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## "EXTRA TIME FOR OVERTIME" NOW LAW

*Frank E. Cooper\**

The Fair Labor Standards Act of 1938<sup>1</sup> presents a great many legal and practical problems of importance commensurate with the comprehensiveness of the act itself, which is probably the most far-reaching of the New Deal statutes since the N. R. A. The act is conceived on the theory that any physical handling<sup>2</sup> of goods destined to be subsequently shipped to another state is an act so closely and substantially related to the flow of interstate commerce as to be subject to Congressional regulation, and thus depends for its validity upon an extension of the theories approved in the Wagner Act cases.<sup>3</sup> The act seeks to increase labor's share in the profits of industry, by compelling a fifty per cent wage increase for hours of employment in excess of a statutory maximum, and by compelling payment of certain minimum wages for all employment periods.<sup>4</sup> In addition, the act contains a new attempt by Congress to outlaw child labor. The significance of the constitutional issues necessarily involved in so far-reaching a measure is only too obvious. Further, in filling the broad interstices of the rather loosely knit legislative fabric, there arise a multitude of problems of statutory construction and administrative interpolation. Many of these must be worked out by individual employers and their attorneys without the benefit of official regulations, since the effective date of the act follows its enactment too closely to permit the issuance of governmental rules of construction substantially in advance of the time when the provisions and penalties of the act become operative.

A brief appraisal of the meaning, constitutionality, and operative effect of the act is outlined in the following paragraphs.

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<sup>1</sup> Pub. No. 718, 75th Cong., 3d sess., approved June 25, 1938.

<sup>2</sup> The act perhaps goes even further. It may be intended to apply to every employee of every company in whose plant are produced goods for commerce, on the theory that the work of every employee is "necessary to the production" of the company's product. See § 3 (j) of the act, and discussion *infra*, especially note 84.

<sup>3</sup> The group of five cases headed by *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615 (1937).

<sup>4</sup> While the act on its face purports to provide a maximum hour schedule, the exaction of working hours in excess of the maximum is permitted on payment therefor on the basis of time and a half for such overtime hours. Overtime payments are to be based not on the statutory minimum rate, but on the regular hourly rate of the particular employee. Of course, such rate is usually well above the legal minimum.

The acts affects all employees who are engaged in commerce or the production

## I

## PROVISIONS OF THE ACT

As the popular name of the measure suggests, the Fair Labor Standards Act of 1938 is in large part a measure seeking to require the establishment of minimum wages and maximum hours as to employees engaged in commerce or in the production of goods for commerce. But at least equally important, so far as immediate effect is concerned, are the provisions designed to prohibit, in the affected industries, employment of children under sixteen years of age, and (in "hazardous" industries) the employment of children under eighteen years of age.

A. *Minimum Wages*

While the minimum wage rate set up by the act is so well below the average now prevailing in all large industries as to create little immediate alarm among articulate employer groups, it is important to note the ease with which the minimum rate may be increased, either by legislative amendment or (to an extent) by administrative order, after the system set up by the act becomes operative. It is provided that for the first year after October 24, 1938,<sup>5</sup> every employer must pay to each of his employees who is engaged in commerce or in the production of goods for commerce, not less than twenty-five cents an hour. For the six years between October 24, 1939, and October 24, 1945, the minimum rate is to be thirty cents an hour; and thereafter it is to be forty cents an hour.<sup>6</sup>

As a practical matter, however, it must be expected that in many industries at least, the minimum rate will be increased to forty cents an hour long before 1945. The machinery provided for such increase consists of committees (for each industry engaged in commerce or in the production of goods for commerce)<sup>7</sup> to be appointed by the admin-

of goods for commerce. The criterion is not (as is usually the case) the character of the employer's business; instead, it is the nature of the employee's job. Such, at least, is the indication of the language of the act. But, as indicated in the text discussion, *infra*, the final result may be that the act applies to all employees of certain businesses, and to none of the employees of other and smaller concerns.

<sup>5</sup> The effective date of the act, according to most published computations. The act becomes effective 120 days after its signing by the President, June 25, 1938.

<sup>6</sup> Subject to the exception that the administrator may by order permit payment of wages under forty cents an hour, but not less than thirty cents an hour, in certain industries, or classifications thereof, if he finds that a wage of less than forty cents is necessary to prevent substantial curtailment of employment in the industry. Sec. 8 (e).

<sup>7</sup> Each committee is to consist of an unspecified number of disinterested persons representing the public, one of whom the administrator shall designate as chairman,

istrator, who supervises the administration of the wage and hour provisions of the act. The committees are charged with the duty, "with a view to carrying out the policy of this act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of forty cents an hour,"<sup>8</sup> of recommending, for classifications within each of the affected industries, the highest minimum wage rate (not in excess of forty cents an hour) which will (1) not substantially curtail employment in such classification (2) nor give a competitive advantage to any group in the industry. Upon order of the administrator, based upon such recommendations of the several committees, the minimum wages may be increased to forty cents an hour, in many classifications of industry, within the next few months.<sup>9</sup>

### B. *Maximum Hours*

A similar sliding-scale is provided for maximum hours, but in this respect there is no provision for the establishment of shorter maximum provisions by administrative order. The act provides<sup>10</sup> that (subject to certain exceptions) no employer shall employ, otherwise than on a time-and-a-half-for-overtime basis, any of his employees who is engaged in commerce or in the production of goods for commerce, for a work-week longer than forty-four hours, between October 24, 1938, and October 24, 1939; or longer than forty-two hours, between October 24, 1939, and October 24, 1940; or longer than forty hours, after the last-mentioned date. Thus, it will be seen, the shortest maximum hour base is attained far more quickly than the highest minimum wage rate, so far as the provisions of the act are concerned.

The sole purpose and effect of this maximum hour section is to require payment of compensation at one and one-half times the regular hourly rate to any worker engaged in commerce or in the production of goods for commerce, for hours of work in excess of the maximum num-

an equal number of persons representing employees in the industry, and a like number representing employers in the industry. Sec. 5.

<sup>8</sup> Sec. 8 (a).

<sup>9</sup> The act provides, § 8 (c), that in fixing such classifications within any industry, the committees shall consider (1) competitive conditions as affected by transportation, living, and production costs; (2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and (3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry. The same section specifically prohibits the making of classifications based *solely* on a regional basis, or on the basis of age or sex.

<sup>10</sup> Sec. 7 (a).

ber of hours set up by the act.<sup>11</sup> The hours provisions of the act are not effectively designed to limit employment to the maximum which can be worked without injury to the health of the employee. These provisions, rather, are to provide further assurance of the payment of high wages, and probably to spread employment.

Special provisions except from the maximum-hour provisions of the act employers operating under certain types of collective bargaining agreements, employers operating under certain annual employment agreements, employers engaged in seasonal industries, and employers engaged in the first processing of certain agricultural products and livestock.<sup>12</sup>

### C. *Child Labor Provisions*

An interstate embargo on the products of child labor manufactured in the United States<sup>13</sup> is provided in section 12 (a) of the act. This sec-

<sup>11</sup> Possibly the Congress entertained the thought that this sanction would be effective to discourage employment in excess of the maximum hours, but to those familiar with the operation of industrial establishments, it seems fairly clear that the chief effect will be to increase payment of wages in rush periods.

<sup>12</sup> The provision with reference to collective-bargaining agreements is, in substance, that such agreements, if made by representatives certified as bona fide by the National Labor Relations Board, may provide that no employees shall be employed more than 1,000 hours during any period of twenty-six consecutive weeks (an average of about thirty-eight and one-half hours per week). But even here, overtime must be paid for employment in excess of twelve hours in a day, or fifty-six hours in a week. Sec. 7 (b). The exception with reference to annual employment agreements relates to contracts made with representatives of employees certified as bona fide by the National Labor Relations Board and providing that the employee shall not be employed more than 2,000 hours during any period of fifty-two consecutive weeks; again, the average is about thirty-eight and a half hours per week, and there is the same provision as to twelve hours a day and fifty-six hours a week. Sec. 7 (b). The exception for seasonal industries is limited to a period or periods of not more than fourteen work weeks in the aggregate in any calendar year or an industry found by the administrator to be seasonal. Sec. 7 (b). The exception with reference to employers engaged in the first processing of agricultural and livestock products provides that in the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of sugar beets, or sugar beet molasses, sugar cane, or maple syrup into sugar (but not refined sugar) or into syrup, the maximum hour provisions shall have no application; and provides that in the case of an employer engaged in the first processing of, or in the canning or packing, of perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the administrator) of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or live stock, exemption from the maximum hour provisions shall be granted for a period or periods of not more than fourteen work-weeks in any calendar year.

<sup>13</sup> Importation of goods made by child labor is not prohibited by the act.

tion prohibits all producers, manufacturers, and dealers from shipping or delivering for shipment in interstate commerce any goods produced in an establishment situated in the United States in or about which, within thirty days prior to the removal of such goods therefrom,<sup>14</sup> any "oppressive child labor" has been employed. The language of the act indicates that it is not necessary, to prove a violation of this section, to show that child labor was employed on the particular goods in question; it is sufficient if child labor was employed in the establishment in which the goods were produced. Obviously, nice questions may be presented in the event that an employer can show that as to particular goods no child labor was employed, although children were working in other branches of his establishment.

"Oppressive child labor" includes, subject to the exceptions indicated in the footnotes, the employment of children under the age of sixteen years<sup>15</sup> in any occupation; and the employment of children over sixteen but under eighteen years of age in industries found by the Children's Bureau to be "particularly hazardous" or "detrimental to their health or well-being."<sup>16</sup> To protect employers from good-faith violation of these provisions, the Children's Bureau may issue certificates declaring certain individuals to be above the oppressive child-labor age.<sup>17</sup> The child labor provisions do not apply to children in the theatrical or motion picture industries, nor to children employed in agriculture while not legally required to attend school.<sup>18</sup>

#### D. *Administration of the Act*

Criminal actions, civil actions at law, and equitable actions for injunction are the triple sanctions provided for the enforcement of the provisions of the act.

Fines up to ten thousand dollars and, for subsequent convictions, imprisonment for not more than six months, are provided for wilful violations of the provisions relating to maximum hours, minimum

<sup>14</sup> Thus, the provisions of the act relating to child labor really became effective September 24, 1938.

<sup>15</sup> Except in the case of employment, by parents or those standing *in loco parentis*, of children in an occupation other than manufacturing or mining; and except that children between the ages of fourteen and sixteen years may be employed in occupations other than manufacturing and mining if the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being. Sec. 3 (1).

<sup>16</sup> Sec. 3 (1).

<sup>17</sup> Sec. 3 (1).

<sup>18</sup> Sec. 13 (c).

wages, and employment of child labor in violation of the act; for wilful shipping or sale in commerce of goods in production of which any employee was employed in violation of the provisions of the act; for discrimination against employees who complain of violations of the act; and for wilful falsity in the keeping of certain required records and reports.<sup>19</sup>

Employees who have suffered because of violations of the act are permitted in a civil action to recover twice the wages to which they were entitled but did not receive, in addition to costs and attorney's fee.<sup>20</sup>

Violations of the act may be restrained by United States District Courts, subject to the provisions of section 20 of the Clayton Act.<sup>21</sup>

The enforcement of the child labor provisions is delegated to the Children's Bureau; and a wage-and-hour division has been created in the Labor Department, under the direction of an administrator, to enforce the wage and hour provisions of the act. He is assisted by the industrial committees described above.

Provision is made for the attendance of witnesses and production of books, papers, and other documents at any hearing or investigation conducted under the act, by reference to sections 9 and 10 of the Federal Trade Commission Act,<sup>22</sup> which provides for issuance of subpoena, enforceable by application to a federal district court for an order requiring obedience of the subpoena, and by criminal prosecution.<sup>23</sup>

Court review of administrative orders is afforded by petition to the several circuit courts of appeal. The review by the courts is limited to questions of law, and findings of fact by the administrator are conclusive when supported by substantial evidence.<sup>24</sup>

The administrator is authorized to gather data regarding hours, wages, and other conditions and practices of employment, and to this end is authorized to enter industrial establishments, inspect their records, and require the making of reports or the preservation of employment records.<sup>25</sup>

<sup>19</sup> Secs. 15, 16.

<sup>20</sup> Sec. 16 (b).

<sup>21</sup> 38 Stat. L. 737 (1915), 28 U. S. C. (1935), § 381. Presumably, such injunction suits will be brought by those officials charged with the administration of the act. It is not clear whether an employer could obtain injunctive relief against an unscrupulous competitor.

<sup>22</sup> 38 Stat. L. 722 (1914), 15 U. S. C. (1935), §§ 49, 50.

<sup>23</sup> Sec. 9.

<sup>24</sup> Sec. 10.

<sup>25</sup> Sec. 11.

### E. *Miscellaneous Provisions*

It is provided that none of the provisions of the act shall excuse non-compliance with any other law or ordinance establishing higher standards.<sup>26</sup> Somewhat wishfully, it is further ordained that no provision of the act shall "justify" any employer in reducing a wage paid by him in excess of the applicable minimum, nor in increasing hours of employment maintained by him which are shorter than the maxima provided under the act.<sup>27</sup>

In addition to the various specific exceptions above described or noted, there are many general exceptions, some of which go far in diminishing the ultimate effectiveness of the act.

There is, of course, special provision for learners, apprentices, and handicapped workers. The administrator is authorized, to the extent necessary to prevent curtailment of opportunities for employment, to provide by regulations and orders for the employment, under special certificate, of learners, apprentices, and bona fide messengers at lower wages than the minima provided by the act. Similar provisions are made with reference to individuals whose earning capacity is impaired by age or physical or mental deficiency or injury.<sup>28</sup>

Among the practically important general exemptions are the following: (1) agricultural workers; (2) employees engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; (3) governmental employees; (4) executive, professional, and administrative employees; (5) employees engaged in local retailing, and outside salesmen; (6) seamen. Other generally excepted classes include workers subject to the Railway Labor Act;<sup>29</sup> workers subject to Section 204 of the Motor Carrier Act;<sup>30</sup> workers subject to part one of the Interstate Commerce Act;<sup>31</sup> employees of common carriers; employees of certain small weekly

<sup>26</sup> Sec. 18.

<sup>27</sup> Sec. 18. Surely this provision is unnecessary if intended merely as a means of permitting compliance with collective bargaining agreements providing for higher standards; and its effectiveness in discouraging employers who are not bound by contract from reducing their standards to those prescribed by the act may be doubted. Under the N. R. A., it was frequently reported that many employers who had previously maintained standards higher than those provided by the applicable codes reduced their standards to the lowest permitted under such codes. Newspaper announcements indicate that similar practices will be followed under the Fair Labor Standards Act.

<sup>28</sup> Sec. 14.

<sup>29</sup> 48 Stat. L. 1185 (1934), 45 U. S. C. (1935), § 151 et seq.

<sup>30</sup> 49 Stat. L. 546 (1935), 49 U. S. C. (Supp. 1937), § 304.

<sup>31</sup> 49 U. S. C. (1935), § 1 et seq.



or semi-weekly newspapers; certain employees engaged in fishing enterprises and dairy processing.<sup>82</sup>

## II

### CONSTITUTIONALITY OF THE ACT

Ten years ago, few lawyers would have hesitated in predicting that the Supreme Court would hold unconstitutional the Fair Labor Standards Act (had it then been enacted); today, even fewer lawyers would venture to predict that the act as a whole is invalid.

Yet it seems clear that the act attempts to advance the concept of the power of Congress to regulate local matters, on the ground that such matters affect interstate commerce, to an extent unprecedented in any statute which has been upheld by the Supreme Court. Undoubtedly, this act is near the periphery of that orbit, yet to be plotted by the Court, marking the outer boundary of the power granted Congress under the commerce clause. Questions as to the constitutionality of the act, in certain of its applications, are close ones.

Such questions can most conveniently be considered by discussing separately the three fronts on which the act most plausibly may be attacked. Fundamentally, the most important of these three is the question whether or not the regulation of hours and wages, in industries producing goods for commerce, falls within the grant of power to regulate interstate commerce. Secondly, questions as to violation of the Fifth Amendment require consideration. Finally, some question might be raised as to the delegation of legislative power to administrative agencies. These several inquiries will be discussed separately.

#### *A. Power to Regulate Hours and Wages Under the Commerce Clause*

For many years, the most vexed problem in constitutional law has been the demarcation of the boundary line which limits the power of Congress to regulate activities which, although not constituting interstate commerce, are related thereto in such a way that the attainment of certain desired results in interstate commerce cannot be achieved unless the local activities themselves can be subjected to regulation. The question did not early arise. Obviously it could not arise when the only substantial regulation of commerce attempted by the Congress concerned the business of interstate transportation. It was not until Congress enacted laws based fundamentally on the concept of promoting or fostering interstate trade that the issue came to the surface. Later,

<sup>82</sup> Secs. 3, 13.

with the frequent employment of the technique of utilizing the commerce power to enable Congress to enact legislation designed primarily to achieve broad social purposes, this question as to the power of Congress became acute.

When the issue was first raised, the Court, taking a viewpoint which was natural under the existing state of national development, considered the various industries in far separated parts of the country as composed of functionally independent and isolated phases of human enterprise. The company which was making steel in Pittsburgh was remote and far removed, functionally as well as geographically, from the contractor who was erecting steel bridges in Chicago. The manufacture of the product, the transportation of it, and the final use by the ultimate consumer, then appeared quite clearly as three distinct steps. They could logically be encapsulated in separate shells, with the result that, while Congress had jurisdiction over the interstate transportation of the products, it could not regulate the manufacture thereof or the use thereof. The economic condition of the country, half a century ago, was entirely different than at present. The organization of business enterprise was different. Present-day conceptions of the productivity of the country as a whole could not then well be foreseen as a matter of ultimate national concern. The integration of business on a nationwide scale, and the centralization of industrial production within national industries, which latterly have altered the pattern of our entire industrial system, could not easily be predicted.

It is not surprising, therefore, that the Court declared in early cases that manufacture is not commerce.<sup>33</sup> This concept persisted, and as recently as 1936, was responsible for invalidating an act regulating the terms and conditions of employment of those engaged in the local production of commodities sold and about to be shipped in interstate commerce, the Court declaring:

<sup>33</sup> See especially *Kidd v. Pearson*, 128 U. S. 1 at 20-21, 9 S. Ct. 6 (1888). "The functions of commerce are different. . . . If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be vested, to the exclusion of the States, with the power to regulate not only manufactures, but also agricultural, horticultural, stock raising, domestic fisheries, mining—in short, every branch of human industry." See also, *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 S. Ct. 249 (1894); *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344 at 407, 408, 42 S. Ct. 570 (1922); *Heisler v. Thomas Colliery Co.*, 260 U. S. 245 at 259, 43 S. Ct. 83 (1922); *Oliver Iron Co. v. Lord*, 262 U. S. 172 at 178, 43 S. Ct. 526 (1923); *Industrial Association v. United States*, 268 U. S. 64 at 82, 45 S. Ct. 403 (1925).

“One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale and shipment were originally intended or not, has engaged in two distinct, and separate activities. . . . In respect of the former, he is subject only to regulation by the state; in respect of the latter, to regulation only by the federal government.”<sup>84</sup>

The *Schechter* case,<sup>85</sup> a few months earlier, had condemned as unauthorized by the commerce clause an assertion of federal power in respect of commodities which had come to rest after interstate transportation. Together, these holdings appeared to close all approaches, save one, to attempts of Congress to regulate local industrial processes in the hope of fostering the national economy through the promotion and enlargement of interstate commerce.

One approach remained open. The Court had long recognized that certain activities, though in themselves local, had so direct an effect upon interstate commerce that Congressional regulation thereof would be permitted to prevent the burdening of interstate commerce. Such decisions can be grouped in several categories, none of which are mutually exclusive or in themselves particularly significant.

The gap between regulation of commerce and regulation of local activities affecting commerce was perhaps most plausibly closed in those cases wherein the activity in question could be said to be in the direct “stream of commerce,” as in the case of a grain elevator or stockyards, where the passage of goods shipped in interstate commerce was halted but momentarily pending further shipment.<sup>86</sup> But the doctrine was not limited to activities occurring in the flow of commerce.<sup>87</sup> Thus, carriers engaged in both interstate and intrastate transportation have long been held subject to federal control even as to their intrastate rates, such control being deemed essential to secure the freedom of interstate traffic from interference or unjust discrimination and to promote the

<sup>84</sup> *Carter v. Carter Coal Co.*, 298 U. S. 238 at 303, 56 S. Ct. 855 (1936).

<sup>85</sup> *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 55 S. Ct. 837 (1935).

<sup>86</sup> *Stafford v. Wallace*, 258 U. S. 495, 42 S. Ct. 397 (1922), where the Court found that sales made at stockyards could not be regarded as mere local transactions, since they occurred in the current of commerce which flowed from the initial raising of stock to the ultimate distribution of meat products; *Board of Trade of Chicago v. Olsen*, 262 U. S. 1, 43 S. Ct. 470 (1923), finding that transactions in grain futures on the Chicago Board of Trade were subject to Congressional regulation because the transactions had become a constantly recurring burden and obstruction to the stream of commerce.

<sup>87</sup> This has been specifically declared in the Wagner Act cases, 301 U. S. 1, 57 S. Ct. 615 (1937). See discussion, *infra*.

efficiency of the interstate service.<sup>38</sup> Activities still further removed from actual interstate transportation were held subject to regulation under the federal anti-trust acts. Combinations of employers in furtherance of monopolistic schemes or in restraint of trade appeared quite clearly to the Court to affect so directly the flow of interstate commerce as to be subject to Congressional regulation. This was true even though the acts complained of primarily affected manufacturing and not commerce.<sup>39</sup> Finally, going a step further, the Court held that under certain circumstances labor strikes in manufacturing industries, if the cessation of production entailed was serious enough substantially to affect interstate commerce, could be subjected to federal control on the ground that the acts of the striking employees evidenced their intent to interfere with the flow of commerce.<sup>40</sup>

What is the distinction between those local acts which cannot be subjected to federal control under the commerce clause, and those local acts which so affect interstate commerce as to be subject to control? It was suggested in the *Schechter* case<sup>41</sup> and the *Carter* case<sup>42</sup> that the cri-

<sup>38</sup> *Texas & P. Ry. v. United States (Shreveport Case)*, 234 U. S. 342, 34 S. Ct. 833 (1914); *Railroad Commission of Wisconsin v. Chicago, B. & R. R.*, 257 U. S. 563, 42 S. Ct. 232 (1921) (validating establishment of a state-wide level of intrastate rates in order to prevent unjust discrimination against interstate commerce); *Florida v. United States*, 282 U. S. 194, 51 S. Ct. 119 (1930). On similar grounds, the broad requirements of the Safety Appliance Act and the Hours of Service Act were held to be justified. *Southern Ry. v. United States*, 222 U. S. 20, 32 S. Ct. 2 (1911); *Baltimore & Ohio R. R. v. Interstate Commerce Commission*, 221 U. S. 612, 31 S. Ct. 621 (1911). See also, *Atlantic Coast Line Ry. v. Florida*, 295 U. S. 301, 55 S. Ct. 713 (1935).

<sup>39</sup> *Standard Oil Co. v. United States*, 221 U. S. 1 at 68, 31 S. Ct. 502 (1911); *United States v. American Tobacco Co.*, 221 U. S. 106, 31 S. Ct. 632 (1911), where the Court perhaps for the first time expressed some doubt as to the validity of the implications of *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 S. Ct. 249 (1894).

<sup>40</sup> *Loewe v. Lawlor*, 208 U. S. 274, 28 S. Ct. 301 (1907); *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 45 S. Ct. 551 (1925) [cf. the first Coronado case, 259 U. S. 344 at 408, 42 S. Ct. 570 (1922)]; *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.*, 274 U. S. 37, 47 S. Ct. 522 (1927); *Local No. 167, International Brotherhood of Teamsters v. United States*, 291 U. S. 293, 54 S. Ct. 396 (1933); *United Leather Workers v. Herkert & Meisel Trunk Co.*, 265 U. S. 457, 44 S. Ct. 623 (1924); *Industrial Assn. v. United States*, 268 U. S. 64, 45 S. Ct. 403 (1925); *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103, 53 S. Ct. 549 (1932). A general discussion as to the circumstances under which a strike is deemed to constitute sufficient interference with interstate commerce to be subject to the federal acts is found in 32 MICH. L. REV. 240 (1933).

<sup>41</sup> *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 55 S. Ct. 837 (1935).

<sup>42</sup> *Carter v. Carter Coal Co.*, 298 U. S. 238, 56 S. Ct. 855 (1936).

terion was whether the effect was "direct" or "indirect." To borrow phrases suggested in other cases, the same test might be stated as a determination whether the effect was "proximate" or "remote," or whether the effect was "intimate" or "collateral."<sup>43</sup> But under more recent cases, it is clear that no such formal or logical test provides a touchstone. As declared by the Court in *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*:<sup>44</sup>

"It is also clear that where federal control is sought to be exercised over activities which separately considered are intra-state, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. . . . To express this essential distinction, 'direct' has been contrasted with 'indirect,' and what is 'remote' or 'distant' with what is 'close and substantial.' Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' 'equal protection.' In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion."

The Court thus comes very close to recognizing what was expressly denied in the *Carter* case,<sup>45</sup>—that the importance of the local act's repercussions on commerce is the deciding factor. Certainly, in the series of decisions validating application of the Wagner Act to varying factual situations, the Court has gone much further in extending the power of Congress to regulate manufacturing industries than would have been predicted on a reading of the *Carter* case.<sup>46</sup> It would appear that what

<sup>43</sup> *Minnesota Rate Cases*, 230 U. S. 352 at 410, 33 S. Ct. 729 (1913); *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103 at 107, 53 S. Ct. 549 (1932); *Addyston Pipe Co. v. United States*, 175 U. S. 211, 20 S. Ct. 96 (1899).

<sup>44</sup> 303 U. S. 453 at 466, 58 S. Ct. 656 (1938). The case held that a company engaged in canning fruits grown in the state in which the company's plant was located was subject to the Wagner Act although only about 37% of the company's products were shipped in interstate commerce.

<sup>45</sup> *Carter v. Carter Coal Co.*, 298 U. S. 238 at 308, 56 S. Ct. 855 (1936), where the Court declared that the question is not the *extent* of the effect produced upon interstate commerce but the *relation* between the activity or condition and the effect.

<sup>46</sup> Whether the *Schechter* and *Carter* cases have been overruled is a question on which the Court has not clearly spoken, although in the *Santa Cruz* case, the

was the exception is now the rule. While it was formerly held that the manufacture of goods for transportation in interstate commerce was ordinarily a local activity, subject to federal control only in case of unusual circumstances, the rule now appears to be that the manufacture of goods for commerce is subject to federal control unless under particular circumstances such manufacture can be said to have no close and substantial relation to commerce.

Does the Fair Labor Standards Act assert control over industries which are not closely and substantially related to commerce?<sup>47</sup> In searching for an answer to this question, it is interesting to consider the declaration contained in the "finding and declaration of policy" in section 2(a) of the act, which provides:

"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 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

Carter case is cited as not establishing a different principle than enunciated in earlier cases. The decision of the Circuit Court of Appeals for the Ninth Circuit in the Santa Cruz case, 91 F. (2d) 790, held that the Carter case had been overruled by the Wagner Act cases. Justice Butler, dissenting in 303 U. S. 453 at 469, criticizes the majority opinion in the Santa Cruz case for failing to declare whether the Carter case is overruled, although affirming the Circuit Court of Appeals decision.

<sup>47</sup> It should be noted that whereas most, if not all, of the previous acts were based on the proposition that certain *industries* were so closely related to interstate commerce as to permit Congressional regulation of the internal incidents of the industry, the Fair Labor Standards Act is directed not to certain classes of employers, but to certain classes of employees. It is the nature of the individual's work, not that of his employer's enterprise, which controls. This may be of great significance. It offers the opportunity, for example, to argue in support of the act that even though the proprietor of a tiny lumber camp, say, is not subject to Congressional regulation, yet the lumberjack in his employ, cutting down trees which are to become the subject of commerce, is subject to such regulation. The productive effort of a single lumberjack has as substantial an effect on the flow of commerce as has the daily work of any single employee in the Jones & Laughlin Steel mill. Therefore, minimum wages can be required for the benefit of the lumberjack, even though most of his employer's functions—even though his employer's business, as such—are not subject to Congressional control.

As opposed to this argument, there is the undeniable circumstance that it is the employer on whom the burden falls. Should not the test, therefore, be the nature of the employer's business, the same as it is in other cases?

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.”

Not only does this declaration reveal a careful attempt to bring the act within the limits of established constitutional doctrine,<sup>48</sup> but it shows also an easily discernible intent to use recent Supreme Court pronouncements as a springboard from which to extend still further into the domain of local activities the regulatory powers of Congress under the commerce clause.<sup>49</sup>

Many of the several Congressional declarations require but little comment. The proposition that payment of low wages and exaction of long working hours burdens commerce and the free flow of commerce appears on its face to be no more than an attempt to fit the act to the language of many former decisions.<sup>50</sup> The declaration that low wages and long hours constitute an unfair method of competition in commerce and interfere with the orderly and fair marketing of goods in commerce is patently referable to the doctrine of decisions sustaining the several fair trade enactments.<sup>51</sup> The pronouncement that the instrumentalities of commerce are used to spread and perpetuate detrimental labor conditions was apparently intended to derive support for the act from the doctrine permitting the prohibition of the use of commerce as an agency to promote the interstate spread of any evil or harm.<sup>52</sup>

The real theory of the act is more clearly revealed in the assertion that the payment of low wages creates conditions detrimental to the well-being of employees, and that such conditions lead to labor disputes burdening and obstructing commerce. The most significant im-

<sup>48</sup> Legislative findings and declarations are entitled to great weight. *Block v. Hirsh*, 256 U. S. 135, 41 S. Ct. 458 (1921).

<sup>49</sup> Significance attaches even to the title selected. The name “Fair Labor Standards Act” seems referable to the hint offered by Justice Cardozo, concurring in the *Schechter* decision, that the unconstitutionality of the National Industrial Recovery Act was in part due to its having delegated to an agency of the government the power and authority to define fair standards in trade practice, instead of the Congress itself defining the same in the act. *Schechter Poultry Corp. v. United States*, 295 U. S. 495 at 552, 55 S. Ct. 837 (1935).

<sup>50</sup> See, particularly, cases cited *supra*, notes 36-40.

<sup>51</sup> See, e.g., *Addyston Pipe Co. v. United States*, 175 U. S. 211, 20 S. Ct. 96 (1899); *United States v. Joint-Traffic Assn.*, 171 U. S. 505, 19 S. Ct. 25 (1898); *Northern Securities Co. v. United States*, 193 U. S. 197, 24 S. Ct. 436 (1904); *Standard Oil Co. v. United States*, 221 U. S. 1, 31 S. Ct. 502 (1911).

<sup>52</sup> See cases cited *infra*, note 57.

plication of this manifesto could be phrased as follows: assuming the hypothesis that the existence of conditions tending to create labor disputes in industries manufacturing goods for commerce is sufficient to establish that "close and substantial" relation necessary to permit Congress to regulate manufacturing activity,<sup>53</sup> the act proposes that the same effective force will be given to a single factor which may tend to bring about such conditions. It would seem that this extends the theory under which the Wagner Act has been upheld. While it is true that the existence of conditions leading to labor disputes are, in certain instances, sufficient "closely and substantially" to relate to commerce the local industry wherein such conditions occur,<sup>54</sup> it has not yet been held that the same may be said of any single term in an employment contract. The act proposes, however, to prohibit the making of an employment contract which may lead to a condition leading to labor disputes. The chain is extended by another link. The Court pointed out, in sustaining the Wagner Act, that

"The Act does not compel agreements between employers and employees. . . . It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine.'" <sup>55</sup>

The Fair Labor Standards Act, on the contrary, dictates two of the most important terms of the employment contract.<sup>56</sup>

It is thought that this proposition raises the most serious doubts as to the constitutionality of the act, and that the ultimate decision as to

<sup>53</sup> This hypothesis, of course, is based on the various decisions sustaining the validity of the Wagner Act as applied to several factual situations. It should be noted, however, that while the language of section 1 (particularly subsections c and d) of the Wagner Act, 49 Stat. L. 449 (1935), 29 U. S. C. (Supp. 1937), § 151, suggests that any industry, anywhere in the country, having unorganized employees, is the target of Congressional action, regardless of that industry's otherwise local character, the Court's decisions have not yet extended the validity of the act to all such situations, but only to cases where, on the facts, the Court was able to point out that the labor dispute in question did substantially affect the flow of goods in commerce. Even in *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 58 S. Ct. 656 (1938), it appeared that the labor dispute in question had rather far-reaching effects.

<sup>54</sup> This is merely a summary of the theory underlying the several decisions sustaining the Wagner Act.

<sup>55</sup> *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 at 45, 57 S. Ct. 615 (1937).

<sup>56</sup> Or, if the act be construed as really relating only to wages, the act dictates the one term of the employment contract which most employees regard as most important.



its validity will depend in large measure on the Court's decision as to the propriety of this extension of Congressional regulation into spheres heretofore untouched.<sup>57</sup>

It is extremely difficult to predict the ultimate answer which may be furnished for the question here suggested. Surely, the answer will not be given in any one case. The decision whether an employer's refusal to write the price-term of his employment contract at the figure ordered by Congress is closely and substantially related to commerce

<sup>57</sup> The writer believes that the attempts to relate the act to other well-defined spheres of permissible Congressional activity will carry no decisive weight. The cases sustaining regulation of activities within the flow of commerce relate to situations where the immediacy of the effect of the local activity on interstate commerce is much more direct than is the case under the Fair Labor Standards Act. The act does not fall within the concept described in these cases. See note 36, *supra*. Nor is the act really a fair-trade measure, in the sense of prior decisions permitting such regulation. Clearly the practices prohibited by the act are not such as might be catalogued with those which "substantially and unreasonably restrict trade" under the decisions in the earlier anti-trust cases. Rather (so far at least as is shown by any factual investigations available to the author) it is the individual employers who pay high wages whose competitive position is injured by the payment of low wages in other shops. Only in the Robinson-Patman anti-price-discrimination act, 49 Stat. L. 1526 (1936), 15 U. S. C. (Supp. 1937), §§ 13, 13a, 13b, 21a, is the test of injury to a single competitor adopted, and even in that act the prohibition relates merely to discrimination; there is no absolute price-fixing, as in the Fair Labor Standards Act. Again, the Fair Labor Standards Act scarcely falls within the doctrine of cases permitting Congress to forbid the use of the instrumentalities of commerce to promote the spread of an evil or harm. Hitherto, such regulations, where sustained, have referred more directly to acts which are an actual part of transportation. *Reid v. Colorado*, 187 U. S. 137, 23 S. Ct. 92 (1902) (transmission of dead stock); *Lottery Case*, 188 U. S. 321, 23 S. Ct. 321 (1903) (transmission of lottery tickets); *Hoke v. United States*, 227 U. S. 308, 33 S. Ct. 281 (1912); and *Caminetti v. United States*, 242 U. S. 470, 37 S. Ct. 192 (1916) (enticing a woman from one state to another for immoral purposes); *Clark Distilling Co. v. Western Maryland Ry.*, 242 U. S. 311, 37 S. Ct. 180 (1916) (shipment of intoxicating liquors); *Weber v. Freed*, 239 U. S. 325, 36 S. Ct. 131 (1915) (importation of prize-fight pictures); *Kentucky Whip & Collar Co. v. Illinois Cent. R. R.*, 299 U. S. 334, 57 S. Ct. 277 (1937) (transportation of goods made by convict labor into states having certain statutes); *Brooks v. United States*, 267 U. S. 432, 45 S. Ct. 345 (1925) (transportation of stolen motor vehicles). Does not the present act fall rather within the category of *Hammer v. Dagenhart*, 247 U. S. 251, 38 S. Ct. 529 (1918), invalidating a prohibition of shipment of goods made by child labor on the grounds that it was not really a regulation of interstate commerce but a Congressional attempt to regulate labor in the state of origin by an embargo in its external trade? Cf. *Weber v. Freed*, *supra*.

While it would seem that decisions under the "flow of commerce" theory, under the fair trade acts, and under the cases last cited, do not go far in suggesting arguments in support of the Fair Labor Standards Act, yet it is believed that if that act is sustained, after consideration of the problems discussed in the text, there is nothing in the several groups of cases referred to in this footnote which will cause the Court to hold the act unconstitutional.

may well depend on factors which will vary greatly from case to case.<sup>58</sup> The size of the business, the relative proportion of its products sold on an interstate market, and perhaps even the amount of wages paid, will all be significant. In a case involving an automobile company which owned the sources of its raw materials, the vehicles of transportation thereof, the plants for the processing of raw material, and the factory for the manufacture of the finished product; which employed a total of several thousand individuals; which sold daily in each state a number of cars; and which suddenly, without warning, lowered wages of all its employees to thirty cents an hour—in such a case, undoubtedly evidence could be marshalled which would show convincingly the catastrophic effect of such wage-lowering upon interstate commerce. On the other hand, in a case involving a small factory, located in a small Michigan town, employing from October until May perhaps seventy-five farmers who worked on their farms during the remainder of the year, and which shipped most of its products to an automobile plant located in Detroit, and could be operated at a profit only by paying a wage two cents below the prescribed minimum, it might be held—particularly if it were shown that the employees were satisfied with the wages they received, and that they would be totally unemployed for six or seven months a year were it not for their jobs with such a factory—that as to such employees the act was invalid. Conceivably, it may be held that the regulation of wages and hours by Congress is permissible in any industry in which the Wagner Act validly applies. Or it may be held—and this would seem the more likely—that refusal to bargain collectively is closely and substantially related to disruptions of commerce in some cases where payment of sub-minimum wages does not have so “close and substantial” an effect as to be subject to Congressional regulation.

No discussion of the validity of the act under the commerce clause can omit reference to the decision in *Hammer v. Dagenhart*,<sup>59</sup> holding unconstitutional a prohibition of the interstate transportation of goods made by child labor. If that decision stands, the child labor provisions of the Fair Labor Standards Act must fall. But since Congress has now been held to have power to prohibit the interstate transportation of goods made by convict labor,<sup>60</sup> should not the transportation of

<sup>58</sup> Despite the argument that the act is directed only to employees producing goods for commerce, it may be determined that the provisions of the act are applicable to any employer who hires any such employees. See note 47, *supra*.

<sup>59</sup> 247 U. S. 251, 38 S. Ct. 529 (1918).

<sup>60</sup> *Kentucky Whip & Collar Co. v. Illinois Central R. R.*, 299 U. S. 334, 57 S. Ct. 277 (1937).

goods made by child labor fall within the same category?<sup>61</sup> Does not the employment of a child have as close and substantial a relation to interstate commerce as the employment of an adult at low wages or for excessive hours?

### B. *Validity Under Fifth Amendment*

Do the wage provisions, or the hour provisions, or the child labor provisions, of the Fair Labor Standards Act constitute a denial of due process?

#### I. *Wages*

As far as the provisions for minimum wages are concerned (and overlooking the requirement of payment of once-and-one-half regular wages for overtime work, which will be subsequently considered), the answer seems clear under the decision in *West Coast Hotel Co. v. Parrish*.<sup>62</sup> While many distinctions can be drawn between the present act and the statute involved in that case, yet it is to be doubted that the Court, having sanctioned the wage-fixing device as a legislative prerogative, will find in the present act any fatal defect. It is, of course, open to an individual employer, dissatisfied with a wage schedule set by the administrator, to show that the particular schedule adopted is as to him "without support in reason,"<sup>63</sup> and if he can make such a showing<sup>64</sup> a particular rate schedule might be held invalid. But it would seem that the general schedule, which is aimed at a weekly wage of sixteen dollars, comes so close to the level demonstrated by social surveys to

<sup>61</sup> Superficially fallacious though the above analogy may be, it is believed to contain a redeeming kernel of truth. In deciding the convict-goods case, the Court pointed out that the child-labor decision was distinguishable, since only in the case of convict-made goods was the use of interstate commerce necessary to consummate the evil which the act was designed to correct. The evil was the evasion of state laws which attempted to prohibit the sale of convict-made goods, but which were largely ineffective because of the original package doctrine. But it would seem that Congress should at least have power to prohibit shipment into a state of goods made by child labor under conditions outlawed in the receiving state. On this theory, the Fair Labor Standards Act would be effective only to the extent that the states adopted laws based on the standards set up in the act. But why should it not be said that the interstate transportation of child-made goods is itself an evil, since manufacturers in the receiving state are compelled, through interstate competition, to themselves make use of the saving in labor costs which the employment of child labor affords?

<sup>62</sup> 300 U. S. 379, 57 S. Ct. 578 (1937).

<sup>63</sup> *United States v. Carolene Products Co.*, 304 U. S. 144 at 154, 58 S. Ct. 778 (1938).

<sup>64</sup> Which will be difficult, in view of the great weight ascribed to the findings of the commissioners.

be the very minimum for maintaining a healthy standard of living as to be reasonable, and hence "due process."<sup>65</sup>

## 2. Hours

While the general doctrine sustaining maximum hour laws as health measures is well settled,<sup>66</sup> yet it would seem that a question might be raised whether the maximum-hour standards of the Fair Labor Standards Act are, in fact, health measures. It is to be noted that the act permits employment in excess of the "maximum" hour schedule, provided the employee is paid one and one-half times his regular hourly rate for such overtime work. There is no limit at all as to the number of hours worked in a day. A twelve-hour day at the minimum rate would seem to be permissible. Is the act a health measure? Or is it a work-sharing scheme?

To answer these questions would require a factual determination beyond the scope of the present article. It might be noted, however, that while scientific opinion is practically unanimous to the effect that an eight-hour day is an important health-conserving device,<sup>67</sup> yet the conclusion that a seven-hour day, or a five-day week, is conducive to better health, is probably open to question.<sup>68</sup> It would seem quite prob-

<sup>65</sup> The National Industrial Conference Board found that the minimum weekly wage on which a single woman could maintain a "fair American standard of living" in New York City was, in 1926, \$16.53; and, in 1935, \$13.41. The figure adopted by the Fair Labor Standards Act is very close to the minimum wage levels fixed in California, Colorado, Connecticut, Illinois, Massachusetts, Minnesota, New Hampshire, New York, North Dakota, Ohio, Oregon, South Dakota, Washington, and Wisconsin, under standards aimed at maintaining decent living conditions. UNITED STATES DEPARTMENT OF LABOR, WOMEN'S BUREAU BULLETIN 137, "Summary of State Hour Laws for Women and Minimum Wage Rates" (1936), BULLETIN 156-II, "State Labor Laws for Women" (1938).

<sup>66</sup> *Muller v. Oregon*, 208 U. S. 412, 28 S. Ct. 324 (1908); *Bunting v. Oregon*, 243 U. S. 426, 37 S. Ct. 435 (1917); *Wilson v. New*, 243 U. S. 332, 37 S. Ct. 298 (1916); *Block v. Hirsh*, 256 U. S. 135, 41 S. Ct. 458 (1921); *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170, 41 S. Ct. 465 (1921); *Holden v. Hardy*, 169 U. S. 366, 18 S. Ct. 83 (1898). Cf. *Lochner v. New York*, 198 U. S. 45, 25 S. Ct. 539 (1905).

<sup>67</sup> An elaborate presentation of such evidence is found in the brief filed for the defendant in error in *Bunting v. Oregon*, 243 U. S. 426, 37 S. Ct. 435 (1917), which is available as a bound volume in most libraries.

<sup>68</sup> While the vast majority of the N. R. A. codes provided for a forty-hour week, these code provisions were frankly a work-sharing device. Further, a large number of N. R. A. codes provided for a forty-eight-hour week. Detailed figures are compiled by MARSHALL, HOURS AND WAGES PROVISIONS IN N. R. A. CODES (1935). An interesting study made some years ago in England, to determine the relation between the number of hours of daily employment and the value to the manufacturer of a week's

able that if a case is tried in which a group of employees join with their employer in desiring to work forty-four hours per week at regular rates, a persuasive array of medical testimony might be developed to the effect that an extra four hours of work each week was in no way detrimental to the employees' health.

Suppose, in such a case, it were proved that the provisions of the act had no reasonable relationship to the health or morals of the employees, or to their safety. Could the act be sustained as a work-sharing measure? This is surely not inconceivable. The spread of employment, by decreasing public relief burdens, is not entirely disconnected with the safety of the state.

Furthermore, it is unquestionable that in any maximum-hour regulation of wide application, some tolerance must (as a matter of administrative necessity) be allowed for cases in which a temporary emergency arises in a particular shop, such as a large rush order that must be filled. A law which did not make some provision for such exceptional cases would be simply unworkable. It would seem that the provision for time-and-a-half for overtime is as practical an expedient as any that could be devised.<sup>69</sup>

While the operation of the overtime clause creates a possibility for a nice argument against the validity of the measure, yet it is likely that the Court's finding in many cases will be that the real purpose of the law is not work-sharing but rather the protection of public health

output by an average employee, gave the following results. 3 CHAPMAN, *WORK AND WAGES* 239 (1914):

Hours of employment per day	Value of labor per week (in shillings)
6	34
7	38
8	40
9	41
10	40
11	39
12	37

<sup>69</sup> Of course, it can be argued that since this in effect creates a minimum wage dependent solely on the regular rate of pay, it has no reasonable relation to any proper legislative purpose. While this argument is logically persuasive, it is factually unimpressive (in many cases, at least). The practice of paying time-and-a-half for overtime is one with which all employers are familiar. It would seem that this would be preferable to a provision requiring the obtaining of a special license in every case in which some overtime work was required. A law which permitted overtime in any case in which the employer found it necessary would be meaningless; and one which prohibited overtime in any case would be unenforceable and would be more of an interference with liberty of contract than is the present measure.

(although this is not true of the application of the act to the country's larger industries, it may well be true in the greater number of individual cases). At least, the propriety of the limit prescribed will probably be sustained, in the absence of clear proof of its unreasonableness in a particular case.

### 3. *Child Labor*

The child labor provisions of the act would seem to be immune to any attack based on the Fifth Amendment.<sup>70</sup>

One particular provision of the act, however, may raise a difficult question. The prohibition of shipment of goods made by child labor extends to all goods produced in a shop in which "oppressive child labor," as defined in the act, was employed in any capacity.<sup>71</sup> Presumably, the framers of this provision had in mind the practical difficulty of proving that particular goods were in whole or in part the direct result of child labor. Suppose, however, an employer can prove that although he employs some child labor in violation of the conditions imposed by the act, yet the goods made by such children are reserved for intrastate sale, and that all goods shipped in interstate commerce are made by adults. Would it not be a deprivation of his property rights to impose an embargo on goods manufactured by adults in his employ, as a penalty for his having employed children in an activity which the power of Congress does not reach?<sup>72</sup>

#### C. *Delegation of Legislative Power*

The framers of the act studiously avoided the appearance of delegating legislative powers. Nevertheless, administrative agencies are necessarily given considerable discretionary power. Are they given too free a hand?

The standards governing administrative determination of wage-rates are clearly defined. The very purpose of the meetings of the industrial committees is defined to be that of "carrying out the policy of this act, by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of forty cents an hour,"<sup>73</sup> and the recommendations of the

<sup>70</sup> *State v. Shorey*, 48 Ore. 396, 86 P. 881 (1906); *People v. Ewer*, 141 N. Y. 129, 36 N. E. 4 (1894).

<sup>71</sup> Sec. 12 (a).

<sup>72</sup> This question is avoided under the wage-and-hour provisions, § 15 (b) of the act providing that proof that any employee in a shop receives less than the minimum wages or works more than maximum hours without overtime pay shall be only prima facie evidence that such employee was engaged in the production of goods for commerce.

<sup>73</sup> Sec. 8 (a).

committees are to be governed by that criterion. In recommending classifications within an industry, thus creating different minimum wage levels in different sections of the country, the committees must consider competitive conditions as affected by transportation, living, and production costs, as well as the wages established for like work in private industry by collective labor agreements or employers voluntarily maintaining minimum wage standards. It is provided that no classification shall give a competitive advantage to any group in the industry, nor shall a classification be made on the basis of age or sex, or solely on a regional basis.<sup>74</sup> The power of the administrator to approve or disapprove a committee's recommendations is limited; he must approve them if he finds that they are made in accordance with law, are supported by the evidence adduced at the committee's hearing, and will carry out the purposes of the law. He is required, in making such finding, to take into consideration the same factors as are considered by the industry committee.<sup>75</sup>

A wider range for administrative discretion is permitted in the sections authorizing employment of learners, apprentices, messengers, and handicapped workers under certificates to be issued by the administrator. No explicit guide is afforded by the provisions of the act to aid the administrator in determining how low the wage may be in such cases, although he is directed to prescribe limitations as to time, number, proportion, and length of service of such employees.<sup>76</sup>

Still broader powers are vested in the Children's Bureau. It is authorized to determine what occupations are particularly hazardous for the employment of children between sixteen and eighteen years of age; what occupations are detrimental to the health or well-being of children between sixteen and eighteen years of age; what occupations (other than manufacturing and mining) will interfere with the schooling, health, or well-being of children between fourteen and six-

<sup>74</sup> Sec. 8 (c).

<sup>75</sup> Sec. 8 (d).

<sup>76</sup> Sec. 14. This is intended to guard against the operation of shops employing only handicapped workers, and to prevent the imposition of unreasonably long apprenticeship periods. The purpose of the act, implicitly at least, is to afford protection to learners and handicapped workers who would be unemployed if they could not be hired at less than the regular minimum rate; and at the same time to prevent unscrupulous employers from violating the purpose of the act by resort to the methods above suggested. Considering the purpose of this delegation of power, and the difficulty of specifying any definite standards to be employed in this connection, objections to the act based on this ground alone would seem ill-founded. Congress presumably could, had it so chosen, have allowed no lee-way at all in this connection, and employers will probably accept without question the regulations issued pursuant to this section.

teen years of age.<sup>77</sup> Employment of children (within the prescribed ages) in any industrial operation placed within one of the above categories by determination of the Children's Bureau is a criminal offense.<sup>78</sup>

Do any of these instances of delegation of power render the act unconstitutional? It would seem that none of the powers of rate-fixing and classifying granted by the act to administrative bodies are really broader than those vested in the Interstate Commerce Commission.<sup>79</sup> It would seem, further, that in passing on questions as to the alleged unlawful delegation of legislative power, the necessity of each case has governed the courts, rather than pure reason.<sup>80</sup> And it would seem,

<sup>77</sup> The observation made in the preceding footnote to the effect that more particular standards would be difficult for the legislature to set up, is applicable likewise to this delegation.

<sup>78</sup> Secs. 12, 15, 16. Only a wilful violation of the act entails criminal penalties.

<sup>79</sup> Whose rates must be "just, fair, and reasonable" and whose rules and classification must be "consistent with public interest." *Interstate Commerce Commission v. Illinois Central R. R.*, 215 U. S. 452 at 476, 30 S. Ct. 155 (1909). The delegation of power to the Interstate Commerce Commission has been a subject of considerable comment. Justice Holmes, dissenting in *Springer v. Government of Philippine Islands*, 277 U. S. 189 at 210, 48 S. Ct. 480 (1928), declared: "It is said that the powers of Congress cannot be delegated, yet Congress has established the Interstate Commerce Commission, which does legislative, judicial, and executive acts, only softened by a *quasi*." See also, Friedrich, "Separation of Powers," 13 *ENCYC. SOC. SCI.* 663 (1934).

<sup>80</sup> Weeks, "Legislative Power versus Delegated Legislative Power," 25 *GEORGETOWN L. J.* 314 (1937). The author adds (pp. 336, 337): "Courts need to guard against applying stricter exactions in regard to standards for new and experimental statutory policies than they apply to well-established ones. . . . If popular control of government is to be maintained in a state where many new and intricate phases of life must be regulated or controlled by expert bodies, the proper relationship must be established between the agency making fundamental decisions and the administrative body responsible for carrying them out. Neither must do more or less than it is equipped to do or ought to do in the interests of both the public demand and the public need." Support from the decisions for the point made in the text above can be found in the following cases: *Brig Aurora v. United States*, 7 Cranch (11 U. S.) 382 (1813); *Field v. Clark*, 143 U. S. 649, 12 S. Ct. 495 (1892); *In re Kollock*, 165 U. S. 526, 17 S. Ct. 444 (1897); *Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 22 S. Ct. 616 (1902); *Butterfield v. Stranahan*, 192 U. S. 470, 24 S. Ct. 349 (1904); *New York ex rel. Liebermann v. Van De Carr*, 199 U. S. 552, 26 S. Ct. 144 (1905); *Michigan Central R. R. v. Powers*, 201 U. S. 245, 26 S. Ct. 459 (1906); *Union Bridge Co. v. United States*, 204 U. S. 364, 27 S. Ct. 367 (1907); *Honolulu Rapid Transit & Land Co. v. Hawaii*, 211 U. S. 282, 29 S. Ct. 55 (1908); *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 30 S. Ct. 356 (1910); *United States v. Grimaud*, 220 U. S. 506, 31 S. Ct. 480 (1911); *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U. S. 380, 32 S. Ct. 152 (1912); *Intermountain Rate Cases*, 234 U. S. 476, 34 S. Ct. 986 (1914); *Mutual Film Corp. v. Industrial Commission*, 236 U. S. 230, 35 S. Ct. 387 (1915); *Douglas v. Noble*, 261 U. S. 165, 43 S. Ct. 303 (1923); *Avent v. United States*, 266 U. S. 127, 45 S. Ct. 34 (1924);



finally, that practical necessities compel the delegation of the functions which Congress has vested, under this act, in the industry committees, in the administrator, and in the Children's Bureau. This is important.<sup>81</sup>

The delegation to industrial committees, under the National Industrial Recovery Act, of *carte blanche* power to specify what trade practices should be unfair is certainly not paralleled by any of the provisions of the Fair Labor Standards Act. Essentially, the administrative bodies may do no more than ascertain how rapidly wage rates may feasibly be increased to the forty-cent level without curtailing employment, allow necessary tolerance for employment of apprentices and handicapped workers, and determine what particular industrial operations are unhealthy or particularly hazardous to children. Congressional sessions are not long enough to permit determination of these items by the law-makers. Such necessary delegation of power should be sustained.<sup>82</sup>

### III

#### THE OPERATION OF THE ACT

##### *A. Many Practical Problems Unanswered*

In addition to the matters specifically delegated to them by the act, it will be necessary for administrative officials to determine (perhaps not as orders or regulations, but only as guides to departmental prac-

United States v. Chemical Foundation, 272 U. S. 1, 47 S. Ct. 1 (1926); Hampton Jr., & Co. v. United States, 276 U. S. 394, 48 S. Ct. 348 (1928); Sproles v. Binford, 286 U. S. 374, 52 S. Ct. 581 (1932); New York Central Securities Corp. v. United States, 287 U. S. 12, 53 S. Ct. 45 (1932); United States v. Shreveport Grain & Elevator Co., 287 U. S. 7, 53 S. Ct. 42 (1932); Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, 53 S. Ct. 350 (1933); Federal Radio Commission v. Nelson Brothers Co., 289 U. S. 266, 53 S. Ct. 627 (1933).

<sup>81</sup> The Wisconsin Supreme Court, in *State ex rel. Wisconsin Inspection Bureau v. Whitman*, 196 Wis. 472 at 495-496, 498, 506, 220 N. W. 929 (1928), per Justice Rosenberry, declared that the courts "under one pretext or another have upheld laws in recent years that undeniably would have been held unconstitutional under conditions which existed prior to the Civil War. . . . there is an overpowering necessity for a modification of the doctrine of separation and nondelegation of powers of government. In the face of that necessity courts have upheld laws granting legislative power under the guise of the power to make rules and regulations; have upheld laws delegating judicial power under the guise of power to find facts. . . . The public interest would be greatly advanced and our law clarified if the situation as it exists were frankly recognized. . . . It only leads to confusion and error to say that the power to fill up the details and promulgate rules and regulations is not legislative power."

<sup>82</sup> The recent decision of the Pennsylvania Supreme Court in *Holgate Bros. Co. v. Bashore*, 331 Pa. 255, 200 A. 672 (1938), invalidating a state "44-Hour Week Law," is not persuasive as to the questions which arise under the Fair Labor Standards Act.

tice in attempting to enforce the act) hundreds of practical questions which arise under but are completely unanswered by the provisions of the act itself. Some of these problems will involve only the application of the broad, generic language of the act to various particular situations; such questions amount to no more than the everyday legal problem of deciding whether or not a concrete instance falls within an abstract category. Other problems, however, will involve something very like the task of deciding what Congress would have enacted if it had thought of certain problems which apparently went unnoticed in the drafting of the act. Questions of the first sort are typical of all legislation; those of the second sort seem to be, judging from experiences with the legislation of recent years, an inescapable result of attempting in a brief statute to apply a homogeneous rule to a heterogeneous national situation. Both sets of problems will be extremely important to business men, who must run the risk of heavy penalties if they fail to comply with the provisions of the act.

Even on so fundamental a question as that concerning the determination of the classes of employees to whom the provisions of the act apply, no clear answer is to be found in the language of the statute. It is true, the benefits of the law are extended to all employees who are engaged in commerce or in the production of goods for commerce, and this would seem to be reasonably definite. But the act further provides that all employees are deemed to be engaged in the production of goods for commerce who are employed in "producing . . . handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof."<sup>83</sup> What jobs are there in any industrial organization which were not created because they were deemed necessary to the continued functioning of that organization's productive plant?<sup>84</sup>

<sup>83</sup> Sec. 3 (j). Italics inserted by author.

<sup>84</sup> Obviously, if the act is interpreted broadly with the purpose of extending its benefits to the largest possible group of employees, this phrase will give the administrator almost a free hand. Press releases from the Department of Labor announce that the act will be so construed by those in charge of its administration. Any attorney handed a list of 30 or 40 different jobs, and asked to advise which of them come within the act, faces a most delicate task. The man running a stamp press is undoubtedly covered. How about the man whose sole job is to test that same machine, and adjust it, before production starts? How about the man who made the die which is used in the machine? Or the designer of that die? Again, how about maintenance and repair men? How about foremen and supervisors? Or, on the other hand, the helper of the power house operator?

While it is rumored that the regulations, when issued, will adopt a more liberal test, it would seem that a distinction should be made between occupations "necessary

Other problems involved in the first group (i.e., problems of definition) may be suggested. What industries are "seasonal"? Probably the term will not be defined to include industries which operate through the entire year, even though they have definite "peak" periods of short duration. Such a definition would create wider exemptions from the provisions of the act than the administrative officers will probably be willing to approve. What standard is to be applied in determining whether an employee is "handicapped"? When does an "apprentice" cease to be such?

Problems of the second sort (i.e., supplying gaps in the act) will

to *production*" and those "necessary to the *proper operation of the business.*" See *Maryland Casualty Co. v. W. C. Robertson & Co.*, (Tex. Civ. App. 1917) 194 S. W. 1140; *New Amsterdam Casualty Co. v. State Industrial Commission*, 80 Okla. 7, 193 P. 974. (1920). Under such a test, the act would be held to cover only those employees on the production line and those on jobs which must be performed concurrently with or immediately preceding the operation of the production line, to prevent that line from stopping.

The decision in *National Labor Relations Board v. Fainblatt*, (C. C. A. 3d, 1938) 98 F. (2d) 615, held that the jurisdiction of the National Labor Relations Board did not extend to an individual operating a small garment manufacturing plant, employing about 600 persons, in New Jersey, whose sole business consisted in tailoring and occasionally cutting cloth shipped to him by a partnership in New York, which firm also took the entire stock of finished goods, title at all times remaining in the partnership, respondent manufacturing on contract and at no time purchasing the unfinished material or selling the manufactured product. Relying on this case some employers may incorporate separate sales companies, or separate manufacturing companies, in an attempt to exempt many of their employees from the provisions of the Wage and Hour Law.

Does the act apply to wages paid by and hours exacted by employers who are not manufacturers, but who sell goods in an interstate market? Are employees of a national wholesale distributing house engaged in commerce? In cases where the employing unit is a grain elevator, or some other establishment which fits closely into the "stream of commerce" theory, it might well be held that the employees are engaged in commerce. Will such theory be extended to include other distributing enterprises not quite so closely connected with transportation systems? To answer is to attempt the hypostasis of prophecy. Or, can it be said that since at least some of the employees of such a distributing establishment handle the goods, and perform certain operations in packing them or perhaps labelling them, such employees are engaged in the production of goods for commerce? The act provides that "production" includes "handling" of goods. Sec. 3 (j). But "goods" lose their character as such after their delivery to the "ultimate consumer thereof other than a producer, manufacturer, or processor thereof." Sec. 3 (i). So, perhaps a distributor, not being a producer, manufacturer, or processor, is an "ultimate consumer" within the meaning of the act, and though his employees would be "producing" goods if they handled goods, yet the articles they are handling are not "goods."

A similar question is involved in the determination of what employees are engaged in an administrative capacity, and as such exempted from the provisions of the act, under § 13 (a) thereof.

be even more difficult of solution, for the reason that the administrative officers will necessarily be doubtful of the extent to which they can go beyond the letter of the act in order to achieve ends which are conceived to be in furtherance of the broad purposes of the legislation.

What provision can be made to mitigate the evils of "home work"? The act appears to contain no provision directly applicable. Quite likely, the administrator will by regulations provide so onerous a method for ascertaining the minimum wages to be paid for employment not done during regular hours and on the employer's premises as to discourage extension of "home-work shops."

How about employees paid on a piece-work basis? Perhaps, following the practice under certain N.R.A. codes, the act will be interpreted as requiring that the employee be paid what he is entitled to on a piece-work basis, or what he is entitled to under the minimum wage and overtime rates, whichever is the higher.

Many other questions suggest themselves. Can the industrial committees, in their wage classifications, fix a higher rate for part-time workers, to compensate them for the relatively larger amount of time spent in unpaid travel to and from work? Again, can any provision be made to take care of grievances arising from cases where employees are required to spend several idle hours weekly within the plant, when work is interrupted?

### B. *Effectiveness of the Act*

As above noted, the chief significance of the act is not in its present application, but in the possibilities by way of future amendments increasing wages and decreasing hours. Although it is entirely possible under the act that the minimum wages in some sections of industry may be raised to forty cents an hour within the next few weeks, it seems likely as a practical matter that considerable time will be required to organize the administrative agencies, and that for the first two years the respective twenty-five and thirty cent minima provided for in the act will apply with few changes.

The forty-cent wage level is probably not in excess of what is paid in most of the larger and well-established industries today.<sup>85</sup> Even in the South, where real wages are proportionately lower than in other sections of the country, most of the larger industries pay close to that

<sup>85</sup> BENEY, DIFFERENTIALS IN INDUSTRIAL WAGES AND HOURS IN THE UNITED STATES I-15 (1938).

level for work requiring any training or skill, if not for common labor.<sup>86</sup> It was made clear in the Congressional debates that the larger industrial establishments did not articulately object to a requirement of a forty cent minimum hourly rate.<sup>87</sup>

It is, of course, these same large industries whose activities are most closely related to the flow of interstate commerce. On the other hand, in countless small, localized concerns—many of which are clearly exempt from the act by its terms, and many others of which are perhaps not subject to Congressional regulation—there is need for a wage-raising mandate.<sup>88</sup> To improve the standards of living of em-

<sup>86</sup> The following table is illustrative. Its source is BENEY, DIFFERENTIALS IN INDUSTRIAL WAGES AND HOURS IN THE UNITED STATES 16-18 (1938).

*Average rate per hour, in cents, for various industries in various sections of the country*

Industry			Middle Far		Percent Differences between high and low
	East	South	West	West	
Foundries, Machine Shops	74.5	64	75	75.2	17.5%
Furniture	56.9	42.2	55.2	63.7	50.9%
Lumber	45.7	32.7	48.5	74.9	129.1%
Printing	96.4	85.4	95.9	98.6	15.5%
Cotton	52.7	42.4	—	—	24.3%
Electrical and Gas	89.3	64.3	88.2	84.4	38.9%
Paper and Pulp	61.9	55.5	61.8	72.3	30.3%

Another source of information is the NATIONAL EMERGENCY COUNCIL REPORT ON ECONOMIC CONDITIONS OF THE SOUTH, prepared for the President a few weeks ago. It states, on p. 22, "The South's industrial wages, like its farm income, are the lowest in the United States. In 1937, common labor in 20 important industries got 16 cents an hour less than laborers in other sections received for the same kind of work. Moreover, less than 10% of the textile workers are paid more than 52.5 cents an hour, while in the rest of the Nation 25% rise above this level. A recent survey of the South disclosed that the average annual wage in industry was only \$865 while in the remaining States it averaged \$1,219." Again, on page 38, with reference to the cotton goods manufacturing industry, it is stated: "According to 1937 figures, the pay for the most skilled work in this industry is about 12 cents an hour less in the South than the pay for the same work elsewhere. The figures for the cotton goods industry also show the large number of low-wage workers and the small number receiving high wages, in the South. More than half the workers in Southern mills earn under 37.5 cents an hour—less than one-tenth of the workers are paid more than 52.5 cents an hour."

<sup>87</sup> See speech of Representative Hamilton Fish, of New York, delivered in the House of Representatives May 4, 1938. 83 CONG. REC. 8298 (1938).

<sup>88</sup> Assuming a weekly wage of sixteen dollars, based on a forty-hour week at forty cents an hour, the following statistics, compiled by the National Industrial Conference

ployees in retail stores, barber shops, cleaners and dyers shops, automobile service stations, and the hundreds of other employments included under the category of service industries doing chiefly an intrastate business (and hence not within the scope of the act<sup>89</sup>) there is real need for further state laws, defining maximum hours and minimum wages, not only for women, but for men.<sup>90</sup> The same need exists as to agricultural employees, and as to certain types of administrative workers, and other broad classes specifically exempted from the national act.

While for the time being it may well be true that those employees who most need higher wages and shorter hours<sup>91</sup> will not get them, it

Board in 1935, are interesting. Derived from NICHOLS and BACCUS, *MINIMUM WAGES AND MAXIMUM HOURS* 182 (1936):

<i>Industry</i>	<i>Per cent of Employees Receiving Less than \$16 Weekly</i>
Hotels and Restaurants	89.0
Candy Manufacturing	87.4
Hand Bag Manufacturing	76.3
Cotton Garment Manufacturing	72.8
Paper Box Manufacturing	71.1
Retail Stores	67.4
Knit Goods Manufacturing	55.1

<sup>89</sup> Sec. 13 (a) (2).

<sup>90</sup> For compilation of hours and wage laws relating to women employees, see UNITED STATES DEPARTMENT OF LABOR, WOMEN'S BUREAU BULLETIN 137, "Summary of State Hour Laws for Women and Minimum Wage Rates" (1936); BULLETIN 156-II, "State Labor Laws for Women" (1938). The states having such laws include California, Connecticut, Illinois, Massachusetts (where the law is only advisory), New Hampshire, New York, North Dakota, Ohio, Oregon, South Dakota, Washington, Wisconsin.

<sup>91</sup> It has been estimated by the United States Department of Labor, according to press releases, that about 2,000,000 employees are subject to the act. This leaves too many without protection. Further, many employees covered by the act may be deprived of its benefits, if their employers choose to lower wages from present standards of sixty cents an hour to a level so close to the minimum under the law as to permit them to pay time and a half for overtime and still work their employees 50 or 60 hours a week without increasing their labor costs.

Of course, labor union resistance will reduce the effectiveness of the last-mentioned expedient. An interesting question, though scarcely related to the scope of this article, concerns the extent to which labor unions may eventually find their position weakened, so far as appealing to prospective members is concerned, if wage and hour laws in time reach a point where the workmen feel there is no need of organized activity to obtain what they deem to be satisfactory pay. This is a question of vital interest to employers as well, because their common complaint is that while they are willing to pay the wages demanded by labor, and to grant working-hour reductions,

may be hoped that the practical operation of the act will speed the day when an awakened public consciousness will result in the enactment of state laws extending to all workers the benefits of a fair day's wages for a fair day's work.

they find it difficult to meet the jurisdictional and organizational concessions requested by union-agent group-bargainers not for the benefit of the employees but for the purpose of consolidating the position of their union, and entrenching it and its paid employees in the employer-employee relationship.