rejection of the FELA principles occurred in *Mitchell v. C.W. Vollmer & Co.*,⁴³ where employees had been engaged in the construction of a Gulf Intracoastal Waterway lock. The federal district court relied upon FELA case precedents in its holding that these employees were not covered by the Act.⁴⁴ In reversing the lower courts, the Supreme Court abandoned the FELA as a yardstick of FLSA application.⁴⁵ Finding that the consistent expansion of the FLSA should continue under its own power guided by practical approaches, not technical FELA considerations, the Court stated: "The test is whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity."⁴⁶ The Court reasoned that the construction of the lock was a vital redesign of an existing facility of interstate com-

in commerce" had those Federal Employers' Liability Act cases brought to its attention.

Id. at 131-32 (footnote omitted).

42. *Id.* at 130. See *Shultz v. A-1 Ambulance Serv.*, 229 F. Supp. 197 (E.D. Ark. 1969).

43. 349 U.S. 427 (1955).

44. *Fleming v. C.W. Vollmer & Co.*, 113 F. Supp. 235 (E.D. La. 1953), *aff'd sub nom. Mitchell v. C.W. Vollmer & Co.*, 214 F.2d 132 (5th Cir. 1954).

45. This abandonment was opposed by the dissenting justices. They found that the facts of this case brought it directly within the "new construction" rule, which had developed from FELA case rationale. The Supreme Court had held that employees constructing new facilities were not covered by the FELA because they were not engaged in interstate commerce. This rule had been utilized to deny FLSA coverage to construction employees building a naval base in *Reed v. Murphey*, 168 F.2d 257 (5th Cir.), *rev'd per curiam*, 335 U.S. 865 (1948) [hereinafter cited as *Murphey*]. Here the Court attempted to soften the blow by distinguishing the *Murphey* case, but the confinement of FLSA coverage by FELA interpretation had been terminated, and the death knell of the "new construction" doctrine for FLSA consideration had been sounded. See Notes, 39 *Geo. L.J.* 156 (1950); 14 *VAND. L. REV.* 414, 416 (1960).

46. *Mitchell v. C.W. Vollmer & Co.*, 349 U.S. 427, 429 (1955).

merce. Therefore, the construction workers' wages and hours had to conform to the requirements of the Fair Labor Standards Act.

Although the Fifth Circuit, in *Archer v. Brown & Root, Inc.*,⁴⁷ was somewhat confused by the Supreme Court's treatment of the *Reed v. Murphey* case in *Vollmer*,⁴⁸ its verification of the impact of *Vollmer's* extension of FLSA coverage was made clear.⁴⁹ The Fifth Circuit held that workers employed to construct the Lake Pontchartrain Causeway and the field plant, which was used for the production of materials essential to the construction of the causeway, were engaged in commerce and thus protected by FLSA standards. The Court concluded that the causeway had been intended to become an instrumentality of interstate commerce upon completion. The "practical considerations" espoused in *Vollmer* rendered such factors as "mere physical isolation, separation of the project from the point or points of its ultimate connection with existing facilities or the necessity for a *future* connection . . ."⁵⁰ irrelevant to this decision. The interstate-link intention had created the nexus which related the entire project so directly to interstate commerce that it had become a practical part of such commerce, rather than isolated local activity.

The outward expansion of Fair Labor Standards Act coverage in this sector has progressed unceasingly since the *Vollmer* decision.⁵¹ For example, in *Mitchell v. Lublin, McGaughey & Associates*,⁵² the employer was an architectural and engineering firm with interstate operations. Upon finding that the firm's non-professional employees worked directly with its work products, the Court concluded that the preparation of these plans and specifications was directly related to the end product, *i.e.*, facilities for interstate commerce.⁵³ Consequently, coverage of the FLSA had advanced another step toward "the farthest reaches of the channels of interstate commerce."⁵⁴

2. EMPLOYEES "ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE"

The revised Interpretive Bulletin on the General Coverage of the Wage and Hours Provisions of the Fair Labor Standards Act of 1938⁵⁵ states:

47. 241 F.2d 663 (5th Cir. 1957).

48. See note 45 *supra* for a discussion of the "new construction" rule in *Murphey* and its effect on *Vollmer*.

49. *But see* Note, 36 N.C.L. REV. 90 (1957), for a discussion of the "new construction" rule and a conclusion that this verification of *Vollmer* was not so clear.

50. *Archer v. Brown & Root, Inc.*, 241 F.2d 663, 667 (5th Cir. 1957).

51. See *Compania De Ingenieros Y Contratistas, Inc. v. Goldberg*, 289 F.2d 78, 80 (1st Cir. 1961), for adherence to *Vollmer* and *Brown & Root, Inc.*

52. 358 U.S. 207 (1959).

53. This finding of FLSA coverage for employees engaged in pre-new construction activities nailed shut the coffin on the "new construction" rule of *Murphey*. See Note, 44 VA. L. REV. 771 (1958), for discussion of the issues facing the Court before its consideration of this case.

54. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567 (1943).

55. 29 C.F.R. § 776.14 (1971).

[T]hree interrelated elements of coverage [are] to be considered in determining whether an employee is engaged in the production of goods for commerce: (a) There must be 'production';⁵⁶ (b) such production must be of 'goods';⁵⁷ (c) such production of goods must be 'for commerce';⁵⁸ all within the meaning of the Act.⁵⁹ [all footnotes added]

Pursuant to this directive, the ascertainment of the three specified objectives by the judiciary will be evident throughout the subsequent case review, but no effort has been made to isolate each case.

Notwithstanding the burden of the courts to satisfy these requirements in determining FLSA coverage, the courts have extended the FLSA's scope more extensively in the "production of goods for commerce" sector than in the "engaged in commerce" area. The reason is that although the Supreme Court has stated unequivocally that coverage depends on the activities of the employee rather than those of his employer,⁶⁰ it is certain a court's inquiry into this production coverage quarter encompasses the employer's business.

Such an encompassment occurred in the Court's treatment of *Western Union Telegraph Co. v. Lenroot*.⁶¹ The government had sought an injunction against Western Union's use of child labor. The 1938 Act barred the use of oppressive child labor in the production of goods for commerce, but not direct employment in interstate commerce.⁶² Upon analyzing this employer's business in detail for the three aforementioned specific objectives,⁶³ the Court agreed with the government's contention that telegraph messages were "goods" within the meaning of the Act.⁶⁴ Although Western Union's engagement in commerce was uncontroverted,

56. "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

29 U.S.C. § 203(j) (1970), *amending* 29 U.S.C. § 203 (Supp. III, 1949) [Act of June 25, 1938, ch. 676, § 3(j), 52 Stat. 1060 (1938)].

57. "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

29 U.S.C. § 203(i) (1970) [Act of June 23, 1938 ch. 676, § 3(i), 52 Stat. 1060 (1938)].

58. "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

29 U.S.C. § 203(b) (1970), *amending* 29 U.S.C. § 203(b) (Supp. III, 1949) [Act of June 25, 1938 ch. 676, § 3(b), 52 Stat. 1060 (1938)].

59. 29 C.F.R. § 776.14 n.51 (1969) states: "These elements need not be considered if the employee would be covered in any event because engaged 'in commerce'"

60. See note 28 *supra* and accompanying text.

61. 323 U.S. 490 (1945).

62. *Id.* at 492-99.

63. See text accompanying notes 56-59 *supra*.

64. *Western Union Tel. Co. v. Lenroot*, 323 U.S. 490, 502-03 (1945).

the Court was not persuaded that it was a "producer" of telegraph messages "shipped" in interstate commerce.⁶⁵ In other words, the handling of goods for transportation was not production of goods for commerce for FLSA purposes.

This exceedingly narrow construction of "production" has since been tacitly repudiated by the Court and several circuits. Following *Lenroot*, the Court considered *Alstate Construction Co. v. Durkin*.⁶⁶ In this case, the employer was a manufacturer of a material used in surfacing concrete roads. In holding that the employees were protected by the FLSA, the Court reasoned that since employees who repaired roads—an integrated instrumentality of commerce⁶⁷—were covered by the Act, "[b]y the same token he who produces goods for these indispensable and inseparable parts of commerce produces goods for commerce"⁶⁸ and is also covered. Thus, "production" coverage also included *Alstate's* employees who transported the goods needed for the rail and road repair to the construction sites. Once "production" coverage had been placed back on the track toward FLSA coverage expansion by the decisions in *Alstate* and *Thomas v. Hempt Bros.*,⁶⁹ the courts of appeals followed suit.⁷⁰

Although *United States v. Darby*⁷¹ obtained its significance as a "landmark" decision by upholding the constitutionality of the Fair Labor Standards Act of 1938,⁷² the case was of further importance for its initiation of guidelines for FLSA coverage when goods were produced for commerce. The Court determined that the congressional purpose was to arrest the production of goods manufactured under substandard labor conditions and intended for interstate commerce as well as to proscribe the unlawful interstate trade itself.⁷³ Pursuant to this determination, the Wage & Hour Administrator said:

65. *Id.* at 503-06. Justice Murphy, joined by Justice Black (one of the Act's authors when a U.S. Senator from Alabama) dissented and again pointed to the future course of the Act; see note 36 *supra* and accompanying text.

66. 345 U.S. 13 (1953). It should be noted that Justice Black, who had concurred in Justice Murphy's dissent in *Lenroot*, wrote the majority opinion in this case.

67. The Court took production coverage down the path blazed by *Overstreet*. See note 39 *supra* and accompanying text.

68. *Alstate Constr. Co. v. Durkin*, 345 U.S. 13, 16 (1953). See Note, 6 U.C.L.A.L. REV. 325 (1959). Compare *Mitchell v. Royal Baking Co.*, 219 F.2d 532 (5th Cir. 1955) with *Mitchell v. Sherry Corine Corp.*, 264 F.2d 831 (4th Cir. 1959).

69. 345 U.S. 19 (1953). This was a companion case to *Alstate* and involved the same issues. The Court relied upon *Alstate* in finding coverage here.

70. See *Wirtz v. Ray Smith Transp. Co.*, 409 F.2d 954 (5th Cir.), *cert. denied*, 396 U.S. 986 (1969); *Wirtz v. Lunsford*, 404 F.2d 693 (6th Cir. 1968); *Bowen v. Hayden*, 404 F.2d 682 (5th Cir. 1968); *Wirtz v. Standard Container and Paper Co.*, 389 F.2d 134, 136 (5th Cir. 1967); *Wirtz v. Intravaia*, 375 F.2d 62, 65-66 (9th Cir.), *cert. denied*, 389 U.S. 844 (1967).

71. 312 U.S. 100 (1941).

72. See note 19 *supra* and accompanying text.

73. [T]he legislative history supports [the conclusion that] the "production for commerce" intended includes at least production of goods, which, at the time of production, the employer, according to normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce.

[T]he fact that goods produced for commerce lose their character as "goods" after they come into the actual physical possession of an ultimate consumer who does not further process or work on them does not affect their character as "goods" while they are still in the actual physical possession of the producer, manufacturer or processor who is handling or working on them with the intent or expectation that they will subsequently enter interstate or foreign commerce.⁷⁴

This interpretation by the Administrator⁷⁵ of section 3(1) of the FLSA⁷⁶ was acknowledged in *Powell v. United States Cartridge Co.*⁷⁷ There, the Supreme Court concluded that a private contractor's employees had produced "goods" for interstate commerce and were covered by the FLSA, even though the labor took the form of munitions production solely for the federal government as the ultimate consumer.⁷⁸

312 U.S. 100, 118 (1941) (legislative references and footnote omitted). See also *Goldberg v. Arnold Bros.*, 297 F.2d 520 (5th Cir. 1962), for an example of the court's reasonably inferring coverage, by utilizing a combination of this employer-intention factor and circumstantial evidence of production for commerce.

74. 29 C.F.R. § 776.20(d) (1969) (footnote omitted). The abbreviated textual treatment of "goods" should not be construed as an indication of lesser importance of this term within the meaning of the Act, for indeed it has been and remains a key term in delimiting coverage. For some selected cases which have held the following products to be "goods," see *Hodgson v. David M. Woolin & Son, Inc.*, 65 CCH LAB. CAS. ¶ 32,527 (S.D. Fla. 1971) (chlorine for water & sewage treatment purposes); *White v. Wirtz*, 402 F.2d 145 (10th Cir. 1968) (plats and maps); *Wirtz v. A.S. Giometti & Associates, Inc.*, 399 F.2d 738 (5th Cir. 1968) (plats and maps); *Mitchell v. Emala & Associates, Inc.*, 274 F.2d 781 (4th Cir. 1960) (fill dirt); *Craig v. Far West Eng'r Co.*, 265 F.2d 251 (9th Cir. 1959) (engineering drawings); *Bozant v. Bank of New York*, 156 F.2d 787 (2d Cir. 1946) (commercial paper); *Hodgson v. Alan Hauling Serv.*, 20 WAGE & HOUR CAS. 839 (D. Md. 1972) (trash containers).

75. Under the President's Reorganization Plan No. 6, which became effective May 24, 1950, administrative functions under the law were transferred from the Administrator to the Secretary of Labor. The Secretary, however, promptly delegated the functions back to the Administrator to be exercised subject only to his general direction and control.

6 BNA, LAB. REL. REP. WHM 90:56 (1966).

Interpretations of the Administrator of the Wage and Hour Division with respect to general coverage are set forth in this part to provide "a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it." These interpretations with respect to the general coverage of the wage and hours provisions of the act, indicate the construction of the law which the Administrator believes to be correct and which will guide him in the performance of his administrative duties under the act unless and until he is otherwise directed by authoritative decisions of the courts or concludes, upon reexamination of an interpretation, that it is incorrect.

29 C.F.R. § 776.0(a) (1969). For a consideration of the weight given the Administrator's interpretative bulletins, see *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *But cf. Mitchell v. City Ice Co.*, 273 F.2d 560 (5th Cir. 1960).

76. See note 57 *supra*.

77. 339 U.S. 497 (1950).

78. See *Bodden v. McCormick Shipping Corp.*, 188 F.2d 773 (5th Cir. 1951), for recovery of overtime compensation by one employed by a yacht owner to sail his yacht from Nova Scotia to Florida and to overhaul her. The court, interpreting the *Powell* decision, stated:

In effect, the *Powell* case holds that the coverage of the Act is not limited to employees engaged in producing goods solely for competitive markets, but extends also to the production of goods for interstate transportation or delivery even though

Less than 1.67% of an employer's business of salvaging useful parts from wrecked or burned autos in *Mitchell v. Jaffe*⁷⁹ was the actual sale of scrap metal. This scrap metal was ultimately sold to producers for interstate commerce through a middleman. Nevertheless, the Fifth Circuit Court of Appeals dismissed the employer's de minimis defense⁸⁰ and concluded that the predominantly local business of an employer would not exempt him from the Act's coverage on behalf of those employees who had worked in activities interstate in nature. Having surmounted this obstacle, the court determined that under the broad definition given to "goods" in the Act,⁸¹ this scrap metal was an essential ingredient in subsequent interstate commerce production. Consequently, since his employees had been "handling, transporting and working on" these goods within section 3(j)'s definition of production of goods,⁸² they were within the Act's protection.⁸³

When the employer produces goods for interstate commerce, all of his employees are generally covered by the FLSA unless he is able to clearly demonstrate segregation.⁸⁴ Such a burden entails a showing that some of his employees have been engaged in strictly local activity during all or part of their work periods. In addition, the employer must produce and show the maintenance of records conclusively illustrating such separation.⁸⁵ It should be noted at this point that once a back pay obligation

such goods are transported for use or consumption by the owner and not for sale or exchange. Whether or not, therefore, the transportation of goods is "commerce" within the definition of the Act, does not depend upon whether such transportation is in connection with a trade or business.

Id. at 775.

79. 261 F.2d 883 (5th Cir. 1958).

80. The employer's resort to the de minimis principle had been rendered virtually useless by *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946). In that case, the employer newspaper had 1/2 of 1% out of state circulation. The Court held its employees covered for the following reasons:

Here Congress had made no distinction on the basis of volume of business. By § 15(a)(1) it had made unlawful the shipment in commerce of "any goods in the production of which any employee was employed in violation of" the overtime and minimum wage requirements of the Act. Though we assume that sporadic or occasional shipments of insubstantial amounts of goods were not intended to be included in that prohibition, there is no warrant for assuming that regular shipments in commerce are to be included or excluded dependent on their size.

Id. at 181-82. *Accord*, *Wirtz v. Durham Sandwich Co.*, 367 F.2d 810 (4th Cir. 1966); *Mitchell v. Independent Ice & Cold Storage Co.*, 294 F.2d 186, 186-90 (5th Cir. 1961); *Crook v. Bryant*, 265 F.2d 541, 543-44 (4th Cir. 1959).

81. See note 57 *supra*.

82. See note 56 *supra*.

83. See *Wirtz v. Pepsi Cola Bottling Co.*, 342 F.2d 820 (5th Cir. 1965). *But see* *Wirtz v. Dr. Pepper Bottling Co.*, 374 F.2d 5 (5th Cir. 1967).

84. [A]s a general rule, . . . an employee will be considered to be within the general coverage of the wage and hours provisions if he is working in a place of employment where goods sold or shipped in interstate commerce or foreign commerce are being produced, unless the employer maintains the burden of establishing that the employee's functions are so definitely segregated from such production that they should not be regarded as closely related and directly essential thereto.

29 C.F.R. § 776.15(b) (1969). See *Tyson, The Fair Labor Standards Amendments of 1949—Wage Hour Coverage*, 28 N.C.L. Rev. 161, 170-71 (1950) [hereinafter cited as *Tyson*].

85. See *Guess v. Montague*, 140 F.2d 500 (4th Cir. 1943), where the employer had

is judged to be owing from the employer, the employee's claim must be settled in full to effectuate the full purpose of this remedial legislation.⁸⁶

a. Employees "closely related or directly essential to the production of goods for commerce"

*A.B. Kirschbaum Co. v. Walling*⁸⁷ has been one of the two decisions cited most often in the domain of the Fair Labor Standards Act. In *Kirschbaum*, FLSA coverage was held to be applicable to operation and maintenance employees of a building which housed tenants principally engaged in the production of goods for interstate commerce. The Court noted the fact that these employees were not those of the producer, but of the owner of the building, and that these employees had not participated in the actual production of the goods for interstate commerce. Notwithstanding these considerations, the Court concluded:

We cannot, in construing the word "necessary," escape an inquiry into the relationship of the particular employees to the production of goods for commerce. If the work of the employees has only the most tenuous relation to, and is not in any fitting sense "necessary" to, the production, it is immaterial that their activities would be substantially the same if the employees worked directly for the producers of goods for commerce.

[However], [i]n our judgment, the work of the employees in these cases had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation "necessary to the production of goods for commerce."⁸⁸

The Court subsequently held that these same principles governed the circumstances in *Borden Co. v. Borella*.⁸⁹ Maintenance employees of a

operated a machinery repair shop and parts service with substantial interstate trade. He had been sued by his employees for unpaid minimum wages and overtime compensation under the FLSA. The court had found

a fair inference from the evidence that plaintiffs here worked on interstate as well as intrastate business; that the two classes of business were commingled in defendant's operations; and that defendant did not attempt to distinguish between the two in the payment of wages. Under such circumstances, we think that plaintiffs have made a prima facie showing entitling them to the protection of the act.

Id. at 504.

86. The result of our holding is that where an employer who has paid less than the minimum wages and overtime compensation prescribed by the act makes settlement with the employee for the full amount due thereunder and the employee accepts same in full discharge and satisfaction of all claims against the employer, there is an end of liability, and the employer may not be harassed by further litigation. The condition, however, is that the employer pay the full amount of the balance of minimum wages and overtime compensation due. If he pays less than this, the settlement constitutes no bar.

Id. at 505.

87. 316 U.S. 517 (1941) [hereinafter cited as *Kirschbaum*].

88. *Id.* at 525-26. *Accord*, *Crook v. Bryant*, 265 F.2d 541 (4th Cir. 1959); *Walling v. Peoples Packing Co.*, 132 F.2d 236 (10th Cir. 1942).

89. 325 U.S. 679 (1945).

building were again the subject of coverage, but here the building was a commercial office facility owned by an employer which occupied 58% of the rentable area for the purposes of central control and coordination of the manufacturing processes in scattered individual factories. In addition, no actual production took place in the building. The Court, however, found that the disparities between this case and *Kirschbaum* were not significant and that FLSA security for Borden's employees was appropriate.⁹⁰

This trend of FLSA expansion was delayed by the Court's opinion in *10 East 40th Street Building, Inc. v. Callus*,⁹¹ handed down the same day as *Borden*. The Court decided that to avoid federal encroachment of the states' rights to protect essentially local activities, an outer boundary had to be erected to maintain proper perspective for FLSA coverage in that sector. Pursuant to this rationale, the Court presumed that the employer's renting of office space to a large variety of tenants was far removed from the physical processes of production. This remoteness made the activity one of local character, which Congress had exempted from the Act's commerce power coverage. Thus, the Court concluded that the local nature of this employer's office building renting business and those operations in *Kirschbaum* and *Borden*, which were closely connected with the production of interstate goods, were reasonably distinguishable. Such a distinction demanded that a fine line be drawn

90. The Court dismissed any differences in these two cases when it stated:

The only distinction between this and the *Kirschbaum* case lies in the fact that here the employees work in a building where production of goods is administered, managed and controlled rather than carried on physically. We hold, however, that this distinction is without economic or statutory significance. . . . From a productive standpoint, therefore, petitioner's executive officers and administrative employees working in the central office building are actually engaged in the production of goods for commerce just as much as are those who process and work on the tangible products in the various manufacturing plants. And since the respondent maintenance employees stand in the same relation to this production as did the maintenance workers in the *Kirschbaum* case, it follows that they are engaged in occupations "necessary" to such production, thereby qualifying for the benefits of the Fair Labor Standards Act.

Id. at 682-83. See 29 C.F.R. § 776.18(a) (1969). The foregoing reasoning was adhered to in *Bozant v. Bank of New York*, 156 F.2d 787 (2d Cir. 1946). The court's discernment of the bank employees' engagement in the production of goods for commerce operated to broadly extend FLSA coverage.

In so far as the Bank's business consists of preparing, executing or validating bonds, shares of stock, commercial paper, bills of lading and the like, it is engaged in "producing goods for commerce"; and included in this are any activities necessary to the effectiveness of the documents even though, as an example, it be no more than registering a share or a series of bonds. On the other hand the mere writing of letters or the drawing of papers, which have no value of their own except as records, are not to be counted.

Id. at 790. See *Craig v. Far West Eng'r Co.*, 265 F.2d 251, 254-55 (9th Cir. 1959), for coverage of employee draftsmen. In *Public Bldg. Auth. v. Goldberg*, 298 F.2d 367 (5th Cir. 1962), the court found coverage of maintenance employees of a building owned by a state agency. Although the state employees who worked in the building were exempt from coverage, the court said they were still producing goods for commerce, so the maintenance employees were covered by the Act.

91. 325 U.S. 578 (1945).

between the present case, which placed the employees outside the FLSA's coverage, and the *Kirschbaum* and *Borden* cases.⁹²

At this juncture, it is important to document the change in statutory effect wrought in this coverage subdivision by the 1949 amendment⁹³ to section 3(j) of the Act.⁹⁴ The substitution of the words, "closely related" and "directly essential," for the word, "necessary," was intended to guide the judiciary and the Wage-Hour Administrator more precisely in their examination of the proper outer limits of the FLSA's coverage.⁹⁵

Judicial construction of the circumscription effected by this 1949 amendment can be seen in *Mitchell v. H.B. Zachry Co.*⁹⁶ There, the employer had been involved in the construction of a dam which supplied Corpus Christi, Texas, with water. To support its conclusion that the FLSA did not protect these construction employees, the Supreme Court surmised that Congress deemed some of the employer activities to which the judiciary had extended FLSA coverage security in the past too remote from production. To this end, Congress had amended section 3(j) of the Act, which made it incumbent upon the courts to be more attentive to the possible local nature of challenged activities. The Court recognized this congressional mandate in its majority opinion:

Bearing in mind the cautionary revision in 1949, and that the focal center of coverage is "commerce," the combination of the remoteness of this construction from production, and the absence of a dedication of the completed facilities either exclusively or primarily to production, persuades us that the activity is not "closely related" or "directly essential" to "production for commerce."⁹⁷

92. See *id.* at 585 for a hearty dissent by Justice Murphy. See Comment, 32 N.C.L. REV. 341 (1954), for a discussion of *Kirschbaum*, *Borden*, *Callus* and other related cases.

93. See Sanders, *Basic Coverage of the Amended Federal Wage and Hour Law*, 3 VAND. L. REV. 175 (1950) [hereinafter cited as Sanders]; Tyson, *supra* note 84, for discussions of the legislative history of the 1949 Amendments to the FLSA and the basic changes in the definitions of "commerce" and "produced," which extended coverage to employees engaged in incoming foreign commerce; and substitution of "closely related" and "directly essential" for "necessary," the purpose here being a limitation of coverage by requiring that the employee have more direct contact with the actual production for commerce than the courts had found necessary under the 1938 Act.

94. See note 56 *supra*. For the legislative history of the 1949 Amendments to the Act, see S. REP. NO. 640, 81st Cong., 1st Sess. [95 CONG. REC. 14874-75] (1949). See also CONF. REP. NO. 1453, 81st Cong., 1st Sess. [95 CONG. REC. 14928-29] (1949).

95. See 29 C.F.R. § 776.17(a) (1969).

96. 362 U.S. 310 (1960).

97. *Id.* at 321. *Accord*, *Mitchell v. W.B. Belcher Lumber Co.*, 279 F.2d 789, 790-91 (5th Cir. 1960). *But cf.* *Wirtz v. Sloan, Inc.*, 411 F.2d 56 (3d Cir. 1969); *Wirtz v. Valco, Inc.*, 407 F.2d 1322 (5th Cir. 1969); *Bear Creek Mining Co. v. Wirtz*, 317 F.2d 67 (1st Cir. 1963); *Mitchell v. John R. Cowley & Bro., Inc.*, 292 F.2d 105 (5th Cir. 1961), for the proposition that the courts are permitting the Secretary of Labor to re-expand the present § 3(j) definition to the broader pre-1949 definition.

III. THE PRESENT

A. 1961 and 1966 Amendments to the Fair Labor Standards Act

The "enterprise" concept was introduced into the law by the 1961 amendments as a basis for a general extension of coverage. Prior to the 1961 amendments, the test of coverage was the work performed by the individual employee. To be covered, the employee himself had to be engaged in interstate commerce or the production of goods for interstate commerce. The business of the employer was not controlling. It was possible to have one employee in an establishment covered by the Act, while another employee working next to him would be outside the law's scope.

This was changed by the "enterprise" concept. An employee is within the Act's general coverage if, in any workweek, he is employed in "an enterprise engaged in commerce or in the production of goods for commerce." Under this concept, all the employees of a particular business unit may be covered by the Act, regardless of the relationship of their individual duties to commerce or the production of goods for commerce.

At the time Congress adopted the 1961 amendments⁹⁸ to the Fair Labor Standards Act, it laid a foundation for further extensions of the Act's coverage in future years. It established "dollar-volume" tests for the new "enterprise" coverage—a coverage that could be expanded merely by reducing the amount of the "dollar-value" tests. It also added a number of exemptions that could be narrowed or deleted by future amendments.

The Fair Labor Standards Amendments of 1966⁹⁹ make both types of changes. For some kinds of "enterprises," the dollar-volume test is eliminated; for others, it is reduced. And there are 29 changes in the statutory exemption structure. The net result is an extension of the Act's coverage to over eight million additional employees.¹⁰⁰

98. See generally Bean, *Some Basic Requirements, Fair Labor Standards Act of 1938 As Amended*, 28 TEX. B.J. 349 (1965); Denbo, *The Fair Labor Standards Amendments of 1961—An Analysis*, 12 LAB. L.J. 731 (1961).

99. See generally Lundquist, *The Fair Labor Standards Act—1966 Model*, 38 OKLA. ST. B.J. 1873 (1968); ABA COMMITTEE ON FEDERAL LABOR STANDARDS LEGISLATION, REPORT, 1967 PROCEEDINGS OF THE ABA SECTION OF LABOR RELATIONS LAW 79.

100. BUREAU OF NATIONAL AFFAIRS, THE NEW WAGE AND HOUR LAW 1 (rev. ed. 1967) (footnotes added). See 35 Fed. Reg. 5543-45 (1970), for an amendment to 29 C.F.R. § 776 (1969) (see note 7 *supra*) to make clear that this bulletin, as it is now constituted, applies only to "individual coverage" of employees and not "enterprise coverage." The bulletin will be amended later to include "enterprise coverage." For the present time, see 35 Fed. Reg. 5865-69 (1970), for recent statements by the Wage and Hour Division of the U.S. Department of Labor concerning "enterprise coverage." See also Nystrom, *Current Problems in the Administration of Wage-Hour Laws*, 3 GA. L. REV. 362 (1969), for a general discussion of the present state of the FLSA's administration.

Sections 3(r)¹⁰¹ and 3(s)¹⁰² of the Fair Labor Standards Act define "enterprise" coverage. It is important to note that there are unlimited possibilities for amplification of the Act's coverage by the judiciary by way of these avenues. Thus, the bulk of federal district court litigation has begun to shift from the traditional individual employee-centered areas to those of enterprise coverage.

B. *Constitutionality of the FLSA Amendments of 1961 and 1966*

The challenge to the constitutionality of these 1966 amendments was made by twenty-eight states in *Maryland v. Wirtz*.¹⁰³ The states had

101. "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: *Provided*, that, within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments. For purposes of this subsection, the activities performed by any person or persons—

(1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit) . . . shall be deemed to be activities performed for a business purpose.

29 U.S.C. § 203(r) (1970), *amending* 29 U.S.C. § 203(r) (Supp. III, 1961).

102. "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person and which—

(1) . . . is an enterprise whose annual gross volume of sales made or business done is not less than \$250,000 (exclusive of excise taxes at the retail level which are separately stated);

(2) is engaged in laundering, cleaning, or repairing clothing or fabrics;

(3) is engaged in the business of construction or reconstruction, or both; or

(4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).

Any establishment which has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

29 U.S.C. § 203(s) (1970), *amending* 29 U.S.C. § 203(s) (Supp. III, 1961).

103. 392 U.S. 183 (1968) [hereinafter cited as *Maryland*]. See Donahue, *supra* note 2,

complained that the extension of FLSA security to schools and hospitals operated by the states or their subdivisions was beyond the commerce power of Congress. A second contention was that such encroachment by the federal government upon state interests¹⁰⁴ contravened the 11th amendment of the Constitution.¹⁰⁵

The Supreme Court replied that the enterprise coverage was added for the purpose of expanding FLSA protection to fellow workers of those employees originally covered prior to the 1961 and 1966 amendments. For support, the majority looked to the *United States v. Darby*¹⁰⁶ rationale regarding the substantial impact of substandard wages and excessive hours on interstate commerce. The theories¹⁰⁷ of unfair competitive advantage and abrogation of labor disputes were also recalled by the Court. From these considerations, the Court concluded that the states' interests in these economic activities were subordinate to those of the federal government in its valid regulation of commerce;¹⁰⁸ the states enjoy no more freedom from federal control in these areas than do private persons.¹⁰⁹ The Court reserved for future review the questions of certain state immunities in FLSA suits, and the determination of whether schools, hospitals, and other institutions constitute "ultimate consumers."¹¹⁰

Enlargement of the employer class subject to the Act was said not to be the purpose of the amendments.¹¹¹ The subsequent case law con-

at 70-71, for a brief illustration of the issues which faced the three-judge district court panel convened to hear this dispute in its initial stages. See also Note, 14 WAYNE L. REV. 627 (1968), for an analysis of the three opinions of the three-judge panel in this case (before its resolution by the Supreme Court).

104. Justice Douglas made this contention the basis for his dissenting opinion with a slight alteration in emphasis. He saw a "[s]erious invasion of state sovereignty protected by the Tenth Amendment," and a dangerous disruption of state fiscal policies. *Maryland v. Wirtz*, 392 U.S. 183, 201 (1968).

105. The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

106. 312 U.S. 100 (1941). See text accompanying note 16 *supra*.

107. See text accompanying note 7 *supra*.

108. In attempting to contrive some limitation on what the dissent termed an overreach of the commerce power, the majority in *Wirtz* equivocated its reliance on the approval of vast commerce powers in *Wickard v. Filburn*, 317 U.S. 111 (1942). *Maryland v. Wirtz*, 392 U.S. 183, 196-97 n.27 (1968). For a more precise statement of the extension of enterprise coverage allowed by the commerce clause, see *Wirtz v. Mayer Constr. Co.*, 291 F. Supp. 514 (D.N.J. 1968). See generally *Briggs v. Sagers*, 424 F.2d 130 (10th Cir.), *cert. denied*, 400 U.S. 829 (1970); *Missouri Dep't of Pub. Health & Welfare Employees v. Missouri Dep't of Pub. Health & Welfare*, 20 WAGE & HOUR CAS. 312 (8th Cir. 1971), *cert. granted*, 41 U.S.L.W. 3037 (U.S. March 27, 1972).

109. The Court held that the principles of *United States v. California*, 297 U.S. 175 (1936), were controlling in this situation. In *California*, the Court had determined that a state-operated railroad, entirely intrastate, was subject to the federal Safety Appliance Act through federal regulation of interstate railroad transportation.

110. See Note, 19 DRAKE L. REV. 177 (1969), for discussion of the *Maryland* decision and these unresolved issues intentionally left unanswered by the Court.

111. *Maryland v. Wirtz*, 392 U.S. 183, 188, 193 (1968).

struing the enterprise amendments has contradicted this contention. Indeed, the very language of the enterprise coverage sections is clearly employer-oriented.¹¹² Thus, there has been a partial, though nonetheless definite, shift in emphasis for enterprise coverage purposes from employee activities to employer activities.

C. Scope of "Enterprise" Coverage

1. EMPLOYEES EMPLOYED IN "AN ENTERPRISE ENGAGED IN COMMERCE OR IN THE PRODUCTION OF GOODS FOR COMMERCE"

In *Wirtz v. Savannah Bank & Trust Co.*,¹¹³ a bank owned a fifteen-story building, of which it occupied the bottom four floors. Although FLSA coverage was conceded for the maintenance and service employees on the bank's floors, the employees performing the same functions on the other eleven floors had not been receiving the FLSA benefits. When faced with resolution of this apparent inequity in protection, the Fifth Circuit Court of Appeals interpreted the enterprise sections¹¹⁴ to require the existence of "(1) related activities, (2) unified operation or common control, and (3) a common business purpose."¹¹⁵ Following the bank's admission of common control, the court of appeals determined that the operation and preservation of the bank building was an integral part of the bank's business and consequently, the two activities were properly related. The "common business purpose" element¹¹⁶ was satisfied by the court's discovery that the operation of this office building allowed the bank to maintain a preferred location, future expansion space, a good public image, and a profit source.

Next, the \$1,000,000 or more gross sales requirement¹¹⁷ was examined in detail. The bank contended it had no "sales," and that the term should be literally construed. However, the Court understood congressional intention to have imbued this "gross-volume-of-sales" test with a broader definition; it should be a "measure of the size of the enterprise."¹¹⁸ The reported income of the bank was found to have met this test. Therefore, the bank was adjudged an "enterprise" establishment, subject to the FLSA.

112. See notes 100-01 *supra*.

113. 362 F.2d 857 (5th Cir. 1966) [hereinafter cited as *Savannah Bank*]. See Note, 1 GA. L. REV. 317 (1967).

114. See notes 101-02 *supra*.

115. *Wirtz v. Savannah Bank & Trust Co.*, 362 F.2d 857, 859 (5th Cir. 1966). *Contra* *Hodgson v. Hatton*, 20 WAGE & HOUR CAS. 549 (S.D. Tex. 1972).

116. See *Hodgson v. Harvey Motor Co.*, 20 WAGE & HOUR CAS. 493 (W.D. Tex. 1971), *aff'd* 461 F.2d 847 (5th Cir. 1972) (per curiam) for varying treatment of this "common business purpose" test.

117. See note 102 *supra*. Note that at the time of this suit the 1961 "enterprise" standards were in effect. The 1966 amendments lowered this annual dollar volume requirement to \$500,000 from February 1, 1967, to January 31, 1969, and \$250,000 thereafter.

118. *Wirtz v. Savannah Bank & Trust Co.*, 362 F.2d 857, 863 (5th Cir. 1966). See *Shultz v. Kip's Big Boy, Inc.*, 431 F.2d 530 (5th Cir. 1970), for this liberal application of the inflow test to a retail enterprise.

The application here of the minimum wage laws to the employees working in the office portion of the Bank building is clearly in harmony with the purpose of the "enterprise" amendments to eliminate situations in which some employees in an establishment of a large enterprise have the protection of the Act while others who work side by side with them do not.¹¹⁹

The *Savannah Bank* "establishment" definition was extended in *Wirtz v. First National Bank & Trust Co.*¹²⁰ The bank had a separate management branch incorporated to oversee the operation of its buildings, interconnected in a complex. The Court of Appeals for the Tenth Circuit believed that the *Savannah Bank* "establishment" was "[n]ot restricted to separate or independent locations," but encompassed "one or more corporate or other organizational units."¹²¹ Applying the *Savannah Bank* principles, the court found that the maintenance and service of the complex for use as a bank and offices were "related activities." This two-unit enterprise, bank and management corporation, was owned and controlled by the bank; the management corporation's activities were essential to the bank's business, so there existed a "common business purpose." For the \$1,000,000 requirement, it was discovered that the bank had \$15,000,000 in gross earnings and that the management corporation had \$2,000,000 in earnings from leases. The court held that the leases comprised "sales" within that term's statutory definition as including "other disposition." Once again, fragmentation of the FLSA's coverage was avoided by application of the enterprise concept.

The Sixth Circuit Court of Appeals adhered closely to the steps of enterprise coverage of *Savannah Bank* in *Wirtz v. Columbian Mutual Life Insurance Co.*¹²² Building custodians were again the employees to whom FLSA protection was extended. The gross sales prerequisite was met by the addition of the insurance company's investment income to its policy premium income. The court said that the legislative history illustrated that sales were used interchangeably with "gross-receipts" or gross business. From prior broad constructions of the term, most if not all of the investment income was includable as sales, regardless of the type of investment or the type of business making the investment.

In *Wirtz v. Allen Green & Associates, Inc.*,¹²³ the construction

119. *Wirtz v. Savannah Bank & Trust Co.*, 362 F.2d 857, 863-64 (5th Cir. 1966).

120. 365 F.2d 641 (10th Cir. 1966).

121. *Id.* at 644. The determination of a single "establishment" from two or more corporate or organizational units does not always signify enterprise coverage. Just such a finding defeated enterprise coverage when it enabled the employer to take advantage of one of the FLSA's exemptions in *Shultz v. Hasam Realty Corp.*, 316 F. Supp. 1136 (S.D. Fla. 1970), *aff'd per curiam*, 442 F.2d 1336 (5th Cir. 1971).

122. 380 F.2d 903 (6th Cir. 1967). The 1966 FLSA amendments had no effect upon the court's FLSA rationale or procedure. See Note, 41 NOTRE DAME LAWYER 596 (1966). See also *Montalvo v. Tower Life Bldg.*, 426 F.2d 1135 (5th Cir. 1970).

123. 379 F.2d 198 (6th Cir. 1967).

company employer had contended that section 3(s)(4)¹²⁴ applied to payments received for construction but not to construction done by the contractor for itself. The Sixth Circuit held:

The underlying concern of the Act is the impact of the particular activity upon interstate commerce. From this perspective the ultimate disposition of the construction has little relevance. The important consideration is whether the activity which went into the actual building process is likely to have an effect on the flow of men, money and materials across state lines. In this case Congress has exercised the legislative judgment that any activity which creates a business volume of \$350,000 or more is likely to have a substantial impact on the channels of the national economic system. The fact that the contractor does not sell the building after its completion does not mean that in constructing it for his own purposes he did not set in motion substantial interstate commercial activities or avail himself of the facilities of other interstate enterprises. Indeed, the facts of this case, involving activities in a number of states, illustrate the soundness of congressional judgment that construction of this magnitude generates an important tributary to the stream of commerce.¹²⁵

The foregoing quote highlights what has remained the primary consideration in determining Fair Labor Standards Act coverage since the Act's inception in 1938: impact of the individual employee's or enterprise's activities upon interstate commerce. The Fourth Circuit Court of Appeals, in *Clifton D. Mayhew, Inc. v. Wirtz*,¹²⁶ recognized the dramatic extension of FLSA coverage in the construction trade afforded by the 1961 amendments. The court pointed out a secondary commerce consideration which has been the most important factor in expanded coverage. This factor is that the full range of an enterprise's activities, rather than an isolated construction project or individual employee's activities, must be utilized in determining coverage of the Act.¹²⁷

In *Wirtz v. Hardin & Co.*,¹²⁸ each of six corporations owned and operated retail grocery stores in Alabama under the trade name of Piggly Wiggly. Each store was operated as a single business entity and

124. 29 U.S.C. § 203(s)(4) (Supp. III, 1961), as amended, 29 U.S.C. § 203(s)(3) (Supp. II, 1966), provided for FLSA enterprise coverage where \$350,000 or more was grossed for construction or reconstruction. For present law, which no longer requires a \$350,000 annual dollar volume, only construction or reconstruction activities, see note 102 *supra*.

125. *Wirtz v. Allen Green & Assoc., Inc.*, 379 F.2d 198, 199-200 (6th Cir. 1967).

126. 413 F.2d 658 (4th Cir. 1969). For other construction enterprise decisions with varying emphases on the requirements for construction coverage see, e.g., *Schultz v. W.R. Hartin & Son, Inc.*, 428 F.2d 186 (4th Cir. 1970); *Wirtz v. Melos Constr. Corp.*, 408 F.2d 626 (2d Cir. 1969); *Wirtz v. Mayer Constr. Co.*, 291 F. Supp. 514 (D.N.J. 1968).

127. *Clifton D. Mayhew, Inc. v. Wirtz*, 431 F.2d 658, 662 (4th Cir. 1969).

128. 253 F. Supp. 579 (N.D. Ala. 1964), *aff'd per curiam*, 359 F.2d 792 (5th Cir. 1966) [hereinafter cited as *Hardin*].

was not subject to any form of common management or control. All but one of the corporations had an income of less than \$100,000. The federal district court held that the FLSA applied to the corporation which had income in excess of \$100,000, and one other, whose employees sent checks regularly across state lines. The four remaining corporations were held not to be individually covered.

The next issue was whether all of those defendants constituted an enterprise under sections 3(r) and 3(s) of the Act. The court concluded that these defendants did not comprise related activities under common control for a common business purpose, mainly because each corporation legally and factually operated as a single entity in every respect. The facts that the Hardin Company had furnished a checking system for the others, had used the same accountant as they, or that the six corporations had common part ownership by the Hardin family did not unify the operations of each of these six corporations sufficiently to support an "enterprise" finding. This decision's effectiveness as a limitation on enterprise coverage was short-lived. It has been continually repudiated to the extent of being overruled by implication, not only by subsequent court decisions,¹²⁹ but also by Congress.¹³⁰

The current status of enterprise coverage where outwardly similar, though separate, corporations exist is best expressed in *Schultz v. Mack Farland & Sons Roofing Co.*¹³¹ In *Schultz* the Fifth Circuit Court of Appeals ascertained the existence of an enterprise by piercing the veil of the physical separateness of the two corporations. Mack Farland, Inc., had engaged in the roofing repair and construction business through two legally separate corporations located in two Florida cities. Apparently relying upon these outward indicia of separateness, the federal district court had held these two corporations were not within the enterprise coverage of sections 3(r) and 3(s) of the Act. The federal district court decision was reversed by the Fifth Circuit, which concluded that these defendant corporations had in fact engaged in the related activities of roofing repair and construction under the common control of William A. McFarland for common business purposes and thereby constituted a single enterprise.¹³²

129. The first of these cases was *Wirtz v. Barnes Grocer Co.*, 398 F.2d 718 (8th Cir. 1968), where three corporations were held to be a single enterprise after substantial, concentrated ownership and control had been confirmed. See also *Hodgson v. Morris*, 315 F. Supp. 558 (M.D. Ala. 1970), *aff'd per curiam*, 437 F.2d 896 (5th Cir. 1971).

130. See H.R. REP. No. 1366, 89th Cong., 2d Sess. 9 (1966); S. REP. No. 1487, 89th Cong., 2d Sess. 7 (1966).

131. 413 F.2d 1296 (5th Cir. 1969).

132. The court distinguished *Hardin* and followed the lead of *Wirtz v. Barnes Grocer Co.*, 398 F.2d 718 (8th Cir. 1968). See note 129 *supra*. At the present time, there exists a split between the courts of appeals on the issue of "common business purpose," which may present the Supreme Court with its first opportunity to consider enterprise coverage requirements, excepting the question of constitutionality which was upheld in *Maryland v. Wirtz*, 392 U.S. 183 (1968). See text accompanying note 103 *supra*. *Shultz v. Falk*, 439 F.2d 340 (4th Cir. 1971), is in accord with the *Mack Farland* decision. *Contra* to *Falk* is *Hodg-*

The most recent statement on enterprise coverage extension was issued by the Fifth Circuit in *Hodgson v. Travis Edwards, Inc.*¹³³ where enterprise coverage of an office building's operation by its owner-operator, Travis Edwards, Inc., was sought by the Secretary of Labor based upon the various activities of Travis Edwards' employees, *i.e.*, office employees, building maintenance personnel, parking lot attendants, concession stand employees, and an elevator operator. In determining sufficient "commerce"¹³⁴ existed in the office building's regular administration by virtue of the office employees of Travis Edwards, Inc.¹³⁵ "handling"¹³⁶ of financial reports which were mailed interstate on a monthly basis to the corporate president and two directors, the court held Travis Edwards, Inc. to be a "covered" enterprise. Finding the office employees were engaged in commerce, the consideration of the other employees' activities was not required by the court since enterprise coverage extends to all employees of the enterprise.¹³⁷

IV. CONCLUSION

From these Fair Labor Standards Act decisions, a consistent trend of unrelenting expansion of the Act's protection to employees, heretofore without its embrace, is clearly discernible. Remember the language of the Supreme Court in *Kirschbaum*:

Since the scope of the Act is not coextensive with the limits
of the power of Congress over commerce, the question remains

son v. Arnheim & Neely, Inc., 444 F.2d 609 (3d Cir. 1971). Both of these cases involve employers who are rental property managers.

133. 465 F.2d 1050 [137 D.L.R.E.-1] (5th Cir. 1972).

134. In sum, we note that the reports we are dealing with are of such a nature as are required to be sent to the president of the corporation and two out-of-state directors. . . . [i]t is common knowledge that a corporate president is ordinarily responsible to some degree for the success and management of the corporation. And, of course, the directors are responsible for the action of the president in the overall supervision and policy guidance of corporate affairs. We cannot assume, therefore, that the operating reports have no relation to business matters in a broad sense concerning the Beck Building. Though these documents may have no intrinsic value, and are for internal corporate use only, they are, in our view, nonetheless sufficient to meet the unexact standards of the statutory definition of "commerce" (*i.e.*, ". . . transmission or communication" among the states).

Id. at 1054.

135. It is interesting to note the reliance of the court upon *Allen v. Atlantic Realty Co.*, 384 F.2d 527 (5th Cir. 1967), which it interpreted to be a greater extension of coverage than the instant case:

If anything, the case before us, insofar as the applicability of the Act is concerned, is even stronger than the *Atlantic Realty* case because in that the case coverage was based on the activities of a *tenant* of the building, whereas here the employees of the building corporation itself are engaged in interstate activities.

Id.

136. The significance of the "employees handling goods" requirement of enterprise coverage had been detrimentally overlooked in many cases. The instant case, as well as those cited in note 72 *supra*, particularly the *Woolin* decision, illustrate this significance.

137. 465 F.2d 1050 [137 D.L.R.E.-1] (5th Cir. 1972).

whether these employees fall within 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. In this task of construction, we are without the aid afforded by a preliminary administrative process for determining whether the particular situation is within the regulated area. Unlike the Interstate Commerce Act and the National Labor Relations Act and other legislation, the Fair Labor Standards Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations. Our problem is, of course, one of drawing lines. There are no fixed points, though lines are to be drawn. The real question is how the lines are to be drawn—what are the relevant considerations in placing the line here rather than there. To that end we have tried to state with candor the larger considerations of national policy, legislative history, and administrative practicalities that underlie the variations in the terms of Congressional commercial regulatory measures and which therefore should govern their judicial construction.¹³⁸

The realization dawns that this advancing augmentation of the Act's outward reach is being accomplished by the judiciary. There was a time when the Supreme Court actually appeared to be on the brink of pushing the Fair Labor Standards Act to its full measure—application of coverage to all activities "affecting" commerce.¹³⁹ But the courts subsequently postulated from the legislative histories of the Act, and its amendments, an outer limitation on the enlargement of the Act's coverage. This limitation was recognized in *Higgins v. Carr Brothers Co.*¹⁴⁰

Another spark for some manner of uniform security for the working man¹⁴¹ flickered in 1949 and again in 1961, but was quickly snuffed out by Congress. The legislative history of the 1949 amendments is representative of the idea that the Congress has thought of possibly opening the door to universal FLSA coverage by amending the Act to cover all activities which affect commerce.¹⁴² Deplorably, this opportunity was quickly rejected by the House Committee on Education and Labor.¹⁴³

138. *A.B. Kirschbaum v. Walling*, 316 U.S. 517, 523 (1941).

139. See note 19 *supra* and accompanying text.

140. 317 U.S. 522 (1943). See notes 30-32 *supra* and accompanying text.

141. See *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1945), for a straightforward expression of this hope:

[T]he prime purpose of the legislation [FLSA] was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage.

142. See *Sanders*, *supra* note 93, at 178.

143. See *Sanders*, *supra* note 93, at 179-91.

The 1961 proposals were dealt the same fate.¹⁴⁴ The 1971 Senate bill¹⁴⁵ and the 1972 House bill¹⁴⁶ died in committee in the 92nd Congress.

There is no denial that the confusion which accompanies FLSA determinations exists in the courts as well as in the industrial sectors of the economy.¹⁴⁷ Throughout its existence, the FLSA's coverage has been fragmented by exemptions and non-uniformity of judicial application, thus frustrating the basic anti-poverty intentions of Congress.¹⁴⁸ The most ideal avenue for elimination of such confusion and achievement of FLSA protection lies within the legislatures of the states. Unfortunately, it seems the states have developed the habit of shirking their responsibilities of social legislation, leaving this task to the overburdened federal government. Studies have illustrated that few states have satisfactory wage-hour laws.¹⁴⁹ The desired direction of fully extended wage-hour security, control and enforcement has seemingly been thwarted by the states' lack of moral responsibility to the laboring classes. Unless the states decide to assume this outstanding obligation, such assumption by the states being very likely too long delayed at this point in time, the inevitable expansion of the coverage of the Fair Labor Standards Act to its farthest constitutional reaches, to all activities "affecting" interstate commerce, remains in the hands of Congress.

144. See Leiter, *supra* note 13, at 141. Further FLSA expansion of coverage is currently being considered in Congress. See also statement of Secretary of Labor Hodgson, *Hearings on FLSA Amendment of 1971 Before the Subcommittee on Labor of Senate Labor & Public Welfare Comm.*, 92d Cong., 1st Sess. (1971).

145. S. 1861, 92d Cong., 2d Sess. (1971), proposed Fair Labor Standards Act Amendments of 1971 in the U.S. Senate, would have raised the minimum wage to \$2.20/hour, would have extended coverage to more workers, and would have further eliminated several of the Act's current exemptions.

146. H.R. 7130, 92d Cong., 2d Sess. (1972), proposed Fair Labor Standards Act Amendments of 1972 in the U.S. House of Representatives, would raise the minimum wage to \$2.00/hour, but would effect little coverage extension or elimination of current exemptions.

147. See Dodd, *supra* note 13, at 331-41; Leiter, *supra* note 13, at 139-50.

148. See note 5 *supra* and accompanying text.

149. See Comment, 36 U. COLO. L. REV. 223 (1964).