Denver Law Review

Volume 16 | Issue 5 Article 2

July 2021

The New Wage-Hour Act

Martin Conboy

THE NEW WAGE-HOUR ACT*

By MARTIN CONBOY, *Member of the New York Bar*

THE proposal to have wages and hours fixed by agencies under the authority of the Federal government constitutes about the farthest removal from what has been called the horse and buggy era that has thus far come under contemplation. To account for it, regardless of whether the measure is good or bad, constitutional or unconstitutional, we are obliged to realize that it has something to do with a change in the pattern of society, for at a time well within the memory of many of us no one would have even dreamt of such a recourse.

It was my privilege to deliver an address on this subject to the Federation of Bar Associations of the Fifth Judicial District at its annual meeting on September 24th.

ECONOMIC DEPRESSION

There is a vast flood of literature on the subject of how best to effect recovery from conditions identified with the economic depression of recent years. A feature common to all of them is the acceptance of conditions now found to prevail. There is a depression problem in agriculture. There is one in transportation. There is one in industry. There is one in labor. There is one in unemployment. Seldom, it is to be noticed, does anyone stop to inquire how the unsatisfactory conditions have come about, and still less often does anyone seek to relate what has happened in one division to what has happened in the others.

The fact probably is that at the time the changes were becoming effective not much attention was paid to them in a general way. They came about in periods of fairly uniform prosperity, during which only the good side of them invited more than passing notice. For more than that, everyone was too busily engaged. It was only when the momentum lessened that reasons were sought for the void that suddenly appeared.

CAUSE AND EFFECT

And yet it is plain that cause and effect are not to be separated. There have been similar dislocations before this one. For example, the lordly mansions that adorned the great

*Courtesy of Mr. Conboy and the New York State Bar Association *Bulletin*.

southern plantations in the first half of the last century were built upon extensive cultivation of tobacco and cotton. Production rested upon the forced labor of negro slaves. Distribution and the resultant fortunes rested with demand overseas, mainly in England. Under the dual threat of freeing the slaves and of endangering the foreign market by setting up high tariffs against the manufactures of the country that bought most of the cotton and tobacco, the Union itself was placed in imminent danger, with war as the final instrument of political policy. The conditions contributing to prosperity, in that instance, were altered by unsuccessful war, and war was followed by half a century or more of inability to recover from the losses that had been sustained in what was the richest portion of the continent.

AGRICULTURE

In the half century after the Civil War, the industrial development in England made that country the principal customer for all the wheat the United States could spare from its own wants, the prairies were opened, and the railroads derived from the increased output perhaps the main impulsion to their spread. Now we have a different situation, and both the wheat producers and the railroads are in trouble.

Agriculture is, as a whole, affected by a different sort of change. In the beginning of our civilization the land was the immediate source of sustenance for all, and all participated in the effort to make it productive. Concern was for the product of the homestead. We have gone from that to a situation in which all the varieties of soil and of climate are at the service of every consumer. Those of us who go by motor car into the farm areas near the great cities are offered the privilege of buying, from local stands, what are supposed to be the produce of the neighborhood, but are actually in many instances, those of Georgia, California or Colorado. And in the process of change the proportion of the population actually engaged in agriculture has been subject to continuous reduction.

INDUSTRY

We seldom stop to think that in the beginnings of manufacturing industry there was a relation to the agricultural element that long ago disappeared. The farmers' sons and

daughters added something to the family income by the work they did, at certain seasons, in the mills. At a slightly later stage, the mill, and its more or less steadily employed staff, was part of an entity of which the small town and the adjacent rural area were also parts. This phase still continues in, for example, sections of Connecticut, and yet the great number of abandoned farms in that state bears witness to the decision ultimately reached to abandon agriculture and depend upon the rewards to be had from service in the mills or in the commerce attendant on industrial development. In the larger cities, there was no nexus with the soil. The adjunct to the work in the factory was the work sent out to be done in the homes.

NEW DEVELOPMENTS

The depression problem, as it relates to industry, consists in there being less work to be done in the factories, and no work at all for a varying ratio of those who have no experience in any other kind of productive effort. Their number is out of all proportion to that which would have had to be provided for in any of the earlier phases. Moreover, in the stage of development when agriculture was an adjunct of industry the families of those out of employment could share with them the products of the soil and assure them of shelter. In the present condition neither the one nor the other resource is available.

There are two further aspects of the change that invite attention. One is that the progress of invention has contributed to the creation of new industries, of which the motor car and the radio are examples, and has brought them to the peak of their possibilities of output, and then beyond their possibilities of employment. The creation of other new industries has not been rapid enough to take up the slack. The second is that, just as agriculture, transportation, industry have increased in volume, so have they ceased to be local. The tendency has been for all of them to adapt themselves to the governing circumstance that in habits, tastes, outlook, we are, as a Supreme Court decision once put it, "all one people." Bands of farm laborers follow the harvest from state to state nowadays, whereas in the long ago the utmost effort of the kind was neighborly interchange of help. Grocery and other

stores under one management are found from coast to coast. The same fashions in clothes are followed in Indianapolis and Seattle as in New York. And those who are out of work are out of the same kinds of work, everywhere, if they ever have been employed, or unable to find employment in the same range of employments if they have just completed school and are seeking to provide for themselves.

SOLUTION PROBLEMATICAL

What is always important, and never to be lost sight of, is that all these changes, imperceptible as they occurred, or at any rate accepted without apprehension of disagreeable consequences, came about through the free play of initiative, courage, industry in the sense of continuous application, on the part of individuals seeking the rewards appropriate to their individual capacities. And what has led to whatever complication there may be associated with the legislation now under consideration is that, for the time being at least, the reliance hitherto placed upon the effectiveness of this system is no longer available to those who have been let down as the whole complex has slowed down. There are those who hold that adjustment will be effected, that the mass intelligence will find a mass answer to the problem. But it is plain that great numbers of those to whom the answer is not patent find themselves under the necessity of asking the government to produce a more immediate solution of the difficulty. Demand has been made upon Congress to that effect, and the Act now under consideration is the present answer of Congress to part of that demand. By specifying the number of hours one may work per week, it seeks to increase the number of employed. By naming a minimum wage, it seeks to set a minimum standard of subsistence for those who are employed. And it adopts, at least for the time being, the view that the people, who are the government, can mitigate the evil into which the people, as participants in the process of improvement through the sum of individual effort and initiative, have been precipitated, whether by their own incapacity or by conditions in the world outside over which they have no control.

FAIR LABOR ACT AN APPROACH

The Fair Labor Standards Act of 1938 is an approach to the problem insofar as it concerns factory output, whether

within the walls or outside them, and whether, in fact, the groupment of men or women in a common effort demands such enclosure. Six months ago the President approved the Act, generally called the Wage-Hour Law, which was passed by Congress in June and which went into effect October 24th. The President has described the law as fixing a floor below wages and a ceiling above hours of labor and as putting an end to child labor. It is obvious, therefore, that the practical effects which the law may have on the American economic system may be very great but that is a subject which falls within the domain of economics rather than of law and I leave it to the economists.

CONSTITUTIONAL ASPECTS

The statute involves important constitutional questions which must be of interest to lawyers. In order to view the constitutional questions involved a brief outline of the principal provisions of the Act are referred to.

One section fixes a minimum wage to be paid to employees engaged in commerce (meaning interstate commerce) and in the production of goods for commence. The minimum rate is 25c per hour during the first year; 30c per hour during the next six years; and 40c per hour thereafter. The 40c rate is subject to the power of the Administrator appointed by the President to establish a lower rate (not less than 30c per hour in industries where circumstances warrant it).

Another section of the Act provides that no employee shall work more than a certain number of hours per week (the number finally gets down to 40) unless he is paid overtime wages.

Another section provides that

> "No producer, manufacturer, or dealer shall ship in interstate commerce any goods produced in an establishment situated anywhere in the United States in or about which any oppressive child labor has been employed."

These are the three provisions which, I assume, the President had in mind when he described the effect that the law would have.

Of course, minimum wage and maximum hour legislation and the prohibition of child labor are not innovations of the year 1938.

The first protective legislation in England was the Health and Morals Act to Regulate Labour of Bound Children in Cotton Factories, sponsored by Sir Robert Peel and adopted in 1802. This Act forbade the binding out of children younger than nine years, restricted the hours to twelve actual working hours a day, and prohibited night work. (3 Ency. Social Sciences, P. 414).

There has, of course, been continuing enlargement of the scope of labor legislation in Great Britain since that time. Under the British Trade Boards Acts of 1909 and 1918, the Minister of Labor was empowered to fix minimum wages.

Congress gave recognition to the eight hour day by making it compulsory on all contractors upon public works of the United States (Acts of August 1, 1892 and of March 3, 1913; 40 U. S. C., 321-3), and for employees of carriers engaged in interstate and foreign commerce (Act of September 3-5, 1916; 45 U. S. C., sec. 65).

NEW YORK STATE LAWS

The amended Constitution of this State passed by the Constitutional Convention last Summer and adopted by the voters at the general election of 1938 contains this new section in Article I, Bill of Rights, taken from Article 8 of the Labor Law:

"Section 17 * * *. No laborer, workman or mechanic, in the employ of a contractor or sub-contractor engaged in the performance of any public work, shall be permitted to work more than eight hours in any day or more than five days in any week, except in cases of extraordinary emergency; nor shall be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used."

Article 5 of our Labor Law entitled "Hours of Labor" contains numerous provisions with reference to hours of labor of operators of motor vehicles and motor buses, state employees, children under sixteen, females over sixteen, females over eighteen in sauerkraut canneries, minors between sixteen and eighteen in certain kinds of business; females on street railroads and male minors and females in telegraph or messenger service.

By Section 69-a of the General Business Law of this State, added by Laws of 1937, Chapter 806, in effect January

1, 1938, the sale of goods produced by child labor is prohibited. The term "child labor" is defined as employment of persons under sixteen years of age. (Section 69-b).

Article 8 of the Labor Law, as we have observed, fixes hours of work and wages on public works and Section 220d requires that the advertised specifications for every contract for the construction, etc., of public work shall state the minimum hourly rate of wages which can be paid to those employed in the performance of the contract.

Assuming that our social and economic needs require legislation of this character to overcome evils against which these laws are addressed, our system of dual governmental authority and the constitutional doctrine of delegated powers raise a peculiar difficulty, so far as federal legislation is concerned by which England and even the states of the Union are not affected.

CONGRESSIONAL POWER

Granting that the need for the legislation exists, has the Federal Congress, which speaks territorially for the entire nation but, in domestic matters, under powers delegated by the states, authority to enact laws of this character? It can be very plausibly argued that the whole field of economic legislation can, in view of the nationwide character of even local enterprises, be efficiently handled only by the federal government.

This is the theory which lies back of the finding of Congress:

"* * * the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several states; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce: (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

And it is the declared policy of the Act:

"* * * through the exercise by Congress of its power to regulate commerce among the several states, to correct, and as rapidly as prac-

ticable, to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

If, as in many other instances where the federal government has intervened, the several states had, through their own legislatures, employed the power of regulation, the need of federal action would not be so apparent.

Goods produced in a state whose legislature has neglected or refused to place restrictions upon what we may, for the sake of argument, call oppressive labor conditions, have an advantage over goods produced in other states. The protection of American goods from unfair competition by nations having lower labor standards is one of the reasons for our protective tariffs.

If any state legislature is disinclined to pass a particular piece of social legislation no outside influence, even of the federal government, can change its attitude.

It is not my purpose to discuss the question whether the fixing of maximum hour and minimum wage standards and the prohibition of child labor are desirable ends to be accomplished, and I am not taking the position that such ends can be accomplished only by means of federal legislation.

The point with which we are chiefly concerned as lawyers, and the one I take to be of most interest is: Now that Congress has acted and passed the legislation, can its validity be sustained under the Constitution? In other words, what is the Supreme Court going to do with it? I am not going to predict the result but I shall attempt to outline some of the constitutional objections which are certain to be raised before the law passes the final test. This will require a very interesting consideration of the history of the Court's decisions as to what constitutes interstate commerce under the commerce clause, and what constitutes due process of law under the Fifth and Fourteenth Amendments.

The handle that opened the door to the passage of the Law and the basis for justifying Congress' control over the matter is found in the interstate commerce clause of the Constitution:

"The Congress shall have power * * * to regulate commerce with foreign nations and among the several states and with the Indian Tribes"

By the terms of the Law, regulation of wages and hours of employees and the prohibition of child labor are confined to employees "engaged in *Commerce* or in the production of goods for *Commerce,*" and commerce is defined in the Act as meaning "trade, commerce, transportation, transmission, or communication among the several states or from any state to any place outside thereof." It is obvious that if the Act were limited to employees engaged in actual commerce between the states its effect would be confined largely to the business of transportation and there is no real doubt but that the field so limited would be a proper one for Congressional regulation.

SUPREME COURT DOCTRINE

The Employee's (Hours of Service) Act of 1907 fixing maximum hours of continuous work for railroad employees engaged in interstate transportation was sustained by the Supreme Court in 1911 in *Baltimore and Ohio R. R.* v. *Interstate Commerce Commission,* 221 U. S. 612, where Mr. Justice Hughes said:

> "The length of hours of service has direct relation to the efficiency of the human agencies upon which protection of life and property necessarily depends,"

and the Court held that inasmuch as Congress had acted within the interstate commerce field there could not be denied to it the exercise of its constitutional authority.

The validity of the Adamson Act (45 U. S. C., sec. 65), which established an eight-hour day for employees of carriers engaged in interstate and foreign commerce, was upheld by the Supreme Court in *Wilson v. New,* 243 U. S. 332, and in *Ellis v. United States,* 206 U. S. 246, the court held that the Act of August 1, 1892, prescribing an eight-hour day on public works (40 U. S. C., s. 321) was not repugnant to the Federal Constitution.

The important feature of the Wage-Hour Law as a departure from previous legislation, is that it is made expressly applicable to "the production of goods for commerce."

Twenty years ago the court held that the authority of Congress under the commerce clause might not be extended to control interstate commerce in the products of child labor; in the words of the court:

"* * * the mere fact that they (the goods) were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power * * *. Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles intended for interstate commerce, is a matter of local regulation." (*Hammer v. Dagenhart*, 247 U. S. 251, 272).

Every argument for permitting Congress to prohibit interstate transportation of goods produced by child labor was considered in that case and held to be of no avail in face of the fact that the making of goods was not *"commerce."* Mr. Justice Holmes, in his dissenting opinion, argued that "Regulation means the prohibition of something, and when interstate commerce is the matter to be regulated * * * the regulation may prohibit any part of such commerce that Congress sees fit to forbid." (247 U. S. at p. 277). The states could regulate their internal affairs and their domestic commerce as they saw fit but when they sought to send their products across the state lines they were no longer within their rights and Congress might carry out its view of public policy whatever indirect effect that might have upon the activities of the states. (*ibid*, p. 281).

The prevailing opinion, however, expressed the doctrine which the court had followed on many previous occasions.

And this view persisted as late as 1936 when the court decided that the Guffey Act regulating the bituminous coal industry was unconstitutional and held that manufacturing, lumbering and mining processes constituted intrastate production and were beyond the power of Congress to regulate. (*Carter v. Carter Coal Co.*, 298 U. S. 238). A decision of the court, so recent as May 16, 1938, calls the manufacture of goods "a purely intrastate activity" even when they are sold in interstate commerce (*J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307 at p. 313).

In 1935 one of the court's grounds for holding the N. I. R. A. unconstitutional was that the activities of the persons therein involved, wholesale dealers in poultry, which had been shipped in interstate commerce, were not subject to regulation by Congress because they were neither transactions in nor acts relating to interstate commerce. (*Schecter Poultry Co. v. United States*, 295 U. S. 495).

I have just stated the doctrine prevailing in the court prior to its 1937 decisions under the National Labor Relations (Wagner) Act in which the court, so it seems to me, departed from the views that it had so long held.

WAGNER ACT AND COURT ATTITUDE

The decisions of the court in the Wagner Act cases indicate that the power of Congress under the commerce clause extends to relations between employers and their employees engaged in manufacturing to the extent necessary to protect interstate commerce. Logically, therefore, the constitutionality of the Wage-Hour Law in its application to the production of goods for commerce must be based upon the views of the court in the Wagner Act cases, rather than on the prior decisions of the court.

It is not too much to say that the doctrine expressed in *Hammer v. Dagenhart* must be overruled or greatly limited, if it has not already been so limited, to sustain the law in its application to employees "engaged in the production of goods for commerce."

The effect of the change in the attitude of the court as to the extent of the regulatory power of Congress under the interstate commerce clause may be observed in the record of the debate in the Senate the day the bill was passed. [Congressional Record, June 14, 1938, p. 12043]:

"Mr. Glass: Mr. President, I want to ask a very simple question of the constitutional lawyers who differ so widely in their interpretation of the Constitution. I should like one of them to define for me what constitutes interstate commerce. Specifically in order to keep out of jail, I should like to ask them if I am engaged in interstate commerce in publishing two newspapers because of the fact that I buy my newsprint in Maine or some other state, or because I purchased my newspaper press from New Jersey, or because I am compelled to buy my type, when I buy type, from some other state? Am I engaged in interstate commerce?

"Mr. Borah: Does the newspaper circulate in several states?

* * * *

"Mr. Glass: Let me ask the other questions now which these constitutional lawyers may be able to answer: What constitutes actual interstate commerce? Suppose I have a newspaper with 20,000 subscribers and all of the papers circulate in Virginia except to ten subscribers. Am I engaged in interstate commerce?

* * * *

"Mr. Borah: Mr. President, if the Senator is purchasing his goods for the purpose of making up his newspaper in different states and he takes them to a particular place where he uses them and he transmits his newspapers into other states—I do not think the number—the number 10, 20, or 30 is controlling. I think the Senator is engaged in interstate commerce.

"Mr. Glass: Well, I do not.

"Mr. Wheeler: Well, if I may interrupt the Senator from Idaho, I will say to the Senator from Virginia that twenty years ago he would not have been engaged in interstate commerce but if he is not considered to be engaged in interstate commerce now, he will be considered to be engaged in interstate commerce ten years from now because the law will be so changed and the courts will finally come to the conclusion that he is engaged in interstate commerce."

Three of the Wagner Act cases at the 1936 October Term involved employers whose business was manufacturing. One of the employers was a clothing manufacturer whose one establishment was located in Richmond, Virginia. A large portion of the material which went into the clothing was shipped in from other states and 85% of the company's products was sold in other states, but the activities of the employees took place entirely within the State of Virginia. In determining that the relations between the employer and his employees were subject to regulation by Congress, the court considered not only the activities of the employer involved but the industry as a whole, quoting a finding of the Labor Board that:

"The men's clothing industry is thus an industry which is nearly entirely dependent in its operations upon purchases and sales in interstate commerce and upon interstate transportation."

In the Jones & Laughlin Steel Corporation case [301 U. S. 1] it appeared that the corporation was engaged in the manufacture of steel in Pennsylvania, receiving its raw materials from and selling its products in other states and the court held that, under the commerce clause, Congress had power to regulate the relations between the corporation and its employees, including those whose activities were confined to intrastate manufacturing. Through the Chief Justice the court expressed the view [301 U. S. 37] that:

"Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."

The court's decision in the Wagner Act cases indicates that the production of goods to be shipped in interstate commerce is subject to federal regulation in order to prevent labor disputes burdening or obstructing commerce or the free flow of commerce.

WAGE AND HOUR REGULATION

It will be remembered that the "Adamson Act" (45 U. S. C. §65) was passed at the instance of President Wilson to avert a strike of the four railway brotherhoods. (*Burke v. Monumental Division, No. 52 Brotherhood of Locomotive Engineers,* 273 Fed. Rep. 707).

Does the power of regulation extend beyond the prevention of labor disputes? Is it necessary for the protection of interstate commerce to give Congress power to fix wages and hours and to prohibit child labor in the production of goods for commerce? This is the primary question of constitutional power which the court must answer. Of course, in every case there will also be a question of fact,—"Are the employees engaged in the production of goods for commerce?"

Along with the question whether Congress has power to enact laws applicable to intrastate activities, justified only upon the basis of the interstate commerce clause, run other constitutional questions arising under the due process clause of the Fifth Amendment. Statutory regulation of the number of hours that a man may work, and of the amount of wages that a man must be paid, and statutory prohibition of the employment of children are, in a sense, limitations upon or deprivations of freedom of contract, and deprivation of liberty, including liberty to contract, is forbidden by the Fifth Amendment, if without due process of law.

I assume that Congress has just as broad powers to legislate on matters committed to it by the Constitution as do "the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government" and it seems clear that Congress can in the exercise of the police power incidental to its delegated powers do in its proper field what the states can do in theirs. Assuming then that the field is one in which Congress has power to legislate by reason of the interstate commerce clause, is the legislation justified under the police power by the need to protect the health and welfare

of workers engaged in the production of goods for commerce?

In the finding and declaration of policy contained in the Act the case for regulation is stated by Congress in terms that have sustained state laws regulating wages and hours:

"The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and well being of workers * * * (2) burdens commerce and the free flow of goods in commerce. * * * (5) interferes with the orderly and fair marketing of goods in commerce."

On the question whether the Act is justified under the police power the court's decisions dealing with the constitutionality under the Fourteenth Amendment of similar state laws are, therefore, important.

HOURS OF LABOR

In *Lochner v. New York,* 198 U. S. 45, the court held, in 1905, that a New York statute fixing maximum hours of labor for bakery employees was not, as to men, a legitimate exercise of the state's police power, but an unreasonable interference with the right and liberty of the individual to contract in relation to his labor and as such in violation of the Fourteenth Amendment.

Subsequently, however, the court sustained the constitutionality of a statute limiting the work hours of women, [*Muller v. Oregon* (1908) 208 U. S. 412], distinguishing *Lochner v. New York* on the ground that women were involved. The decision may be said to have been based upon infirmities inherent in sex, and the court, referring to woman, said

"Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained."

Similar legislation where women were involved was sustained in *Riley v. Massachusetts,* 232 U. S. 671 (in factories); *Miller v. Wilson,* 236 U. S. 373 (in hotels); *Bosley v. McLoughlin,* 236 U. S. 385 (in hospitals); and the New York statute which restricted the employment of women in restaurants at night. *Radice v. New York,* 264 U. S. 292.

Furthermore, in *Bunting v. Oregon*, 243 U. S. 426, the court, in 1917, sustained an Oregon law limiting the hours of work of employees in manufacturing establishments without regard to the sex or age of the employee, thereby implicitly reversing *Lochner v. New York*.

The justification for such statutes now seems to be that they are health regulations passed in exercise of the state's police power to safeguard the health of workers.

If a state may limit hours of labor as a health regulation without violating the Fourteenth Amendment, may not Congress do the same thing in the field of interstate commerce without violating the Fifth?

MINIMUM WAGES

The Supreme Court's treatment of minimum wage statutes, in one respect at least, has not paralleled that fixing hours of employment. The court held in 1923 in *Adkins v. Childrens Hospital* [261 U. S. 525], that a law passed by Congress fixing minimum wages for women employed in the District of Columbia was in violation of the due process clause of the Fifth Amendment, Mr. Justice Holmes dissenting. Noting the court's frequent approval of state statutes fixing minimum work hours for women he was moved to comment that he did not "understand the principle on which the power to fix a minimum of wages for women can be denied by those who admit the power to fix a maximum for the hours of work."

Despite adverse criticism the authority of the *Adkins* case was recognized as controlling for fourteen years and in 1936 a New York minimum wage law for women was held unconstitutional in *Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587.

About eight months later, however, the court held valid the Washington minimum wage statute for women in *West Coast Hotel Co. v. Parrish* [300 U. S. 379] and overruled the *Adkins* case, stating that "the decision in the Adkins case was a departure from the true application of the principles governing the regulation by the state of the relations of employer and employed." The challenge to the validity of the distinction made by the *Adkins* case between minimum wages and maximum hours so far as concerned the limiting of liberty of contract was successful.

There has been, so far as I am aware, no case before the court involving the validity of a statute fixing minimum wages for men. This is apparently an undetermined matter. Classification on the basis of sex with regard to hours of work seems no longer to be the rule. Can it persist in respect to minimum wages in the face of the claim recognized in the *West Coast Hotel Company* case, that a legal distinction between wages and hours cannot be sustained?

CHILD LABOR

The law prohibits transportation in interstate commerce of goods produced by oppressive child labor.

As we have seen, however, this provision of the law is the very one which the Supreme Court in *Hammer v. Dagenhart* held to be invalid, as an interference with the rights of the states.

Congress, therefore, has sought, in the Wage-Hour Act, to effect a reversal of *Hammer v. Dagenhart*. If "federal control under the commerce power," which was there held not to apply because manufacture was not commerce, and therefore those engaged in manufacture were not engaged in commerce, is hereafter held to justify the regulation of child labor, presumably it will be so held in deference to the plea that exclusion of products of unprotected child labor from interstate commerce "is essential or appropriate to protect that commerce from burdens and obstructions." The statute evidently was written with the presentation of that argument in prospect. Whether the court will vary, on that or another ground, the finding in *Hammer v. Dagenhart*, we shall only know when the court has spoken.

DELEGATION OF LEGISLATIVE POWER

No consideration of the constitutional hurdles which the Wage-Hour Law must surmount would be complete without discussing one which invalidated the National Industrial Recovery Act. As the Chief Justice said in the *Schechter* case: "The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States' * * *. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."

The N. I. R. A. was fatally defective, as Mr. Justice Cardozo said, for the reason that in that case "The delegated power of legislation * * * is not canalized within banks that kept it from overflowing. It is unconfined and vagrant. * * *."

The Wage-Hour Law delegates some powers to an Administrator who is appointed by the President. The Administrator is authorized to appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce and the Administrator has power, in industries where circumstances warrant it, after consulting with the Committee, to establish a lower rate, not less than 30c per hour, below the 40c per hour rate fixed by the Act. The Industry Committee and the Administrator are further authorized to establish reasonable classifications within the industry for the purpose of fixing separate wage scales for such classifications based upon local conditions, including cost of living and production costs. The Administrator and his subordinates are authorized to determine within certain standards what constitutes "oppressive child labor prohibited by the act." The Administrator is given broad power of definition with respect to certain classes of employees exempt from the provisions of the act. The question is whether the delegation of powers to the Administrator is limited to the application of standards contained in the law, that is, is the delegated power confined "within banks that keep it from overflowing?" The objection will undoubtedly be raised when the law comes before the court. The General 44 Hour Week Law of Pennsylvania was recently declared unconstitutional by the Supreme Court of that state (*Holgate Brothers v. Bashore,* 331 Pa. 255) on the ground that it contained an unconstitutional delegation by the Legislature of its powers, but the objectionable delegation seems to have been in the fact that the schedules of working hours fixed by any federal regulatory body were made the standard under the Pennsylvania Law. It was for the same reason that the State Recovery Act (Laws of 1933, ch. 781) was held unconstitutional in this State. Chief Judge Crane, speaking for the majority of the Court of Appeals, said:

"Stripped of all its verbiage, and narrowing these provisions down to the real authority, we find that the Legislature of the State of New York has turned over to the National Administrator the question of determining whether there shall be price-fixing in New York State of coal and what it shall be. The Legislature has left too many things to be determined by other bodies to make this law constitutional." (Darweger v. Staats, 267 N. Y. 290, 304).

CONCLUSION

To repeat, what we have here to consider is an enactment that is primarily concerned with economic policies to one phase of which the Act is designed to give effect. It is not my purpose to pass upon the merits of the Act, in its bearing upon the public welfare, or to agree with or oppose this particular item of political policy. Our examination is restricted to speculation whether the provisions of the Act will bear the scrutiny of the law when they come to be tested in the Supreme Court. If much of the consideration has turned upon recent decisions of the Supreme Court, it is because the expressions of the court in those cases indicates that the commerce clause is now regarded as having an extensile quality, the farthest limits of whose expansion the court may not as yet have announced. Five years ago, or even three years ago, most of us would have been disposed to say that the law was not within the power of Congress to enact, under the Constitution, in the light of decisions then taken as controlling. But when we have before us the court's reversal of its own controlling decision in the *Adkins* case, and add to that its action in *Erie R. R. v. Tompkins* at the last term, overruling *Swift v. Tyson,* we have ample indication that the court has no qualms about reversing even decisions that are century old. In this situation, and in the light of the recent decisions that have passed under review as being pertinent to the problems of constitutional interpretation, any one who would now give an opinion that the Wage-Hour Act is not within the power of Congress to enact must have more assurance than I have that the Act will be declared unconstitutional when the Supreme Court comes to pass upon it.

There can be no doubt that the question of who is and who is not engaged in "the production of goods for commerce"

will be many times posed for answer and will be productive of much litigation; nor that the judicial ingenuity and resourcefulness of that great tribunal will be exhausted in answering the question.

There is, for example, the fact that goods produced in one state and sold in another state are in competition with goods produced and sold exclusively within a state. Will this competition bring within the power of Congress the regulation of intrastate production, if the competition should prove to the disadvantage of the part that is under interstate regulation? This is by no means an idle inquiry. The power of the Interstate Commerce Commission over interstate transportation rates has resulted in regulation by that Commission of intrastate rates where such rates enable carriers to compete on more favorable terms than those enjoyed by interstate carriers. Manipulation of manufacturing, if it is shown to affect the price of the article in interstate commerce, has been declared a violation of the Anti-Trust Act. If price is adversely affected, as to articles in interstate commerce, by the competition of articles that are only in intrastate production and commerce, can we be quite certain that regulation under the commerce power will not be resorted to? And if it shall prove that the power of Congress can be and actually is directed to the control of more and yet more matters heretofore regarded as entrusted solely to local authority for regulation, who is there that would venture to set limits to the process of erosion, or define with certainty what remainder of power, over what have been accepted as local matters, will remain to the states?

In the measure whose bearings we have been considering, the disposition of Congress in this respect is manifested in ways that admit of only one inference. What we have next to learn is whether the Supreme Court considers the perseverance of Congress, up to this point at any rate, consistent with its powers under the Constitution. For that we must wait, as we must wait, also, for indications as to whether the states are concerned over the trend of events or are passively acquiescent. Time alone will tell.