

# The Wage and Hour Law in the Supreme Court

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## Comments

### THE WAGE AND HOUR LAW IN THE SUPREME COURT

On February 3, 1941, the United States Supreme Court upheld the federal "Fair Labor Standards Act of 1938"<sup>1</sup> in two decisions: *United States v. F. W. Darby Lumber Company*<sup>2</sup> and *Opp Cotton Mills v. Administrator of the Wage and Hour Division of Department of Labor*.<sup>3</sup> The action taken by the Supreme Court in the *Darby Lumber Company* case<sup>4</sup> was not startling. In the *Jones*

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1. 52 Stat. 1060 (1938), 29 U.S.C.A. §§ 201-219 (Supp. 1940). See Comment (1939) 52 Harv. L. Rev. 646.

2. 61 S.Ct. 451, 85 L.Ed. 395 (1941), noted in (1941) 54 Harv. L. Rev. 882.

3. 61 S.Ct. 524, 85 L.Ed. 407 (1941).

4. 61 S.Ct. 451, 85 L.Ed. 395 (1941). This case upheld the statute as against the contention that it was beyond the scope of the federal authority granted by the "commerce clause" of the Constitution of the United States, Article I, Section 8.

& *Laughlin* decision<sup>5</sup> upholding the constitutionality of the National Labor Relations Act,<sup>6</sup> four years ago, the court made abundantly clear that it would support the exercise of federal authority under the Commerce power far beyond limits recognized a decade ago. The *Opp Cotton Mills* case<sup>7</sup> reaffirmed the freedom of Congress to delegate the detailed administration of its regulatory laws within a statutory framework.<sup>8</sup>

The *Jones & Laughlin* case had come as something of a surprise to the legal profession. Prior to the time that it was decided, six United States District Courts, proceeding on the authority of the *A. L. A. Schechter Poultry Corporation v. United States*<sup>9</sup> and *Carter v. Carter Coal Company*,<sup>10</sup> had held that the National Labor Relations Board had no authority to regulate relations between employers and employees engaged in local production, and these holdings had been affirmed on four occasions by the Circuit Courts of Appeal.<sup>11</sup>

The decision that the activities of the Jones & Laughlin Corporation of Pennsylvania had a *substantial* effect upon interstate commerce would not necessarily be precedent for upholding the Fair Labor Standards Act in such a case as the *Darby Lumber Company* case. Jones & Laughlin was the fourth largest manufacturer of iron and steel products in the United States. Its assets were more than one hundred and eighty million dollars; its gross income forty-seven million dollars; its employees number twenty-two thousand persons. It was the parent of nineteen subsidiaries

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5. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352 (1937).

6. Act of July 5, 1935, 49 Stat. 449 (1935), 29 U.S.C.A. §§ 151-166 (Supp. 1940).

7. 61 S.Ct. 424, 85 L.Ed. 407 (1941). In this decision the statute successfully met the challenges that it was contrary to basic "separation of powers" theories and that it was an unconstitutional delegation of legislative authority to the executive department.

8. In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947 (1935), the Court stated: "But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry." (295 U.S. at 537-538, 55 S.Ct. at 846, 79 L.Ed. at 1584.) See also *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936). However, ". . . Congress may declare its will, and after fixing a primary standard, devolve upon administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations." *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85, 53 S.Ct. 42, 44, 77 L.Ed. 175, 179 (1932). See also *United States v. Grimaud*, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563 (1911).

9. 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947 (1935).

10. 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936).

11. See *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 76-77, 79-84, 57 S.Ct. 615, 630-633, 81 L.Ed. 893, 924, 926-928 (1937).

and maintained sales offices in twenty cities. Pointing out that "the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce," the Court said: "In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic."<sup>12</sup> When the *Jones & Laughlin* opinion was handed down, however, the gates were open. Subsequent decisions rapidly extended its doctrine to subject to the jurisdiction of the National Labor Relations Board concerns whose operations had a less obvious effect on interstate commerce.<sup>13</sup>

The distinction between the problems of policy involved in upholding the National Labor Relations Board and the problems raised by the wage and hour law was well stated by Arthur A. Ballantine in a speech reported in the American Bar Association Journal in 1939. He said:

"In the cases sustaining the jurisdiction of the National Labor Relations Board, the Court has pointed out that the businesses involved were sufficiently large so that a stoppage of their operation by a strike would reduce substantially the flow of interstate goods, but the Wage and Hour Law, by its terms, applies to all employees engaged in the production of goods for interstate commerce, even in plants so small that a strike in them would produce an infinitesimal effect upon the flow of goods."<sup>14</sup>

The so-called "Wage and Hour Law" became effective on October 24, 1938. The most far-reaching legislation of its kind since the abortive National Industrial Recovery Act of 1933,<sup>15</sup> the statute was conceived on the theory that any physical handling of goods, destined for subsequent shipment across state lines, is an act so closely and substantially related to the flow of inter-

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12. 301 U.S. at 41, 57 S.Ct. at 626, 81 L.Ed. at 914.

13. See *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126 (1938), where there was no *shipment* across state lines, but the company supplied electric energy to the City of New York which was the focal point of railways, steamship lines, radio networks, telegraph companies, etc.; *National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U.S. 49, 57 S.Ct. 642, 81 L.Ed. 918 (1937), which involved the manufacture of trailers, where fifty per cent of the raw materials were obtained out of state and eighty per cent of the finished products were shipped out of state; *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U.S. 453, 58 S.Ct. 656, 82 L.Ed. 954 (1938), when thirty-seven per cent of the fruit packed was sent out of the state where grown and packed.

14. Ballantine, *The Federal Power Over Interstate Commerce Today* (1939) 25 A.B.A.J. 252, 255.

15. 48 Stat. 195 (1933), 15 U.S.C.A. §§ 701-712 (1939), approved June 16, 1933.

state commerce as to be the subject of congressional regulation.<sup>16</sup> The 1941 Supreme Court is unanimously in accord with this position.

The act sets up a comprehensive legislative scheme to prevent the shipment in interstate commerce of goods produced in the United States under labor conditions which fail to conform to minimum standards established by the statute. Its purpose is to "provide for the establishment of fair labor standards in employments affecting interstate commerce"<sup>17</sup> by fixing a minimum wage<sup>18</sup> and a maximum number of hours of work per week,<sup>19</sup> and by prohibiting "oppressive child labor."<sup>20</sup> To this end, a Wage and Hour division under the direction of an Administrator is

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16. The act states its own theory, as follows: "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 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." 52 Stat. 1060 (1938), 29 U.S.C.A. § 202 (Supp. 1940).

Section 3(b) defines "commerce" as "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

17. Preamble, 52 Stat. 1060 (1938). See 52 Stat. 1067 (1938), 29 U.S.C.A. § 213 (Supp. 1940) for exemptions, e.g., the statute does not apply its wage and hour provisions to seamen, agricultural employees, etc.

18. Section 6(a) fixes a 25 cents per hour minimum during the first year after the effective date of the act, a 30 cents per hour minimum for the next six years, and a 40 cents per hour minimum thereafter. The administrator is given certain authority to mitigate the rigidity of the rate, within the limit of 40 cents per hour. 52 Stat. 1062, 1064 (1938), 29 U.S.C.A. §§ 206, 208 (Supp. 1940).

19. Section 7(a) provides a maximum "workweek" of 44 hours for the first year, 42 hours for the second year, and a 40 hour week for subsequent years. For work in excess of this maximum, the employee must receive "not less than one and one-half times the regular rate at which he is employed." 52 Stat. 1063 (1938), 29 U.S.C.A. § 207 (Supp. 1940).

Section 15(a) provides that it shall be unlawful for any person "(1) to transport, offer for transportation, ship, deliver or sell in commerce, . . . or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation" of the wage and hour provisions of the statute "or in violation of any order of the Administrator" regularly issued. 52 Stat. 1068 (1938), 29 U.S.C.A. § 215 (Supp. 1940).

20. "Oppressive Child Labor" is extensively defined in Section 3(e), 52 Stat. 1060 (1938), 29 U.S.C.A. § 203 (Supp. 1940). Generally, it excludes employment of children under the age of sixteen and employment of children over the age of eighteen in occupations designated as "hazardous" or "detrimental" by the Chief of the Children's Bureau of the Department of Labor. The same officer has discretion to permit employment of children between the ages of fourteen and sixteen in certain employments determined not to interfere with the children's schooling, health and well-being. Section 12, 52 Stat.

established in the Department of Labor, with power to effectuate the provisions of the act.<sup>21</sup> Criminal penalties sanction the statute.<sup>22</sup>

The National Industrial Recovery Act of 1933<sup>23</sup> had attempted to accomplish, inter alia, the same three objectives sought in the 1938 act: namely, minimum wages, maximum hours, and abolition of child labor. In the *Schechter* case<sup>24</sup> that act was declared unconstitutional on two grounds: (1) the fixing of the hours and wages of employees engaged in *intrastate* activities was the exercise of a power not delegated to Congress by the Constitution, hence could not be accomplished by federal statute, and (2) Section 3 of the act, authorizing the approval of codes of fair competition, was an unconstitutional delegation of legislative power to the President in that it did not supply standards or prescribe rules of conduct to be applied to the particular states of fact determined by administrative procedure.

Three months after the *Schechter* opinion,<sup>25</sup> the President approved the Bituminous Coal Conservation Act of 1935,<sup>26</sup> which provided among other things that wages and hours agreed upon by producers of more than two-thirds of the annual tonnage production and representatives of more than one-half of the mine workers should be accepted by all code members. Again, in *Carter v. Carter Coal Company*<sup>27</sup> the Supreme Court held that such provisions constituted an unlawful delegation of legislative authority and an attempt to regulate local productive activity not forming a part of the stream of interstate commerce. It seemed well settled that "production is not commerce."<sup>28</sup>

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1060 (1938), 29 U.S.C.A. § 212 (Supp. 1940), forbids shipment in interstate commerce of all goods from any establishment "in or about which within 30 days prior to the removal of such goods therefrom any oppressive child labor has been employed."

21. Sections 4, 8, 11, 52 Stat. 1061, 1064, 1067 (1938), 29 U.S.C.A. §§ 204, 208, 211 (Supp. 1940). It is unlawful to violate orders of the Administrator. Section 15(a)(1), 52 Stat. 1068 (1938), 29 U.S.C.A. § 215 (Supp. 1940).

22. Section 16 provides a maximum fine of \$10,000 and/or a maximum imprisonment for six months for violation of certain specified acts prohibited by Section 15.

23. 48 Stat. 195 (1933), 15 U.S.C.A. §§ 701-712 (1939), approved June 16, 1933.

24. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947 (1935).

25. *Ibid.*

26. 49 Stat. 991 (1935), 15 U.S.C.A. 801-827 (1939), approved August 30, 1935.

27. 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936).

28. "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce." *Kidd v. Pearson*, 128 U.S. 1, 20, 9 S.Ct. 6, 10, 32 L.Ed. 346, 350 (1888). "Commerce succeeds to manufacture and is not a part of

Twenty-three years ago, in *Hammer v. Dagenhart*,<sup>29</sup> the Supreme Court—with memorable dissent by Mr. Justice Holmes—denied the right of Congress to exclude from the channels of interstate commerce the products of child labor. A similar congressional effort to regulate child labor, under the taxing power, met a like fate at the hands of the Court.<sup>30</sup> Attempts to adopt a “child labor amendment” to the Constitution died still-born. It seemed clear that there could be no federal regulation of child labor.

In February, 1941, however, the Supreme Court upheld the Wages and Hours Act. In a different day a different Court has

it. . . .” *United States v. E. C. Knight Co.*, 156 U.S. 1, 12, 15 S.Ct. 249, 253, 39 L.Ed. 325, 329 (1895).

“If the possibility, or indeed, certainty of exportation of a product or article from a State determines it to be in interstate commerce before the commencement of its movement from the State, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries. . . .” *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 259, 43 S.Ct. 83, 86, 67 L.Ed. 237, 243 (1922).

See also *Chassaniol v. City of Greenwood*, 291 U.S. 584, 54 S.Ct. 541, 78 L.Ed. 1004 (1934); *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 835, 80 L.Ed. 1160 (1936).

*A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947 (1935), involved the corollary principle that, once goods have come to rest within a state after having been in the “stream” of interstate commerce, they are no longer subject to federal regulation.

29. 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101, 3 A.L.R. 649 (1918).

30. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 42 S.Ct. 449, 66 L.Ed. 817 (1922). Similarly, in *United States v. Butler*, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477, 102 A.L.R. 914 (1936), the Agricultural Adjustment Act of 1933 (48 Stat. 34, 35 (1934), 49 Stat. 770 (1935), 7 U.S.C.A. §§ 608, 609, 623 (1939)) was held unconstitutional because not a true tax. A true tax must be for a “public purpose.” See *McAllister, Public Purpose in Taxation* (1929) 18 Calif. L. Rev. 137, 241. Much federal regulation has, however, been accomplished under the taxing power, e.g., the Federal Social Security Act of 1935, 49 Stat. 626 (1935), 42 U.S.C.A. §§ 501-503 (Supp. 1940). *Steward Machine Co. v. Davis*, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279, 109 A.L.R. 1293 (1937); (prohibitive tax on narcotics) *United States v. Doremus*, 249 U.S. 86, 39 S.Ct. 214, 63 L.Ed. 493 (1919); (tax on dealers of “gangster’s” firearms under National Firearms Act of 1934) 48 Stat. 1236 (1934), 26 U.S.C.A. § 2733 (1940), *Sonzinsky v. United States*, 300 U.S. 506, 57 S.Ct. 554, 81 L.Ed. 772 (1937). Cf. *Ribble, Conflicts Between Federal Regulation Through Taxation and the States* (1934) 23 Corn. L. Q. 131. In effect, if the Court feels that a regulatory tax is desirable or not desirable it will decide its constitutionality according to the following formula:

- | <i>Constitutional</i>   | <i>Unconstitutional</i>  |
|---|--|
| (1) Court will not examine the <i>motives</i> of Congress.                          | (1) Court will examine the <i>intention</i> of Congress.                     |
| (2) Court will not look behind the <i>face</i> of the statute.                      | (2) Court will look behind the <i>mask</i> of the statute.                   |
| (3) The statute actually <i>raises revenue</i> .                                    | (3) <i>Revenue is merely incidental</i> . Regulation is primary object.      |
| (4) Statute has no <i>criminal penalty</i> (or penalty is only to enforce the tax). | (4) Statute has a <i>penalty</i> , which is a characteristic of regulations. |

found constitutional fiat to sustain a statute accomplishing the formerly reprobated objectives—and this in the face of the same contrary arguments under the same Constitution. Thus—evolution without revolution.

In the *Darby Lumber Company* case<sup>31</sup> a lumber manufacturer was charged with operating, under substandard labor conditions as to wages and hours, a business which involved the obtaining of raw material and its conversion into lumber, with the intent of shipping at least a part of the finished product across state lines. It was also charged that the manufacturer did, in fact, send certain of his finished goods into another state. The Federal District Court for the Southern District of Georgia sustained a demurrer to the indictment on the ground that the statute was an unconstitutional attempt of the Federal Congress to control a purely intrastate matter. The Supreme Court of the United States reversed this decision on appeal, holding, in sum, that labor conditions in the manufacture of goods intended for interstate shipment have a "substantial" effect upon interstate commerce; that, accordingly, such conditions are a fit subject for congressional regulation. The Court cited *National Labor Relations Board v. Jones & Laughlin Steel Corporation*<sup>32</sup> and companion cases<sup>33</sup> in support of the proposition that production may be commerce. In delimiting federal regulatory authority, the settled criterion has long been whether the effect upon interstate commerce of the activity sought to be controlled was "direct," "intimate," "close," or "substantial" as distinguished from "indirect," or "remote."<sup>34</sup> Silently ignoring the test-words "direct," "intimate," and "close," the Court found that

31. *United States v. F. W. Darby Lumber Co.*, 61 S.Ct. 451, 85 L.Ed. 395 (1941).

32. 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352 (1937).

33. *Supra* note 13.

34. ". . . where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention. . . . 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. . . ." *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U.S. 453, 466-467, 58 S.Ct. 656, 660, 82 L.Ed. 954, 960 (1938).

". . . there is a necessary and well-established distinction between direct and indirect effects [on interstate commerce]. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. . . . If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government." *A.L.A. Schechter Corp. v. United States*, 295 U.S. 495, 546, 55 S.Ct. 837, 850, 79 L.Ed. 1570, 1588, 97 A.L.R. 947, 966 (1935).

the production of lumber had a "substantial" effect upon interstate commerce, and the die was cast.

*Hammer v. Dagenhart*<sup>35</sup> was overruled, *eo nomine*, the Court stating that that decision stood alone and that

"The distinction on which the decision rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when made and unsupported by any provision of the Constitution—has long since been abandoned. . . .

It should be and is now overruled. . . ."<sup>36</sup>

This was not a difficult decision. Congressional power to prohibit the movement of goods in interstate commerce had already been upheld in many cases, for example, as to (1) goods "unfit for commerce," e.g., diseased cattle,<sup>37</sup> impure food,<sup>38</sup> misbranded food;<sup>39</sup> (2) goods the transportation of which is essential to the accomplishment of an immoral activity, e.g., women for immoral purposes,<sup>40</sup> prize fight pictures,<sup>41</sup> lottery tickets;<sup>42</sup> (3) goods the transportation of which evades the laws of the state of origin, e.g., stolen motor vehicles,<sup>43</sup> kidnaped persons;<sup>44</sup> and (4) goods the transportation of which evades the laws of the state of destination, e.g., intoxicating liquor<sup>45</sup> and convict-made goods.<sup>46</sup> Further, it has been frequently held that congress may wholly prohibit intrastate activities which, if permitted, would result in restraint of interstate commerce.<sup>47</sup> The distinction between convict-made

35. 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101 (1918).

36. 61 S.Ct. 451, 458, 85 L.Ed. 395, 401-402 (1941).

37. *Reid v. Colorado*, 187 U.S. 137, 23 S.Ct. 92, 47 L.Ed. 108 (1902).

38. *Hipolite Egg Co. v. United States*, 220 U.S. 45, 31 S.Ct. 364, 55 L.Ed. 364 (1911).

39. *McDermott v. Wisconsin*, 228 U.S. 115, 33 S.Ct. 431, 57 L.Ed. 754 (1913).

40. *Hoke v. United States*, 227 U.S. 308, 33 S.Ct. 281, 57 L.Ed. 523 (1913);

*Caminetti v. United States*, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917).

41. *Weber v. Freed*, 239 U.S. 325, 36 S.Ct. 131, 60 L.Ed. 308 (1915).

42. *Lottery Case*, 138 U.S. 321, 23 S.Ct. 321, 47 L.Ed. 492 (1903).

43. *Brooks v. United States*, 267 U.S. 432, 45 S.Ct. 345, 69 L.Ed. 699 (1925).

44. *Gooch v. United States*, 297 U.S. 124, 56 S.Ct. 395, 80 L.Ed. 522 (1936).

45. *Clark Distilling Co. v. Western Maryland Ry.*, 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326 (1917).

46. *Kentucky Whip and Collar Co. v. Illinois Central R.R.*, 299 U.S. 334, 57 S.Ct. 277, 81 L.Ed. 270 (1937).

47. *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295, 45 S.Ct. 551, 69 L.Ed. 963 (1925); *Local 167 v. United States*, 291 U.S. 293, 54 S.Ct. 396, 78 L.Ed. 804 (1934). Congress may regulate intrastate rates on interstate carriers where the effect of the rates is to burden interstate commerce [*Houston E. & W. T. R.R. v. United States*, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341 (1914); *United States v. Louisiana*, 290 U.S. 70, 54 S.Ct. 28, 78 L.Ed. 181 (1933)]. Cf. *Federal Trade Commission v. Bunte Brothers*, 61 S.Ct. 580, 85 L.Ed. 531 (1941).]. It may prescribe maximum hours for employees engaged in intra-

goods as "bad" and child-made goods as "not bad" was specious.<sup>48</sup> It was easy for a Court so minded to add the exclusion of child-made goods.

It could be argued with considerable merit that a rigidly uniform minimum wage might be a violation of the Fifth Amendment because "arbitrary."<sup>49</sup> In congressional hearings prior to the passage of the Fair Labor Standards Act, it was pointed out that varying costs of living in different parts of the country would render a wage, uniform in dollars and cents, quite non-uniform when translated into terms of purchasing power.<sup>50</sup> To meet this, the act provides for classification of industries and classification within industries, with accompanying flexibility of minimum wage rates, in accordance with the recommendation of "industry committees."<sup>51</sup> In determining the wage rates in such classifications, the Administrator is to consider the following facts: "(1) competitive conditions as affected by transportation, living and production costs; (2) the wages established for work of like or

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state activity connected with the movement of a railroad train, such as train dispatchers and telegraphers [Baltimore & Ohio R.R. v. Interstate Commerce Commission, 221 U.S. 612, 31 S.Ct. 621, 55 L.Ed. 878 (1911)]. It may compel the adoption of safety appliances on rolling stock moving intrastate because of the relation to and effect of such appliances upon interstate traffic moving over the same railroad. Southern Ry. v. United States, 222 U.S. 20, 32 S.Ct. 2, 56 L.Ed. 72 (1911).

48. Compare this distinction with the treatment of regulatory taxes suggested supra note 30.

49. "... the guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia v. New York*, 291 U.S. 502, 525, 54 S.Ct. 505, 510-511, 78 L.Ed. 940, 950 (1934).

50. "Such a wage rate, while uniform in amount, would be unequal and discriminatory when translated into 'living wage.'" 83 Cong. Rec. 7301 (1938). "The bill . . . totally ignores the fact that in a country as large as the United States there are thousands of varying conditions to which this inflexible proposal must be applied. . . .

"We must also consider, from the standpoint of the employer. . . , the cost of transportation. . . .

"To impose a rigid inflexible wage in all parts of the United States will unquestionably mean that some employers cannot longer compete in the eastern market where a majority of our consumers reside." 83 Cong. Rec. 7303 (1938).

The "child labor" provisions might also be attacked as arbitrary. "... an arbitrary wholesale prohibition of an entire business operation, only a part of which was affected by the evil aimed at, where satisfactory results could be achieved by more specific and less drastic regulatory measures constitutes a deprivation of property without due process." Henry Root Stearn of the New York Bar speaking of the "Barkley Bill" which, on this point, was like the Fair Labor Standards Act. Hearings before the Senate Committee on Interstate Commerce on S. 592, S. 1976, S. 2068, S. 2226, S. 2345, 75th Cong., 1st Sess. (1937) 134.

51. Sections 5 and 8, 52 Stat. 1062, 1065 (1938), 29 U.S.C.A. §§ 205, 208 (Supp. 1940).

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 character by employers who voluntarily maintain minimum-wage standards in the industry. . . ."<sup>52</sup> As to classifications so made, the Administrator is enjoined by the statute to fix for each classification the highest minimum wage rate, not in excess of forty cents an hour, which "(1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry."<sup>53</sup> Apparently, this flexibility satisfied the Supreme Court in the *Darby Lumber Company* case.<sup>54</sup> The question of "due process" was dismissed in a very brief paragraph stating that, since the decision in *West Coast Hotel v. Parrish*,<sup>55</sup> there was no doubt as to the existence of legislative power to fix minimum wages; that the exercise of this power "is not a denial of due process under the Fifth more than under the Fourteenth Amendment."<sup>56</sup> It will be remembered that the *Parrish* case involved a state statute. The Court did not dwell upon this tacit assumption that there is a federal "police power,"<sup>57</sup> but, at another point in the opinion, it quoted from its language in another recent decision, viz.,

"The authority of the Federal Government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce."<sup>58</sup>

Similarly, the Court, in citing cases supporting the maximum hour provision, was forced to rely upon decisions involving state statutes.<sup>59</sup>

The requirement of the law that records be kept by employers showing the hours worked each day and week by each

52. Section 8(c), 52 Stat. 1064 (1938), 29 U.S.C.A. § 208 (Supp. 1940).

53. *Ibid.*

54. *United States v. F. W. Darby Lumber Co.*, 61 S.Ct. 451, 85 L.Ed. 395 (1941).

55. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330 (1937), specifically overruling *Adkins v. Children's Hospital of the District of Columbia*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785, 24 A.L.R. 1238 (1923), and upholding the Washington "Minimum Wages for Women" statute. See Comment (1938) 11 So. Calif. L. Rev. 256.

56. 61 S.Ct. 451, 462, 85 L.Ed. 395, 406 (1941).

57. Cf. *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934). See Cushman, *The National Police Power under the Constitution* (1919) 3 Minn. L. Rev. 452.

58. 61 S.Ct. 451, 458, 85 L. Ed. 395, 401 (1941), quoting *United States v. Rock Royal Co-Op.*, 307 U.S. 533, 569, 59 S.Ct. 993, 1011, 83 L.Ed. 1446, 1468 (1939).

59. For example, *Holden v. Hardy*, 169 U.S. 366, 18 S.Ct. 383, 42 L.Ed. 780 (1898); *Bunting v. Oregon*, 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830 (1917).

employee<sup>60</sup> was upheld as "an appropriate means to a legitimate end."<sup>61</sup>

In the *Opp Cotton Mills* decision,<sup>62</sup> handed down with the *Darby Lumber Company* opinion, the Fair Labor Standards Act successfully weathered the additional challenge that it involved an unconstitutional delegation of legislative authority. Affirming the Circuit Court of Appeals for the Fifth Circuit, the Supreme Court determined that the administrative procedure established in the act for the determination of minimum wage orders for classified industries does not constitute an unlawful delegation of the legislative power of congress. The Court pointed out that the function of the industry committees appointed by the Administrator is merely to investigate factual data, and to make recommendations to the Administrator. Decisions based on that data are made by the Administrator. Upholding the grant of discretion to the Administrator, the Court stated clearly its position relative to administrative officials and agencies:

" . . . the Constitution does not require that Congress should find for itself every fact upon which it bases legislation. . . . In an increasingly complex society, Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy in fixing, for example, a tariff rate, a railroad rate or the rate of wages to be applied in particular industries by a minimum wage law. The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable. The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective."<sup>63</sup>

The Court noted that the act satisfies the requirements thus set out in that it specifies certain factors which are to be considered by the Administrator in making his determinations<sup>64</sup> and dis-

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60. Sections 11(c) and 15(a)(5), 52 Stat. 1066, 1068 (1938), 29 U.S.C.A. §§ 211, 215 (Supp. 1940).

61. 61 S.Ct. 451, 462, 85 L.Ed. 395, 406 (1941).

62. *Opp Cotton Mills v. Administrator*, 61 S.Ct. 524, 85 L.Ed. 407 (1941).

63. 61 S.Ct. at 532, 85 L.Ed. at 416.

64. Section 8(c), 52 Stat. 1064 (1938), 29 U.S.C.A. § 208 (Supp. 1940), quoted in text at pp. 613-614, *supra*.

countenanced the objections that these criteria were too vague. Further, the Court stated, requirements of due process are satisfied by provisions for hearings before the Administrator "after due notice to interested persons,"<sup>65</sup> prior to his determination of minimum wages within the various industry classifications. It was objected by the Opp Cotton Mills that no opportunity for "notice and hearings" before the fact-finding industry committees was provided. The court declared, however, that requirements of due process do not demand a hearing at any particular point in an administrative proceeding, but are satisfied where there is ample opportunity for interested parties to be heard at some time before the final order becomes effective. Thus this phase of the Wages and Hours Act is fitted by the Court into the developing structure of administrative law.

The "Fair Labor Standards Act of 1938" has survived major constitutional attacks from all sides. The Supreme Court has declared that the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution.<sup>66</sup> It has further stated in effect that the shipment across state lines of an infinitesimal portion of the total output of a business may, under the "commerce power," render every step in the chain of production within the gamut of Congressional authority.<sup>67</sup> The governmental history of the United States is the story of continuous growth of federal authority at the expense of that of the several states. Unless the position of the Supreme Court in the *Darby*

65. Section 8(d), 52 Stat. 1064 (1938), 29 U.S.C.A. 208 (Supp. 1940).

66. *United States v. F. W. Darby Lumber Co.*, 61 S.Ct. 451, 85 L.Ed. 395 (1941).

67. The following language is found in the *Darby Lumber Company* case: "Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It is recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great." (61 S.Ct. at 461, 85 L.Ed. at 405.) See H.R. Rep. 2182, 75th Cong., 1st Sess. (1937) 7. Cf. *National Labor Relations Board v. Fainblatt*, 306 U.S. 601, 59 S.Ct. 668, 83 L.Ed. 1014 (1939).

As to the scope of acts included within the phrase "production for commerce," the Court said:

"Without attempting to define the precise limits of the phrase, we think the acts alleged in the indictment are within the sweep of the statute. The obvious purpose of the Act was not only to prevent the interstate transportation of the proscribed product, but to stop the initial step toward transportation, production with the purpose of so transporting it." (61 S.Ct. at 459, 85 L.Ed. at 402.)

See also Sections 7, 8, 15(a)(2), 52 Stat. 1062, 1063, 1068 (1938), 29 U.S.C.A. §§ 207, 208, 215 (Supp. 1940).

*Lumber Company* case be subsequently modified, we are justified in concluding that this migration of authority is practically complete. Whatever else be the implications of this recent pronouncement of our highest tribunal, it has certainly met the criticism that the American constitutional system is too inflexible to operate in an evolving world.

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### DIVISIBILITY OF THE MINERAL SERVITUDE

The development of the concept of the mineral servitude in Louisiana has given rise to the application of many legal doctrines and rules. Of all of these, perhaps the most controversial is the doctrine announced in *Sample v. Whitaker*<sup>1</sup> that the mineral servitude is indivisible. Some writers felt very strongly that this doctrine of indivisibility ought not be applied to the mineral servitude,<sup>2</sup> and consequently most of the argument has been concerned with this. However, any belief that the court would reverse itself was abandoned after a very recent decision,<sup>3</sup> which followed the doctrine to its logical extreme. With approval by the court now clearly established, a re-examination and analysis of the doctrine, and an inquiry as to how it should be applied, would appear to be appropriate, for upon this doctrine rests a great deal of the law of prescription as applied to the mineral servitude.

The first type of situation in which the doctrine of indivisibility occurs is that in which a mineral servitude created on a particular tract of land is acquired by A and B as co-owners. Does the interruption or suspension of prescription on the servitude as to A also interrupt or suspend it as to B? To this the Louisiana Supreme Court gave an affirmative answer in *Sample v. Whitaker*. In so doing the court rejected the contention of the landowner that Article 538<sup>4</sup> of the Civil Code, which states that a

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1. 172 La. 722, 135 So. 38 (1931).

2. See Comment (1940) 14 Tulane L. Rev. 246.

3. *Ohio Oil Co. v. Cox*, 198 So. 902 (La. 1940).

4. Art. 538, La. Civil Code of 1870: "Usufruct is divisible; for if this right is vested in several persons at a time, there is but one usufruct, which is divided among them, each having his portion. The reason is because the object of this right is the receiving the fruits of the thing, which are corporeal and divisible."