NATIONAL MINIMUM WAGE REGULATION IN THE UNITED STATES

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Committee in Charge:
Professor Z. C. Dickinson, Chairman
Professor Margaret Elliott Tracy
Professor I. L. Sharfman
Assistant Professor John W. Lederle
Assistant Professor William B. Palmer

by

IRVING ISADORE PASTER

UNIVERSITY OF MICHIGAN

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TO

JOSEPH BORISOW KASS

PREFACE

I am deepfully grateful to Professor Z. C. Dickinson of the Department of Economics of the University of Michigan for the valuable advice which he gave me during the writing of the dissertation. I also wish to thank his colleagues, Professors William Haber, John W. Lederle, William B. Palmer, I. Leo Sharfman, and Margaret Elliott Tracy, for critically reading the manuscript and making many useful and helpful suggestions.

Irving Isadore Paster

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CHAPTER I

SCOPE OF THE STUDY

The purpose of this study is to trace the development of legal minimum wage regulation and to offer some analysis of its economic significance, such development and analysis to be made with special reference to the Fair Labor Standards Act of 1938. The examination of minimum wage controls other than those contained in this Act will be largely incidental.

The legal minimum wage has assumed a wide variety of forms in different countries and in different periods of time. Wage controls, in some countries, for example, apply not only to low-paid, unskilled workers but to all grades of labor. Our concern here will be almost exclusively with the legal regulation of wages paid the former group. Certain complementary social controls such as the family allowance movement, hours regulation, premium pay for overtime, and child and female labor regulation have also been somewhat associated with the legal minimum wage movement. These fringe adjuncts of the legal minimum wage, too, will be dealt with only incidentally here. The bulk of the dissertation will be devoted to the legal minimum wage itself.

The scope of the study may be further defined. The

theoretical portion, Chapter II, will include a brief statement of general wage theory and its relation to minimum wage regulation. The theoretical aspects of the control of wages through collective bargaining and through minimum wage laws will also be discussed. The chapter will deal with comparatively abstract, deductive wage theory with special emphasis on the theory of legal minimum wage regulation.

The historical portion of the study is contained in Chapter III. The legal minimum wage is an international phenomenon, and it has had a long and varied history in many countries throughout the world. Some antecedents of modern wage regulation will be traced briefly and some attention will be devoted to the experience of Australasia, Great Britain, and Canada. State and federal legislation in the United States prior to 1938 will also be sketched but the major portion of the dissertation, as noted above, will be devoted to the Fair Labor Standards Act of 1938.

The legislative struggle which preceded the passage of the latter Act will be reviewed in Chapter IV wherein some attention will be given to the committee hearings on the original bill and its progress through the halls of Congress. The nature of the considerations for and against enactment and the grouping of the opponents and proponents of regulation will be examined.

The question of the Act's constitutionality will be explored in Chapter V. Doubt as to the right of American

governmental authorities to regulate wages was one of the obstacles which retarded the progress of state and national minimum wage legislation and was one of the important factors leading Congress to enact a law which in many respects was weaker than that originally and more recently proposed.

Since the effectiveness of a minimum wage law depends to a large extent on the adequacy of its coverage, the scope of the coverage of the Act will receive our attention in Chapter VI. It is necessary to study the question of coverage not only as to how far it extends under the terms of the Act, but also as to how far it is delimited by the numerous and complicated exemptions which pervade it. In addition, the problems inherent in coverage together with various proposals which have been suggested for their solution will be examined.

The nature of the administration of the Act will receive due attention in Chapter VII. The problems of administration which are the result of defects inherent in the Act as well as those which are the result of obstacles deliberately thrown into the paths of those who have tried to administer the Act effectively will be probed. Our study of the enforcement of the Act, in Chapter VIII, will cover the question of the adequacy of the available funds and the necessity for federal-state cooperation. The Congressional amendment which relates to the enforcement of the Act will be examined in Chapter IX.

The economic effects of the Act, so far as they can be ascertained, will be studied in Chapter X. This chapter is

an inductive and concrete examination of the effects attributable to the Act. It supplements the theoretical discussion in Chapter II. We will note how the Act has affected wages, employment, and productivity, and their relationships with each other. Special attention will be given to the problem of the South and how its economy has been affected. We will also examine the economic implications of an increase in the amount of the minimum wage.

Such are the problems to be considered in the individual chapters. In the dissertation as a whole answers will be sought to certain questions: Has legal minimum wage regulation benefited labor, industry, and society in general as has been asserted by its proponents? If so, what have been these benefits? If it has been harmful, what has been the nature of its adverse effects? How has the Fair Labor Standards Act functioned as an instrument of legal minimum wage regulation? How may it be improved? Should the minimum it provides be increased and should its coverage be extended? What changes should be made in the interests of better administration and enforcement? And, finally, what is the place of the legal minimum wage in the entire complex of regulatory laws which are designed to make our economy function more smoothly and to soften the rigors of an imperfectly operating system of free enterprise?

CHAPTER II

BASIS OF MINIMUM WAGE REGULATION

Before embarking on an extensive study of legal minimum wage regulation, it is pertinent to ask why there is a need for such regulation. To understand why necessitates an excursion into theory in order to find out how wages are determined. In our brief review of marginal productivity theory we will show how wages are automatically determined by market forces. We will show that, because of imperfections in the economy, it is frequently necessary to apply artificial controls to wages. The two basic ways in which wages are controlled, collective bargaining and legal minimum wage regulation, will be reviewed. The economic aspects of the latter type of control will be subjected to a more detailed analysis. Finally, the various methods by which wages are legally regulated will be noted.

A. The Automatic Factors in the Determination of Wages

An answer to the problem as to what determines the amount which will be paid for labor or for any given factor of production is proposed by what is commonly known as the theory of marginal productivity. According to this theory, in the long run, under competition the value, or price, of a productive factor is determined by the value of its marginal

product. The marginal product is defined as the additional output obtained from the use of an additional unit of a productive factor. An employer of labor, for example, will hire workers until the value of the product of the last worker hired just equals the wage which he must be paid. The same principle applies in the determination of the number of units of land and capital that are employed. In addition, not only do entrepreneurs employ the factors of production up to the point where the price paid for the last unit employed equals the value of its product, they also try to find that combination of factors which will result in the production of the product at least cost in order that profits be at a maximum.

The wage paid, then, is determined by the value of the product of the marginal worker. Employers hire more workers as long as the wage paid them is less than the value of the product they produce. However, as more workers are hired, the other factors remaining constant, the marginal product diminishes in accordance with the principle of diminishing productivity, and the value of the product, and, therefore, the wage, decreases.

The marginal productivity of labor is dependent, too, on the supply of labor relative to the demand for it and relative to the other factors of production. If the supply of labor is great relative to the demand for labor, the price for it will be low, and since more units of it will be employed, the value of the marginal product will be low. If the supply of

labor is low relative to the demand for labor, the reverse is true.

The wage level, then, depends on the demand for labor which is determined by the value of the marginal product, and on the supply of labor which in conjunction with the supply of other factors determines the productivity of the marginal laborers. These are the principles of marginal productivity. The theory in its original form was based on several simplifying assumptions: perfect competition between employers and workers, perfect mobility of labor and capital, and perfect knowledge of wages and prices.

If the number of workers is constant, then a wage higher than the value of the marginal product cannot be paid without resulting in the unemployment of marginal workers. A wage lower than the value of the marginal product will result in the competition of employers for labor with the result that wages will be bid up to the value of the marginal product. That is, on the assumption of being able to vary in small increments the units supplied and demanded, the value of the marginal product just equals the wage.

B. The Artificial Control of Wages

Thus, the marginal productivity theory sets certain limits and norms for wage determination. The actual details of wage determination may not operate strictly in accordance with these theoretical assumptions because of various

imperfections in the economy.[1] Employers and workers do not compete freely. Labor and capital are not completely mobile. At any particular point in time the workers may receive wages which may be greater or less than the value of their marginal products. Where the latter is the case there is room for the operation of artificial forces to bring the wages up to their marginal productivity levels. Indeed, it is essential that some effort be made to see that this is done. The worker who does not receive a marginal productivity wage may receive a wage which is less than a living wage. The pernicious effects of low wages are so well known to those who will read this study that it is unnecessary to detail them here. Suffice it to say that for its own protection society must take positive action to insure the receipt by all workers of a wage that is at least equal to a marginal productivity wage. So far as activity on the part of society is confined largely to the wage area which lies below the marginal-productivity level, there would be relatively few effects on prices, output or employment. Conceivably, however, in some "parasitic trades"[2] and elsewhere, union and state action may establish a minimum wage on a living wage basis with the understanding that the latter may be greater than the current marginal productivity

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[1] See pp. 15-16 and 23-24, infra.

[2] See p. 13, infra.

level and hence will tend to decrease such parasitical employment and require social assistance for the unemployed.

Yet although the outstanding objective of wage regulation is to see to it that the worker gets at least his marginal productivity wage, no one seriously asserts that this wage can be accurately determined and a claim made on the employer for this amount. The best practical approximation to it is usually considered to be a "fair wage," the British expression, or the "prevailing wage," the American idiom.

An early definition of the fair wage concept was one by Alfred Marshall which defined it as a rate "about on a level with the average payment for tasks in other trades which are of equal difficulty and disagreeableness, which require equally rare natural abilities and equally expensive training."[1] The prevailing wage principle was first brought to national attention in the United States when in 1923 Justice Sutherland, in the District of Columbia decision, stated that "a statute requiring an employer to pay the value of the services rendered . . . would be understandable."[2] As a result the state minimum wage laws which were enacted following this decision required labor commissioners to be guided by (1) all

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[1] Introduction to L. L. F. R. Price, Industrial Peace (London, 1887), p. xiii. Cited in Arthur C. Pigou, The Economics of Welfare (London, 1920), p. 505.

[2] Adkins v. Children's Hospital, 261 U.S. 525 (1923).

relevant circumstances affecting the value of the service or class of service rendered, (2) the considerations which would guide a court in a suit for the reasonable value of the services rendered where the services were rendered at the request of an employer without contract as to the amount of the wage to be paid, and (3) the wages paid in the state for work of like or comparable character by employers who voluntarily maintain minimum wage standards.[1]

The principle may also be found expressed in that section of the Fair Labor Standards Act of 1938 which prescribes the basis for fixing of wages by wage order. In this section, in addition to requiring that transportation, living, and production costs which affect competitive conditions be considered in the determination of the highest minimum rate under 40 cents per hour which will not substantially curtail employment, the industry committees must also consider the wages paid for work of like, or comparable, character either as a result of collective bargaining agreements or as paid voluntarily by employers who maintain minimum wage standards.[2]

The application of this prevailing wage principle involves some difficulties. The problem of defining "skill" is no simple one. There must be, in addition, extremely nice

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[1]See, for example, State of New Hampshire, Bureau of Labor, Minimum Wage Law for Women and Minors (Concord, 1943), Pt. VII.

[2]Sec. 8 (c).

judgment exercised in considering such conditions as agreeableness or onerousness of work, privileges, rights, and penalties pertaining to the work, in the determination of the rate.

Its application in the United States is frequently encountered in connection with wages set in public contracts which provide for the payment of prevailing wages. However, in actual practice, these "prevailing wages" frequently are much higher than those actually prevailing and instead are the wages which are asked for but not always received by the labor unions involved perhaps in some distant and higher wage markets or for work of a more seasonal character.

We see then that although the marginal productivity analysis has an academic flavor for us so that it is not highly regarded by practical people, to a considerable extent the prevailing wage is based on the same idea in different language. There is always considerable difficulty in practical determination of what the marginal productivity or the prevailing wage of a given group of workers should be. Great as the difficulties of the prevailing wage principle are, those of the "living wage" principle are still greater.

The living wage principle is more extensively used as a basis for minimum wage regulation. The right of government to intervene to provide for a minimum on this basis does not encounter as much resistance as would government intervention under many other circumstances. Unfortunately, the principle

has been subjected to a variety of indefinite and elastic definitions. For example, it has been defined in Arkansas as the wage necessary "to supply a woman or minor female worker engaged in any occupation or industry the necessary cost of proper living to maintain the health and welfare of such woman, or minor female worker"[1] and in Minnesota as the wages "sufficient to maintain the worker in health and supply him with the necessary comforts and conditions of reasonable life."[2] The wage usually arrived at by wage boards, far from fulfilling these requirements, is a compromise between the budgets declared as necessary by representatives of the employers and those presented by representatives of the workers.

Both the living wage and the prevailing wage may be higher than the marginal productivity wage. Where this is the case, adverse reaction on employment may follow if the employer is compelled to pay such a wage on extra-marginal production. Nevertheless, the payment of a living wage even higher than marginal productivity has a number of informed advocates. These believe that since intra-marginal employers can pay a living wage to at least all their present employees and still make profits, all employers should therefore be

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[1]Arkansas State Department of Labor, An Annotated Digest of the Labor Laws of the State of Arkansas (Little Rock, 1943), p. 27.

[2]Minnesota Department of Labor and Industry, Employment of Women, Minors and Children and Sanitation Code (St. Paul, 1943), p. 4.

compelled to pay such a wage. They challenge the argument that employees in low-wage plants are less efficient and may be receiving their actual marginal productivity wage. They disregard the assumption that employers who pay low wages are naturally less efficient and that forcing them to pay higher wages only bankrupts them leading to unemployment. If an entire industry--a "parasitical" one or one in which the employer is not gaining unconscionable profits but the consumer is benefiting at the expense of the worker--is involved, they suggest the possibility of a price increase. Finally, if a price increase is not feasible and productivity cannot be increased so that workers are paid a living wage, then there is no justification for the industry in their opinion. They recommend that its capital and labor be transferred to other activities.[1]

The basic and most convincing reason why an employer's present ability to pay should not be the major consideration in a determination of minimum wages is the fact that of all the factors that operate in the economy, industry is logically the one on which the responsibility for the payment of an adequate wage rests. As the economic system now operates, industry uses labor as a factor of production in an effort to make profits, pursues such profits with little consideration

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[1]Paul Douglas, "The Economic Theory of Wage Regulation," University of Chicago Law Review, V (February, 1938), 201-202.

as to the social costs of low wages, and then expects either the workers themselves or society to bear the costs of exploitation. If industry must be subsidized because of economic or social reasons, then society rather than the workers should bear the costs. If society does not, then society pays a higher price in the long run in the form of relief, jails, and hospitals. The argument that man is a human being and should be permitted to live as such has been eloquently stated:

> . . . . in addition to meeting the requirements of the exchange justice of the market place, a wage or price must also meet the demands of social justice. Though commonly recognized in the first stages of economic life, this indispensable virtue is today ignored almost as completely as exchange justice is accepted. Social justice places a positive responsibility on every member of society to contribute positively to the common good of that society. In the matter of wages, social justice demands not that the worker receive the economic value of his work, that is, exchange justice, but that he must receive the social value of his work. The full activity of the head of a family is a contribution to the wealth of the community by one of its members of all that he is capable of contributing. All the income of the community is made up of such contributions. In return for such effort, he has merited to receive from the community the means of living an adequate life as a human being.[1]

Having detailed the objectives and general possibilities of minimum wage regulation, we turn now to a consideration of the two major means by which such objectives may be achieved: collective bargaining and the legal minimum wage. Some of their leading characteristics and their interactions will be reviewed.

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[1]Bernard W. Dempsey, "Ability to Pay," Quarterly Journal of Economics, LX (May, 1946), 355.

1. Collective Bargaining

Collective bargaining helps eliminate low wages by eliminating the disparity which exists between the strength and powers of the employer and the employee.[1]

Workers as individuals lack the information which is essential if they are going to bargain. They know little or nothing of labor conditions in different areas or of the cost of living in these areas. Where such information is available, they find themselves unable to take advantage of this information because of their immobility. Moving from one job to another involves pecuniary, physical, and social costs. The acquisition of status and privileges such as pension and insurance rights in the present job make employees reluctant to change their jobs frequently. In addition, the individual

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[1]The collective bargaining activities of unions may be said to have their basis in the "bargaining theory of wages" according to which wages are determined primarily on the basis of bargaining skill and only secondarily on the basis of economic laws. According to this theory, wages range from a potential maximum based on the marginal productivity of labor to a potential minimum based on the cost of subsistence. Wage rates do not rise above this maximum without causing unemployment or below this minimum without reducing the number of wage earners. The point at which the wage actually is set is determined by the bargaining strength of the employers and the employees. This theory of wage determination is true only in the short run. In the long run, if wage rates are too low in an industry, investment in it is accelerated and wage rates eventually rise; if they are too high, investment in it is reduced and wage rates eventually decline. See Z. C. Dickinson, Collective Wage Determination (New York, 1941), pp. 101-102.

employee lacks the bargaining skill enjoyed by his employer. Finally, the individual employee lacks the waiting power which is possessed by his employer because of the latter's greater financial reserves.

A still more important factor leading to failure of the employee to receive a wage equal to the value of the marginal product is the absence of competition for labor on the part of employers. No matter how immobile labor is, if there is active local competition for labor services, such immobility can be overcome or offset to a large extent. But where a labor market is dominated by one or two employers there is usually a tendency to keep wages below a competitive level. Even if the area has many firms, they may agree to pay "prevailing" wages. Pressure is exerted on small employers by their industrial leaders, and those who fail to follow the wage policy set by these leaders may be subjected to unpleasant retaliatory tactics of various kinds.

Workers, therefore, have turned from individual to collective bargaining. Under the latter arrangement representatives of workers bargain with the representatives of the employer or the employer himself. The individual worker turns over his bargaining rights to his union. The union concludes all arrangements regarding wages, hours, and working conditions. The admission by the employer that the employees have the right to organize and bargain collectively and that the union is authorized to represent the employees in their

business relationships with the employer is followed by the collective bargaining agreement, a document which describes the terms of employment.

This arrangement increases labor's bargaining power. Unions secure information which the individual worker cannot possibly obtain--information on the supply of and demand for labor, market conditions, the rate of profits, production costs, the cost of living, and wage rates in different industries and localities. Not only do they secure information and expand the knowledge of workers, they also are able to make good use of such knowledge by employing skilled and efficient bargainers who are able to meet employers and their representatives on the basis of equal ability to bargain. Contrast the feebleness of the bargaining of the individual worker with the vigor and efficiency with which the Textile Workers Union of America carries on its negotiations:

> . . . . TWUA local unions in the various branches of the industry have organized industry councils, or conferences, at which their representatives can come together, compare information, and democratically determine collective-bargaining policies. Such conferences take place regularly in the woolen and worsted, cotton syntehtic, yarn, carpet, hosiery, dyeing and finishing, and other sections of the industry. At these conferences representatives of local unions can act democratically and intelligently on the basis of their own information and that which is set before them by the skilled economists attached to the staff of the national union. Negotiations can then be carried on with the individual companies or in a given area, on the basis of the program set forth at the conference. Industry experts attached to the staff of the national union are able to negotiate with the employers on an equal basis. They have full access to wage statistics, production, and

> profit figures, and other necessary information supplied to them by the locals and the national union research department. . . .[1]

With the growth of unionism have come research, legal and educational departments and a wide variety of specialized services made possible by organization on a nationwide scale. In addition, unions furnish the individual workers with funds and thus increase their waiting power during the periods when they withhold their services in order to force employers to accede to wage demands.

However, the problem of low wages has not been solved for all classes of workers by trade unions. The workers most in need of protection--the unskilled, women, and children--are the least unionized members of the labor force. Even for those who enjoy trade union protection the benefits received often lack the elements of permanence and uniformity. The privileges gained by a union not only are restricted to only a portion of the working population, they are also formally limited by the period of time covered by the contract and practically limited by how well the union holds together. And although unions are national in scope, their powers vary with different employers and in different localities. The benefits which their members enjoy, therefore, vary accordingly. Finally, there are the limitations of the unions

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[1]U. S. Congress, Senate, Committee on Labor and Public Welfare, Labor Relations Program, Hearings on S. 55 and S. J. Res. 22, 80th Congress, 1st Session (Washington, 1947), Statement of George Baldanzi, pp. 1523-1524.

themselves. They are still young and have much to learn from experience. They do not always limit their demands for minimum wages to the appropriate area in which minimum wages can be paid without resulting in serious effects on the economy. Union leaders may mobilize labor votes for a legal minimum wage for reasons noted below, sometimes perhaps seeking minimum wages which are far in excess of the marginal productivity level in the lowest wage sectors covered.

The labor unions are essentially interested in free collective bargaining and are opposed to governmental control of wages. Yet they generally favor the legal control of minimum wages. First of all, they have some humanitarian interest in the wages paid low-wage workers who are not organized. Secondly, they favor minimum wage control in order to protect the organized employer who, in the absence of minimum wage control, may incur higher labor costs than the unorganized employer. Under legal minimum wage regulation the state, in effect, universalizes the standards of labor unions. To this method of wage control we now turn our attention.

2. The Legal Minimum Wage

The fixing of minimum wages by law has been defined as "making it a penal offense to hire labor at a lower rate than that fixed by law."[1] Such a law sets a rate which is the

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[1]Sidney Webb, "Economic Theory of a Legal Minimum Wage," Journal of Political Economy, XX (December, 1912), 973.

minimum which must be paid by employers for the work for which the rate is designed. The law may prescribe the rate, or it may establish a commission which prescribes it. The basis of the rate may be what is regarded as the minimum necessary for decent living or the rate may be determined on the basis of the prevailing wage principle. Frequently, a combination of both standards is used. In addition, those who set the rate may be influenced by what they believe the employer can pay. The law may provide subminimum rates for certain classes of workers whose productivity may not warrant the established minimum.

Proponents of minimum wage regulation have marshalled a number of weighty reasons as to why minimum wage regulation would benefit all elements in the economy: workers, employers, and society as a whole.

The minimum wage is regarded as a tool which supplements collective bargaining in the attempt to achieve higher labor standards. As has been pointed out above, not all workers are organized, nor are all labor organizations powerful enough to force employers to pay a living wage. The economy contains a host of children, women, and other workers in agriculture and industry who need legal protection. A legal minimum wage can provide workers with a rate which is more uniform and inclusive than a rate arrived at as a result of collective bargaining.

Employers also benefit. The wage cutting employer who

competes only on the basis of lower labor costs is either eliminated or is forced to change his ways. The higher-paid worker is a more efficient and productive worker. Labor difficulties decrease with the removal of one of the most fertile sources of labor disputes.

Society benefits from the greater productivity of adequately paid workers, from a lower tax burden as relief costs drop, and from the elimination of the losses due to labor disputes. Increased purchasing power resulting from the higher wages remove, according to some of the Act's proponents, one of the basic causes of depressions, the inability of the worker to buy the product of his labor.[1]

The negative point of view is also bolstered by a number of arguments. The opponents of regulation point out, for example, several dangers or hazards to workers which result from such regulation. The minimum wage, some assert, will become the maximum wage because employers will lower the wages of higher-paid employees in order to make possible the higher payments to lower-paid workers made requisite by the legislation. Or the employer may effect the same adjustment by discharging higher-paid employees and replacing them with

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[1]In simple form, the theory that raising wage rates increases purchasing power and thereby results in employment and recovery from depression, disregards the effect of higher wage rates on employment. Those who advocate higher wages on the assumption that purchasing power will be increased frequently forget that if wages are raised high enough unemployment may follow with a consequent decrease in purchasing power.

employees paid wages at or near the minimum level. Others insist that there will soon come a "bumping-up effect" raising all wages and not merely those initially below the legal minimum. Minimum wage legislation has also been termed "dangerous and discriminatory" to slow and inefficient workers. Such workers, it is asserted, are thrown into unemployment because they are not sufficiently productive to merit the payment of the established minimum.

Employers suffer, it is asserted, when their labor costs rise. Such legislation is regarded as discriminatory against employers who for one reason or another are unable to bear the cost of the higher wage. In fact, it has been alleged that considerable pressure for such legislation stems from employers who are better situated economically and who welcome a law which means the elimination of weaker competition. Thus, small business owners complain that they are discriminated against because they are unable to handle the increase as well as large business. Most employers, regardless of their economic situation, resent the interference with the freedom of enterprise by government commissions, boards, and their representatives.

Even if these adverse effects are not realized, we are told that there are still the difficulties of the establishment, administration, and enforcement of such regulation. A wage must be found which is sufficiently high so as to benefit the worker but not so high as to bankrupt the employer, or not

so high that it might be regarded as confiscatory and, hence, unconstitutional. The problem of picking a standard on which the wage should be based is beset with difficulties. And, finally, how is the problem of the varying sizes of workers' families, which require different budgets to provide for a living wage, to be met under minimum wage legislation?

3. Further Analysis of Union and Legal Wage Controls

Some of the considerations which have been mentioned above have been the subject of careful analysis on the part of economists for decades. Let us consider the effects of the imposition of a minimum wage where a firm is exploiting its workers by not paying a marginal productivity wage.

If a firm has been exploiting its labor by paying less than a marginal productivity wage, the imposition of a minimum wage will not only result in an increase in wages but may actually result in an increase in employment. This will be the case where the firm is hesitant about competing actively because of the fear that competition might bid up the price of labor. Such a situation might be present where there is one employer of labor, as is the case in the company town, for example, or where a group of employers agree on what the prevailing wage in a particular area should be. The establishment of a legal minimum wage or the imposition of a minimum wage by a trade union will result in increased employment--in addition to the payment of higher wages--since the employer is no longer able to keep wages down by refusing to bid for labor. He will then

increase employment up to the point where the cost of the last worker added equals the value of the product of this worker.

Let us now consider the effects of the imposition of a minimum wage where a firm is paying its workers a marginal productivity wage and there is no question of exploitation. This possibility has been explored by one noted economist whose analysis of the results of such an action runs substantially as follows:

The wage which can be paid to workers is limited by their marginal productivity. A worker who asks for more than the marginal productivity wage cannot expect to continue in employment. If a legal minimum wage is enacted which forces an employer to pay more than this amount, the costs of production rise. The employer will then either reduce output and discharge workers until the wage paid the marginal worker equals the value of his product or raise prices. Either of these alternatives is harmful, the first resulting in unemployment and the second in higher prices.[1]

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[1]This point of view has been expressed by J. B. Clark as follows: "Practical tests of the proposed policy are now in progress . . . and the results of these trials will be carefully watched; but a few things can be asserted in advance as necessarily true. We can be sure, without further testing, that raising the prices of goods will in the absence of counteracting influences, reduce sales; and that raising the rate of wages will, of itself and in the absence of any new demand for labor, lessen the number of workers employed." "The Minimum Wage," Atlantic Monthly, CXII (September, 1913), 289-297, cited in Weir M. Brown, "Some Effects of a Minimum Wage upon the Economy as a Whole," American Economic Review, XXX (March, 1940), 100.

However, it should be noted that this reasoning is true only for small movements of particular wages. The raising of all wages need not necessarily result in unemployment and may perhaps even increase employment because of the "multiplier" effect.

Furthermore, the analysis ignores some other possible favorable effects. Where employers are paying a marginal productivity wage, an increase in wages above the marginal productivity level need not necessarily result in a reduction in employment or in higher prices for the increase in costs resulting from the wage increase may be offset by a decrease in unit costs as a result of the increase in the efficiency of the employees, employers, or both.

Consider first the repercussions of such a wage increase on employee efficiency. The fact that under regulation the employer is no longer interested in securing men at the lowest possible rate but rather is interested in securing the best possible employees he can get for the legal rate has a favorable effect on the efficiency of workers is the opinion of some students. "The young workman, knowing that he cannot secure a preference for employment by offering to put up with worse conditions than the standard, seeks to commend himself by a good character, technical skill, and general intelligence."[1]

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[1]Webb, op. cit., p. 979.

Nor is this the only effect on the efficiency of labor. The higher minimum leads to better nutrition, clothing, leisure, all of which contribute to greater vitality and physical and mental efficiency. The inadequately fed worker who lives in a slum has little incentive to make him contribute all of which he is capable. This theory--that just as feeding more fuel into the boiler of a steam engine creates more power, so does putting more food into the worker create more energy--has been called the "steam engine theory of wages."[1]

But it should be noted that there are limits to the increase in efficiency which results from wage increases. A point is eventually reached where the increase in the income of workers has no effect whatever on their skill. Increased efficiency may result from higher wages but this does not necessarily follow. Some workers do not respond to increases in income by increasing their efficiency. They do not know how to spend their incomes properly on nourishing food, adequate clothing, and proper housing. Higher wages frequently are the result not the cause of higher efficiency.[2]

There is another point which should be made in connection with the efficiency of labor. If one employer increases his wages he will be able to attract the most efficient help

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[1]Francis A. Walker was a proponent of this theory. See The Wages Question (New York, 1876), pp. 54-56.

[2]Cf. F. W. Taussig, "Minimum Wages for Women," Quarterly Journal of Economics, XXX (May, 1916), 426-427.

from the labor market. But if all employers raise their wages, as is the case in the enactment of a universal minimum wage, then they are all still in the same position as they were prior to the enactment of the legislation.[1]

That a legal minimum wage may result in increased efficiency on the part of employers as well as employees is maintained by some economists. Thus Webb argues that the legal minimum wage increases employer efficiency by transferring "the pressure from one element in the bargain to the other; from the wage to the work, from the price to quality." In the absence of regulation employers sometimes profit more by hiring inefficient workers and paying a low wage than by hiring efficient ones and paying a high wage. Under legal minimum wage regulation, the employer must see to it that his employees are at least efficient enough to earn the minimum. Under the pressure of higher costs he reorganizes his plant so as to maintain his profits in spite of the increased labor costs.[2]

Some economists, however, question this conclusion. They contend that the pressure exerted on business men to increase their profits is not increased by the imposition of a legal minimum wage. Their conclusion is that it is the hope of profit rather than the fear of loss which is the important factor in initiating changes in the interests of better plant

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[1] Loc. cit.

[2] Webb, op. cit., p. 978.

organization, more effective machinery, and improved technology in general.[1]

C. Methods of Legal Regulation of Wages

Before closing the theoretical discussion of the legal minimum wage, it is essential that the reader be informed concerning the three methods by which minimum wages are legally regulated. These are the statutory minimum wage, the wage board system, and the arbitration system.

The statutory minimum wage involves the fixing of the minimum wage in the statute itself. The statute also details the way in which this minimum is to be applied. An outstanding example of a statutory minimum wage is the Fair Labor Standards Act of 1938. This type of wage fixation has the merit of being comparatively simple to administer and enforce but it is extremely rigid and inflexible. It is difficult to adapt it to varying local situations and changing conditions. Thus, for example, a rising price level will render nugatory a statutory minimum wage.

The wage-board system, as it operates in Great Britain and parts of Australia, although backed by the state, is dependent on the different industries in the economy. Each industry forms a tripartite board consisting of representatives of industry, labor, and the public. A public member is

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[1]See Taussig, op. cit., pp. 124-125, and G. J. Stigler, "The Economics of Minimum Wage Legislation," American Economic Review, XXXVI (June, 1946), 359.

the chairman of the group. This board determines the wage which, after a prescribed period of time, becomes the legal minimum in the industry and area covered by the board.

A more complicated wage board system is in effect in the United States and Canada. In these countries the wage boards in the states and provinces are under the control of external state or provincial authorities such as, for example, the state department of labor or the state minimum wage commission. Such a body sets up the wage boards, instructs them to determine what the living wage is for the industries and areas involved, and reviews their recommendations. Where the recommendation is satisfactory, it is either immediately adopted or its adoption or rejection follows a public hearing. This system has the advantage of flexibility which is lacking in the flat rate type of law described above.

Wages are also regulated by arbitration. This method is characteristic of Australian regulation. A permanent court of arbitration is established for the purpose of dealing with wage disputes and other labor disagreements. Employers and workers are legally obligated to abide by the awards of the court and strikes and lockouts in contravention of an award are penalized. Disputes are referred either directly to the court or to a conciliation board where an attempt is made to reach an agreement before resort is had to the court.

The arbitration system is used in the determination of

the wages of all grades of labor whereas the statutory minimum wage is applied only in the determination of the wages of unskilled, low-paid labor. The wage board in the United States is used in the determination of the wages of unskilled labor. In England, it is used in the determination of the wages of all grades of labor.

It is obvious that with the rise of modern industrial civilizations it is no longer possible to leave the determination of wages wholly uncontrolled. Attempts on the part of workers themselves have been accompanied by considerable success. But the efforts of their organizations must be supplemented. One effective device is the legal minimum wage. This regulatory mechanism, however, has not been universally accepted. Many competent economists and the large majority of employers regard the extension of minimum wage legislation with some misgivings. They wonder whether the proposed cure may kill the patient. Yet it must be granted that in view of labor immobility and of frequent employer reluctance to compete for labor, it is essential that legal minimum wage regulation be utilized to bring wages up to the competitive level. It is true that such regulation might result in adverse effects on employment, output, and prices

in the short run, but if the wage is set in proper relation to the productivity of the large majority of employers and employees, society benefits in the long run.

CHAPTER III

HISTORY OF MINIMUM WAGE REGULATION

We turn from the theoretical to the historical portion of our discussion of minimum wages. Regulation before the twentieth century will be briefly noted. We will review the Australasian, British, and Canadian experience during modern times. A sketch of state minimum wage legislation as well as federal legislation in the United States before 1938 will complete the chapter.

A. The Regulation of Wages Prior to the Twentieth Century

Regulation of wages during the early middle ages[1] was based on the principle of the "just price," a price fair to both parties in the transaction, more commonly, the conventional price. The regulators of wages and prices were the guilds. This arrangement provided economic security for the workers although it involved only a subsistence level of living.

The close relationship between the employer of labor and the employed, together with the security which accompanied

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[1]The middle ages as used here covers a period of about a thousand years dating from the fall of the Roman Empire in the fifth century to about the middle of the fifteenth century.

it, were severely shaken by the commercial revolution which brought with it the "commutation of services for money" whereby the performance of services in exchange for the right to hold land was replaced by the redemption of such services through money payments. This movement received a sharp impetus from the shortage of labor which followed the English Black Death epidemics of 1349 and 1351. The demands of workers for higher wages and other rights and privileges roused the employers of labor to petition Parliament for protection. Parliament responded with the Ordinance of Laborers in 1349, later the Statute of Laborers of 1351. In contrast to the regulation imposed by the principle of the "just price" which had fixed wages at their customary levels, this was maximum wage legislation--legislation designed to curb the payment of high wages.[1] It is of some significance to us for it marked the first entrance of government into the wage bargain. In spite of the penalties which the law provided, it was of little avail. Both employers and workers violated it with little hesitation. Wages, therefore, kept rising so that by the fifteenth century both the monetary and real wages of labor had reached high levels. So prosperous was labor during the fifteenth century that the period has

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[1] "The Ordinance of Laborers," English Economic History: Select Documents, ed. by A. E. Bland, P. A. Brown, and R. H. Tawney (New York, 1919), pp. 164-167.

been termed "the golden age of the English labourer."[1]

In the latter half of the sixteenth century three factors contributed to a decline in the fortunes of English labor: the rise of enclosures, the domestic system, and the rise in prices. The enclosure movement led to the dispossession of the small landholders who were forced to work on a part-time basis for the big landholders, move to the towns, or migrate to America. Those who went to the towns contributed to the oversupply of labor there. Those who remained on the land were forced to turn to homework, or the domestic system to supplement their meager incomes.[2] A factor which aggravated the unhappy condition of the workers was the rise of prices during the sixteenth century.[3] The net result of these economic changes was the destitution of the laboring population during the sixteenth century.

Parliament responded to this situation with the second Statute of Laborers of 1563, also known as the Statute of

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[1]Arthur Birnie, An Economic History of the British Isles (London, 1935), pp. 64-67.

[2]S. B. Clough and C. W. Cole, Economic History of Europe (Boston, 1941), p. 309.

[3]The rise in prices was ascribed, by the medieval theologian and economist, Jean Bodin, to five causes: the influx of precious metals from the mines of Africa and America; the practice of monopolies; the scarcity of comodities as a result of excessive exports; the luxurious consumption of commodities at home; and the debasement of the currency. A. E. Monroe, Early Economic Thought (Cambridge, 1924), pp. 123-141.

Artificers. This law gave justices of the peace the right to fix wages so that hired persons would receive a "convenient proportion of wages."[1] Unfortunately, the general effect of the activities of the justices of the peace was to keep wages low rather than high.[2]

Although the economic condition of the workers during the sixteenth and seventeenth centuries was deplorable, it became even worse with the arrival of the eighteenth century and the beginning of the industrial revolution. Wages dropped to even lower levels. Prices soared to even greater heights. Unemployment depleted income already at a starvation level.[3]

The nadir of the English worker's fortunes was reached in the early years of the nineteenth century. Then a turning point came and conditions changed for the better. The passage of factory legislation and the rise of organized labor contributed to this improvement.

The first English law which concerned working conditions in factories was enacted in 1802. It limited the working hours of apprentices in the cotton industry to twelve per

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[1]"An Act Touching Divers Orders for Artificers, Labourers, Servants of Husbandry and Apprentices," Bland, Brown, and Tawney, op. cit., pp. 325-333.

[2]Clough and Cole, op. cit., pp. 224-225.

[3]Jurgen Kuczynski, "Great Britain, 1750 to the Present Day," A Short History of Labour Conditions under Industrial Capitalism, Vol. I, Part 1 (London, 1944), pp. 42-46.

day. Subsequently, additional legislation dealing with the length of the working day was enacted. Meanwhile, the skilled and semi-skilled workers were organizing themselves, in small groups at first, and then in increasing numbers until by 1875 they had left the ranks of the sweated groups. The mass of workers, however, the unskilled and unorganized, still remained in dire straits.[1]

What lessons can we learn from this brief review of early English history? Several points are outstanding. First of all government intervention in these early days favored the employing class.[2] Legislation to keep wages down was enacted readily but legislation to raise wages received only the sluggish attention of Parliament. Starvation and poverty were accepted then as the lot of the workers and any attempt to alleviate their condition was regarded with suspicion. Yet even in those early days we find the beginnings of the successful operation of legislation and collective bargaining in their interests. The Factory Acts and the activities of organized labor joined in an attempt to raise living standards.

We turn now to an examination of the progress of minimum wage regulation in modern times.

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[1] Barbara N. Armstrong, Insuring the Essentials (New York, 1932), pp. 30-38.

[2] "Whenever the law has attempted to regulate the wages of workmen it has always been rather to lower them than to raise them." Adam Smith, The Wealth of Nations (New York, 1933), Book I, Chapter X, p. 119.

B. Foreign Experience

Four countries have been selected to illustrate the genesis, structure, problems, and economic effects of minimum wage legislation abroad: New Zealand, Australia, Great Britain, and Canada. They have been chosen because much of the legislation which we have in this country has been patterned according to theirs and, furthermore, because we have many economic political, and social points of similarity.[1]

1. New Zealand

The New Zealand experience in state wage regulation is the oldest of those we are considering here, extending as far back as 1894. Wages in New Zealand are regulated in

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[1]Readers interested in the minimum wage legislation of countries other than those described in the following pages are referred to the sources listed below:

Barbara N. Armstrong, op. cit., pp. 111-124. Mexico, South America, Europe, and South Africa.

International Labour Office, The Minimum Wage, An International Survey, Studies and Reports, Series D (Geneva, 1939), pp. 50-99, 144-150, and 178-190. Belgium, Czecho-Slovakia, France, Ireland, and Peru. See also various articles in the International Labour Review and the I.L.O. Yearbook.

U.S. Bureau of Labor Statistics, Minimum Wage Legislation in Various Countries, Bulletin No. 467 (Washington, 1928), pp. 67-125. South Africa, Mexico, France, Norway, Argentina, Germany, Spain, Switzerland, Austria, Czecho-Slovakia, Uruguay, Hungary, Poland, Italy, and Russia.

Also helpful are the following reprints on "Labor Conditions in Latin America" from the Monthly Labor Review: Numbers 1082, 1330, 1405, 1467, 1523, 1564, 1607, 1674, 1705, 1744, and 1766.

The following reprints from the Monthly Labor Review have information on minimum wages in European countries: Numbers 1561, Greece; 1580, Bulgaria; 1592, Yugoslavia; 1601, Rumania; 1690, Norway; 1696, France; 1709, Denmark; 1735, Germany; 1617, Belgium; and 1741, the Philippines.

three ways: In the first place, minimum wage rates may be made parts of awards of the New Zealand Arbitration Court in connection with the settlement of disputes between employers and registered unions. Secondly, minimum wage rates may be written into statutes regulating wages. Thirdly, minimum wage rates may be fixed by law and then extended by Orders in Council to other workers after consultation with labor organizations and employers. In short, New Zealand regulates wages indirectly through compulsory labor arbitration and directly through statutory enactment. Furthermore, it will be noted, control applies not only to low-paid unskilled labor but to all grades of labor, both skilled and unskilled. We will consider first the regulation of wages through compulsory arbitration.

In 1894, the passage of the Industrial Conciliation and Arbitration Act created the New Zealand Arbitration Court, a tribunal whose function was the settlement of industrial disputes by conciliation and arbitration. In 1898, this Court obtained the power to prescribe minimum wage rates. Since then the functions of the Court have turned more and more from problems of working conditions to problems of wage determination. A setback occurred in 1932 when the Court was directed to adjudicate only disputes referred to it voluntarily by the parties involved or disputes involving only women workers. However, the election of a labor government in 1936 resulted in the return of compulsory arbitration of labor disputes.

The legislation enacted in 1936 also provided for the registration of unions, the issuance of awards covering industries on a nation-wide basis, and the fixing of basic rates of wages for covered workers so as to provide earnings high enough to enable a man to maintain a wife and three children "in a fair and reasonable standard of comfort."[1] It should be noted that this basic rate is so small that only a very few workers have benefited from it. Of greater importance are the rates set by awards and agreements which cover workers in other classes than the lowest-paid groups of workers in addition to the minimum provided by other wage-fixing legislation which is described below.[2]

Important changes in the wage-fixing provisions of the Act have occurred since its enactment. In 1918 the Court was directed to consider, among other things, changes in the cost of living in making its awards. In 1919 the Court fixed standard minimum rates for skilled, semi-skilled, and unskilled workers.[3]

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[1]International Labour Office, The Minimum Wage, An International Survey, Studies and Reports, Series D (Geneva, 1939), pp. 151-152. Cited hereinafter as I.L.O., The Minimum Wage.

[2]Ibid., p. 159. The basic weekly rate of wages of a regularly employed adult male in 1936 was 76 s. per week; for females it was 36 s. The New Zealand Official Yearbook, 1945 (Wellington, 1945), p. 552. Cited hereinafter as 1945 New Zealand Yearbook.

[3]In 1945, for example, the rates for casual labor per hour were: skilled workers, 3s. ½d.; semi-skilled workers, 2s. 8½d.; and unskilled workers, 2s. 7½d. 1945 New Zealand Yearbook, p. 552.

The Court bases its operations on three principles: the rule that in fixing of minimum wages for a trade the rates paid in the district concerned and elsewhere should be considered, i.e., that "fair wages" be paid; that consideration be given to the requirements of skill and responsibility and to other job characteristics such as onerousness, danger, and irregularity of employment; and that the wage paid should be a living wage. Rates have risen with increases in the cost of living but there has been no indication as to how the living wage is to be determined or how much it should be. Finally, ability of industry to pay is also given consideration. At first, the ability of particular industries to pay was the decisive factor. At present the principle is made applicable only on the basis of the ability of the country as a whole to pay. The simultaneous application of all of these principles would ordinarily result in conflicts but such conflicts have not occurred in New Zealand since simultaneous application has been avoided and, further, liberal interpretation of the provisions of the Act has enabled the Court to apply the principles as necessary to particular cases.[1]

An important feature of the Act is the provision for the extension of the terms of an agreement between a registered trade union and a registered employers' association to all workers and employers in the industry where the agreement involves the majority of the workers in an industry and where

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[1]I.L.O., The Minimum Wage, pp. 170-171.

the extension is in the public interest. The agreement then loses its voluntary character and becomes mandatory in nature. This arrangement, it has been asserted, tends to prevent industrial disputes by establishing labor conditions satisfactory to a majority of the workers and employers in an industry.[1]

The Act is administered by the Minister of Labour. The Inspectors of Factories and Inspectors of Mines have the power to compel employers to open their books for the purpose of determining compliance with the Act and may be empowered by the Arbitration Court to interview workers at the employers' places of business. Failure to comply with an award or participation in strikes or lockouts in contravention to an award are subject to penalty. However, workers may bargain individually for higher wages. Workers may sue for amounts legally due but unpaid or the Inspectors may sue in their behalf under certain conditions.[2]

Minimum wage protection has been extended to workers in connection with other legislation. The Factories Act and the Shops and Offices Act prescribe specific rates which must be paid workers employed in factories, shops, and offices. An extra premium must be paid for overtime. Administration is in the hands of the Minister of Labour. Failure to pay

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[1]Z. C. Dickinson, Collective Wage Determination (New York, 1941), pp. 497-498.

[2]I.L.O., The Minimum Wage, pp. 157-158.

the applicable minimum is punishable by a fine for each day of default. Inspectors may sue for recovery in behalf of persons entitled to payment.[1]

The Agricultural Workers Act, passed in 1936, prescribes minimum weekly rates of pay for workers on dairy farms. Rates became effective on October 1, 1936, and continued to July 31, 1937, after which rates were fixed by Orders in Council. The Act has been extended to other classes of farm workers by Orders in Council so that by 1941 wool, meat, grain, and other groups of agricultural workers were covered.[2]

A major step in the direction of complete coverage was taken on December 7, 1945, when New Zealand passed the Minimum Wage Act, 1945.[3] This law provides that, regardless of any other law or legal arrangement, all workers over twenty-one years of age must be paid the minimum which the act prescribes.[4] If a worker can prove to an Inspector of Awards

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[1] Ibid., pp. 161-163.

[2] Ibid., pp. 164-169.

[3] 9 Geo. VI (1945) No. 44.

[4] Male workers: two shillings and ninepence per hour if paid by the hour or by piecework; one pound two shillings a day if paid by the day; and five pounds, five shillings a week in all other cases.
Female workers: one shilling and eightpence an hour if paid by the hour or by piecework; thirteen shillings and fourpence a day if paid by the day; and three pounds three shillings a week in all other cases.
Ibid., Sec. 2 (2).

that he is incapable of earning the prescribed minimum, the latter may grant him a permit to accept a lower wage. There are provisions for the exemption of apprentices and other persons employed in connection with the receipt of training and instruction. The act contains the unusual provision that no deductions in connection with time lost can be made except "by reason of the default of the worker, or by reason of his illness or of any accident suffered by him."[1] Thus, a guaranteed wage is provided for the worker.

Students of the New Zealand compulsory arbitration system regard it as an example of successful legal minimum wage control. They note that the wages of weakly organized workers have been stabilized; that it has offset the effects of cyclical fluctuations to some extent;[2] that it has resulted in, or at least been accompanied by, a striking decline in the number of labor disputes; and that the awards and industrial agreements have not resulted in a substantial amount of unemployment.[3]

Comment regarding other New Zealand minimum wage legislation has also been favorable. The Factories and Shops and Offices Acts have been especially helpful in the case of young and inexperienced workers, large numbers of whom were paid

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[1] Ibid., Sec. 2 (5).

[2] I.L.O., The Minimum Wage, pp. 172-175.

[3] U.S. Bureau of Labor Statistics, Minimum Wage Legislation in Various Countries, Bulletin No. 467 (Washington, 1928), pp. 28-30.

practically nothing for their work prior to the enactment of these laws. The Agricultural Workers Act has had considerable wage-raising effect as is indicated by the fact that the minimum rate it provides for adult male workers is 60 percent higher than the average rate paid six months prior to the act's effective date.[1] There has not been sufficient experience with the Minimum Wage Act of 1945 to have its results evaluated.

2. Australia

We turn now to Australia for a view of the development of state wage regulation in a country physically much larger than New Zealand, containing a larger population and possessed of a more industrialized economy. Here, too, regulation has been tied largely to the country's system for the arbitration of wage disputes. In addition, we meet another method of wage control: the wage board system.

The Commonwealth Court of Conciliation and Arbitration was established in 1904 when the Federal Parliament of Australia passed a law creating the court for the purpose of achieving industrial peace through the conciliation and arbitration of industrial disputes. This court subsequently engaged in the fixing of wages. State legislation had its origins in Victoria in 1896 followed by South Australia and Western Australia in 1900 and by New South Wales in 1901. Wage controls in Queensland were enacted in 1907 and in Tasmania in

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[1] I.L.O., The Minimum Wage, pp. 175-176.

1910. The laws of all of the states with the exception of Victoria and Tasmania are related to compulsory arbitration. Victoria and Tasmania regulate wages only through wage boards.[1]

Three terms which are used in discussing Australian wage regulation should be defined:[2] (1) the basic wage, the basis of all awards made by the commonwealth and state arbitration courts, which awards are amended with changes in the basic wage; (2) the secondary wage, the extra payment added to the basic wage for extra training or other exceptional qualities; and (3) the minimum wage, the lowest rate payable in a particular industry and which may be equal to or in excess of the basic wage.

In general, the fixation of wages by the courts of both the commonwealth and state tribunals is similar. The courts determine a basic or living wage on which are built minimum wages for different occupations and levels of skill within occupations. Although the wage boards of Victoria and Tasmania do not fix basic rates, they are strongly influenced by the decisions of the Commonwealth Court.[3] Basic wages in

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[1]Orwell de R. Foenander, Towards Industrial Peace in Australia (Melbourne, 1937), pp. vii-ix.

[2]Australian Commonwealth Bureau of Census and Statistics, Official Yearbook of the Commonwealth of Australia, No. 35 (Canberra, 1944), p. 469. Cited hereinafter as Australian Yearbook No. 35.

[3]I.L.O., The Minimum Wage, pp. 5-6.

Australia which are fixed by courts established under the commonwealth and state arbitration acts fluctuate from time to time in accordance with changing economic conditions. The Commonwealth Arbitration Court is constitutionally limited to the settlement of industrial disputes extending beyond the confines of any state.[1]

The "basic wage" concept was promulgated in 1890 by Sir Samuel Griffith, Premier of Queensland. In 1905 the doctrine was again expressed by the New South Wales Arbitration Court. Finally, in 1907 the first basic wage was declared in an Australian court by Mr. Justice Higgins, President of the Commonwealth Court of Conciliation and Arbitration. He stated that the lowest wage which could be paid to an unskilled laborer should be based on "the normal needs of an average employee regarded as a human being living in a civilized community."[2] Such a wage, for a family of five in Melbourne, was declared to be 7s. per day or £2 2s. per week.[3]

The Commonwealth Arbitration Court adopted the Harvester basic rate in its awards. Its use was continued until 1913 at which time it was increased in line with the increased cost of living. A further increase was made in 1922 as a result of the rise in prices and provision was made for quarterly

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[1] Australian Yearbook No. 35, p. 469.

[2] Familiarly known as the "Harvester Wage" since the declaration was made as the result of a proceeding in connection with the Sunshine Harvester Works of Victoria.

[3] Australian Yearbook No. 35, p. 469.

adjustment with fluctuating purchasing power.[1] In 1933 the Harvester wage was redefined to include not only the prerequisites necessary under the original definition, but also, in addition, compensation due to any "peculiar condition of labour and environment." Skilled labor rates were thus built upon the "basic" wage. In 1930 as a result of the depressed state of the economy, pressure was placed on the court to reduce wages in addition to the reduction resulting from the falling price level. Such a reduction was effected in February, 1931. On April 30, 1934, a new basic rate was established for the six capital cities of Australia as a result of a hearing on an application by the unions for an increase in the basic wage. The wage was increased by increments to be considered as an integral rather than an adjustable part of the wage.[2] In June, 1937, as a result of the improvement in

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[1]Regular adjustments at quarterly intervals based on fluctuations in the cost of living have been made under the awards of the Commonwealth Court since 1922. Similar provisions are contained in State awards but the bases and dates are different. I.L.O., The Minimum Wage, p. 40.

[2]The basic wage in the various state capital cities recently was:

Sydney	£5. 8. 0	Adelaide	£5. 2. 0
Melbourne	£5. 6. 0	Perth	£5. 2. 0
Brisbane	£5. 2. 0	Hobart	£5. 5. 0
	Six Capitals	£5. 5. 0	

Source: Personal letter from the Department of Labour and National Service of the Commonwealth of Australia, January 22, 1947.

economic conditions, the basic wage was increased 10 percent. Another similar request by the unions in 1940 was tabled for later consideration after a hearing. At this time the Court unanimously stated that the basic wage should be related to the size of the family. The court felt that a child endowment plan might be the solution of the problem of inadequate wages.[1] Such a system was established on July 1, 1941, with the result that the wage of every Australian family is supplemented by a child endowment of 5s. a week paid by the commonwealth government for every child under sixteen years of age after the first in every family, regardless of the size of the family income.[2]

Several of the states have adopted state basic wages in connection with their industrial arbitration courts. In New South Wales the basic rate is in line with the commonwealth rate. In Queensland and Western Australia the basic rates are based on a family of five and fluctuate quarterly with changes in the cost of living. In South Australia the Industrial Court determines the wages of adult male and female employees after a public hearing.

In Victoria and Tasmania the wage board system of wage

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[1] Australian Yearbook No. 35, pp. 469-473.

[2] Ibid., p. 480.

rate determination prevails.[1] Each board determines the minimum rate to be paid in each industry or trade. Rates are adjusted with changes in the cost of living. In Victoria the wage boards must adopt those provisions of the commonwealth awards which are not in conflict with the state law.[2]

A variety of problems have arisen. The courts have had to make practical decisions as to what a living wage is, and this has created difficulties. Thus, attempts have been made to adjust the basic wage to the cost of living but this principle has been discarded in situations where the competitive problems of employers made its strict application impossible. Attempts to adhere to established principles of wage determination have given way to compromises since the courts operate on the basis that they must prevent as well as settle industrial disputes. Furthermore, attempts to arrive at objective decisions have been hampered by the absence of adequate information regarding profits, the cost of living, production costs, and other data.[3]

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[1]Minimum wage regulation in Britain and the U.S.A. are modelled on Australian wage boards. These two countries have turned to compulsory wage determination only under the stress of war except to a limited extent under the N.R.A. codes in which above minimum wage rates were controlled. For an analysis of above-minimum wage regulation under the N.R.A. codes see Leverett S. Lyon et al., The National Recovery Administration (Washington, 1935), Chapter XIII.

[2]Australian Yearbook No. 35, pp. 474-477.

[3]Foenander, Towards Industrial Peace in Australia (Melbourne, 1937), pp. 245-252.

A serious problem is the difficulty which arises from conflicting and overlapping awards which result from division of powers between the commonwealth and state governments. Although the authority of the Commonwealth Court is limited to interstate disputes, employers and employees have not found it difficult to make local disputes interstate ones by enlisting the cooperation of friends in other states. The necessity of one authority in the field of wage determination is obvious.[1] This difficulty has been mitigated, however, by two circumstances: (1) a decision of the Australian High Court invalidating conflicting state determinations, and (2) the increasing voluntary use by state authorities of the basic wages fixed by the Commonwealth Court.[2] The lack of coordination in wage regulation is also exemplified in the failure of other agencies to cooperate with arbitration so that wage fixing can be made to operate smoothly with other public policies. However, this lack of coordination has been held to be a part of the price which must be paid in connection with the operation of a democracy--a price which is not too high.[3]

Some mention has been made of enforcement problems. It has been pointed out that the effectiveness of the legal wage

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[1]Orwell de R. Foenander, Solving Labour Problems in Australia (Melbourne, 1941), p. 134.

[2]Z. C. Dickinson, Collective Wage Determination, p. 499.

[3]Ibid., pp. 499-500.

determinations has been limited to the extent that some workers have not cooperated in the enforcement of the laws. Such workers usually are foreigners or refugees whose ignorance is exploited. Where the workers are Australians, the fear of discharge is the basic reason for this failure to cooperate.[1] However, any attempts to evade the awards of the courts by the use of the lockout in the case of an employer, or of a strike in the case of a labor organization, are effectively penalized. The imposition of penalties supplemented by the force of public opinion has resulted in a fairly complete acceptance of the awards of the arbitration courts.[2]

Australian wage regulation has been the subject of a number of criticisms. Although an attempt has been made to retain the established differentials between the wages of skilled and unskilled workers, the attempt has not been regarded as successful. Critics have repeatedly asserted that regulation has favored the unskilled worker.[3] In addition, the statement has been made that regulation has discriminated in favor of industrial as against agricultural

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[1]Foenander, Solving Labour Problems in Australia, pp. 126-127.

[2]Dickinson, Collective Wage Determination, pp. 501-502.

[3]It should be noted, however, that there was a universal reduction in the percentage wage margin of skilled workers during the World War I period because of the dearth of skilled workers and because of the practice in most countries of granting equal cost of living wage increases to all workers. Ibid., p. 504.

workers although the latter have received some benefits from regulation. Finally, the adjustment of wages with fluctuations in the cost of living has been held to be disadvantageous in two respects: First, it is asserted that such adjustment has resulted in the stabilization of real wages at levels lower than what is indicated by the nation's rising productivity. In the second place, it has been alleged that there has been some reluctance of workers to work at optimum efficiency because increased production reduces prices which in turn reduces wages.[1]

Yet, in spite of these criticisms, the regulation of wages is regarded as having been beneficial on the whole. An early study details the successful results of the Victorian wage boards. In shows that sweating was eliminated, strikes decreased, and a better understanding of one another's problems attained by the parties to wage controversies as a result of wage board operation. Although some unemployment followed wage board activity, it was kept at a minimum by the issuance of permits to pay subminimum rates to the aged and the infirm. Finally, the study indicated, both employers and employees were unanimous in their preference of the wage board system to any other system of wage determination. No one wanted them abolished.[2]

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[1]I. L. O., The Minimum Wage, pp. 43-46.

[2]Mathew B. Hammond, "The Minimum Wage in Great Britain and Australia," Annals of the American Academy of Political and Social Science, XLVIII (July, 1913), 31-36.

These early conclusions regarding wage boards have been confirmed by later studies.[1] Enthusiastic reports regarding the arbitration system in Australia can also be cited. Thus, the Commonwealth Court is regarded as outstandingly successful in the promotion of industrial peace. It is credited with having helped to increase industrial output with no untoward effects on employment. It is regarded as the means whereby less prosperous elements in the Australian community have been enabled to participate in the advancement of Australian progress. It has demonstrated the possibility of achieving industrial peace and industrial justice with no untoward effects on production.[2]

One can only conclude, then, that Australian regulation, regardless of its disadvantages, has been accepted wholeheartedly by all elements of the Australian population. Employers want it because it has eliminated "unfair" competition and minimized industrial disputes; workers want it because it is vital to those with little bargaining strength and helpful to the strongly organized workers in their wage-raising efforts; and the community wants it because of its great contributions to industrial peace.[3]

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[1]Cf. U.S. Bureau of Labor Statistics, Minimum Wage Legislation in Various Countries, pp. 18-21.

[2]Foenander, Solving Labour Problems in Australia, pp.1-7.

[3]Cf. I.L.O., The Minimum Wage, pp. 46-47.

3. Great Britain

The third country chosen for examination, Great Britain, is of interest to us for a number of reasons. American traditions, law, and political and economic organization have much in common with those of Great Britain. In addition, the British wage boards constitute an excellent example of a successful, democratic, and popularly accepted method of wage determination.

During the year 1795-1796 a minimum wage bill was introduced into the House of Commons. This bill was designed to protect the poor from the "avaricious employer, who might take advantage of their necessities, and undervalue the rate of their service." It proposed to do this by empowering justices of the peace to fix minimum wages. Those who opposed the enactment of this bill suggested that other means be used to eliminate the evils of poverty: the amendment of the laws of settlement, the encouragement of industrial schools, the advancement of "small capitals." The opposition noted that it would result in the unemployment of "those who by sickness or old age were rendered incapable of doing so much as a common labourer, and who consequently would be rejected for persons of more strength and activity." The bill failed to pass.[1]

More than one hundred years later, in 1909, Parliament enacted the first Trade Boards Act providing for the fixing

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[1] "Debates on Whitbread's Minimum Wage Bill," Bland, Brown, and Tawney, op. cit., pp. 554-568.

of wages by wage boards where the rate of wages was low as compared to other employments. Each wage board was to contain an equal number of employers and employees and "appointed members who were independent persons."[1] This law was first applied to four industries: paper box making, chain making, machine-made lace and net finishing, and wholesale ready-made tailoring. By 1916 there were thirteen wage boards in eight industries covering about half a million workers.[2]

The passage of the second Trade Boards Act in 1918 saw the introduction of a new principle in legal minimum wage regulation. Wage boards could now be established where there was no adequate machinery for the regulation of wages. Where previously regulation was applied strictly for the purpose of preventing sweating, the new law provided for the regulation of all grades of labor in trades for which boards were to be established.[3]

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[1]These boards contain between 6 and 24 members the number varying with the variety of interests to be represented. Ordinarily the number of appointed members is three, consisting of two men and one woman. The chairman and the deputy chairman are appointed members designated for these offices by the Minister of Labour. An attribute requisite of appointed members is their impartiality. Accordingly, persons engaged in political activity or closely associated with workers' or employers' organizations are excluded. Harry E. Carlson, "The British Trade Boards System," Monthly Labor Review, XLVI (May, 1938), 1093-1094. For a detailed discussion of the way in which these boards operate see Hector Hetherington, "The Working of the British Trade Board System," International Labour Review, XXXVIII (October, 1938), 472-480.

[2]Dorothy Sells, British Wages Boards (Washington, 1939), pp. 19-22.

[3]Ibid., pp. 29-31.

Other legislation followed. The abolition of the agricultural wage boards in 1921 was succeeded in 1924 by the Agricultural Wages Act covering the wages of unskilled agricultural labor in England and Wales. The year 1928 witnessed the passage of the Road Haulage Wages Act covering certain road transport workers. This last piece of legislation is notable in that it provided for subsistence payments and guaranteed weekly payments as well as minimum wage rates, overtime, and holiday pay.[1] The Catering Wages Act, covering the catering industry, followed in 1943.

On March 28, 1945, Britain's most advanced form of wage legislation, the Wages Council Act, was enacted. The act repealed and re-enacted, with certain modifications, the first and second Trade Boards Acts. Wage boards established by the Trade Boards Acts of 1909 and 1918 became Wages Councils and the Minister of Labour and National Service was authorized to establish new councils under certain conditions. He is permitted to do so in any one of three ways:[2]

(1) As in the 1918 act he may establish a council on his own initiative if he believes that there is no adequate voluntary machinery which effectively regulates the remuneration of workers and that the establishment of a council is expedient.

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[1] Ibid., pp. 34-43.

[2] British Ministry of Labour and National Service, Wages Boards and Councils, typewritten statement (London, 1946). Cited hereinafter as B.M.L.N.S., Wages Boards and Councils.

(2) Employer-employee groups may petition the Minister to establish a council on the basis that existing machinery for wage regulation is or will be inadequate in which case the Minister may refer the petition to a Commission of Inquiry, if he believes that there is ground for doing so.

(3) The Minister may on his own initiative ask a Commission of Inquiry to consider whether a council should be established, if he considers that adequate regulation may not be present.

The powers of the wages councils are much more extensive than the trades boards in at least two respects. In the first place, on the basis of the precedent in the Road Haulage Wages Act, the term "remuneration" may be employed to further the establishment of guaranteed weekly pay instead of "minimum rates of wages" and it can recommend holidays with pay beyond one week. Secondly, the Act provides for the appointment of a central coordinating committee wherever such coordination of two or more councils will more effectively carry out the purposes of the legislation.[1]

Another provision of the Act which is of major importance is that which continues, with some modifications, "those provisions of the wartime Conditions of Employment and National Arbitration Order 1940 which requires employers to observe conditions not less favorable than the conditions determined

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[1]Canadian Department of Labour, Labour Legislation Branch, Post-War Wages Policy in Britain (Ottawa, 1945), pp. 4-5.

jointly for the industry concerned, by organizations of employers and workers in the district." In effect, this means that the terms of collective agreements will be extended so as to cover all employers and workers in the industry concerned unless more favorable terms are in effect. In addition, decisions made by joint conciliation boards and industrial councils become applicable generally on the same basis.[1]

The significance of this legislation cannot be overestimated. The extension of regulation to practically all wages which will be the eventual result of this law bears out the fact that wages are interdependent on one another. Affecting the wages of the unskilled low-paid worker exerts profound effects on other workers. The legal minimum wage when enacted seems to be but the beginning, the prelude for further and more complicated regulation.[2] Significant too is the provision for guaranteed weekly pay. Obviously, the British have realized that a legal minimum hourly rate alone cannot solve the problem of poverty.

Some problems which have arisen in the course of all this may also be noted. One of the weaknesses of the British wage boards is their lack of adequate statistical and other data necessary for the scientific determination of wages. They do not have investigatory powers and the lack of facts

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[1] Ibid., pp. 1-4. For a detailed description of the act see "British Wages Councils Act, 1945," Monthly Labor Review, LXI (July, 1945), 120-123.

[2] Cf. Dickinson, Collective Wage Determination, pp. 486-487.

on which to base determinations results, on occasion, in faulty decisions. Nevertheless, the trend is in the direction of the assembly and use of more and more pertinent data.[1]

Another weakness is the failure of the British legislation to indicate the principles on which wage fixing is based. No scientific standards are used in determining what the minimum wage should be. Instead of a scientific determination of what the wage should be, e.g., a wage that industry can pay, the value of the worker's services, or the "fair wage," we find decisions made purely on a compromise basis. In the long run the wage rate is determined on the basis of the application of a variety of factors: the bargaining strength of the opposing parties, the ability of industry to pay, the supply of and demand for labor, the rates paid for similar work, the rise and fall of prices, and profit margins. However, this situation is regarded as one not wholly without merit. It permits the boards to be genuine collective bargaining agencies. It gives them an opportunity to deal with the various problems which come before them without the necessity of subordinating pertinent issues to standards and principles to which they would frequently be unable to adhere. Thus, the adoption of differentials according to area or

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[1]Sells, op. cit., p. 127. A similar criticism has been leveled at the New Zealand Arbitration Court. See E. J. Riches, "Conflicts of Principle in Wage Regulation in New Zealand," Economica, (August, 1938), 316-332. Cited in Dickinson, Collective Wage Determination, p. 503.

occupation is facilitated. Compromises between the standards of the employer and employee representatives are arrived at more easily.[1]

Enforcement in general has not presented any problems. However, in the case of the enforcement of minimum wages in agriculture some difficulties have been encountered. The individualism of the farmers and the decentralization of farming have contributed to these difficulties. However, most of the violations in this connection are overtime rather than minimum wage underpayments.[2] Another source of difficulty in enforcement after 1920 was the biased nature of the courts. Some of the judges were quite friendly to the opponents of regulation and, on occasion, refused to prosecute or to compel the payment of back wages.[3]

It is generally agreed that wage regulation has been of considerable benefit to the British people in a number of

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[1]I.L.O., The Minimum Wage, pp. 130-132, and Sells, op. cit., p. 128. Clay also feels that it is best for the boards to be flexible and not to adhere to rigidly established principles. He notes that the Cave Committee which reviewed the operation of the wage board system in 1922 complained that no principles to guide the boards were contained in the law which established them. However, the committee itself could furnish no guidance as to what a reasonable minimum is nor how to obtain it. The reason, Clay states, for the absence of such principles is because no one agrees as to what the minimum should be and even if agreement could be obtained, it would be impossible to fix such a wage, for the minimum to be applied varies with the fluctuations of economic conditions. Henry Clay, Problems of Industrial Relations, (London, 1929), pp. 231-235.

[2]I.L.O., The Minimum Wage, pp. 140-141.

[3]Burns, Wages and the State, pp. 170-171.

ways. Some of the more important results have been the following:

(1) The enactment of minimum wage legislation promptly raised industrial wage rates for both men and women. With the price rise of World War I minimum wage rates rose accordingly. And, with the postwar depression the regulated rates held quite steadily, declining less than non-regulated rates. Agricultural rates, too, have been prevented from declining during depression periods although the level of agricultural wages is low relative to urban wages.[1] One student of the subject concludes that "the wage-fixing machinery has been a major factor in raising wages in the industries to which it applies" and that "wages boards have probably also exerted an important stabilizing influence upon general wage rates . . . and may be credited with the steady upward trend of real wages and therefore of potential purchasing power. . . ."[2]

(2) Regulation has not resulted in any increase in unemployment. Investigation of complaints alleging such effects have usually disclosed that factors other than minimum wage legislation have been the basic causes of the unemployment. Most employers were able to meet the minima resulting from the 1908 legislation because, firstly, the higher wages resulted in an increase in the efficiency of the workers, and

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[1] I.L.O., The Minimum Wage, pp. 132-136.

[2] Sells, op. cit., p. 278.

secondly, the employers radically revised their methods of production. Workers who became unemployed as a result of such changes were eventually reabsorbed. Similar results followed the 1918 legislation.[1]

(3) Regulation has caused a decrease in the number of homeworkers in certain industries. Continuous and persistent enforcement has made homework difficult to carry on with the result that most homework industries and their employees have been moved, willy-nilly, to a higher status in industry. Where homework still is prevalent, wages have risen considerably.[2]

(4) The minimum has tended to become the maximum but this tendency has been controlled by fixing special minimum wage rates for the skilled occupations in order that the differentials between skilled and unskilled occupations be maintained. "Skilled rates" are fixed by three-fourths of all the wage boards for special occupations. Only in those trades which are relatively unskilled have no special rates been established. Thus, the criticism that the minimum might become

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[1] J. W. F. Rowe, Wages in Theory and Practice (London, 1928), pp. 200-205.

[2] For example, of five to six thousand homeworkers in the Nottingham lace industry prior to World War I only 532 homeworkers remained in 1932. In the tailoring industry where there was no such reduction, wages of the 3,500 to 5,000 homeworkers rose from 42s. 9d. for a 56½ hour week for an adult skilled worker in 1906 to 82s. 6d. for 46½ hours in 1930. Gertrude Williams, The State and the Standard of Living (London, 1936), p. 128.

the maximum has been avoided.[1] Another factor which offsets the tendency for the minimum and the maximum to approximate one another is the practice of unions to enter into collective bargaining agreements which provide for rates which are higher than the minima prescribed by the wage boards.[2]

The wage boards have had other salutary effects. Minimum wage legislation has increased the membership and raised the status of trade unions. Employers have benefited in that they have expended their trade organizations in numbers and membership in order to meet labor organizations on equal terms and to properly represent themselves on the wage boards. Such organizations have stabilized industry and have raised the plane of competition. Employershave benefited from the elimination of employers who competed solely on the basis of low wages. They have gained from the contribution made by the boards to the decrease in the number and intensity of industrial disputes. Such reduction is ascribed not merely to the removal of sweating from the English industrial scene but rather to the fact that the wage boards present an opportunity for employer and worker representatives to meet in friendly discussion and arrive at an understanding of each other's problems. Finally, the legislation has contributed to an over-all increase in efficiency: to employee efficiency

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[1]Sells, op. cit., pp. 200-201.

[2]Ibid., pp. 288-290.

insofar as well-nourished employees are more efficient employees; to employer efficiency insofar as employers have made an attempt to meet increased labor costs by increased mechanization with its greater attendant efficiency.[1]

4. Canada

Having considered Britain and her Australasian possessions in some detail, we need spend little time on Canadian minimum wage legislation. Some attention to the Canadian experience is justified in view of Canada's proximity to our boundaries and our common economic, social, and political problems.

The history of the legal minimum wage in Canada dates from 1918 when minimum wage laws were enacted in Manitoba and British Columbia. Since that time the movement has grown apace so that at present there are in operation minimum wage laws in all of the provinces except Prince Edward Island.

Generally, the laws provide for tripartite boards established for industries and trades where the need for them is indicated and called to the attention of a designated public official. An important development in the Canadian legislation is the extension of regulation to men as well as women in all of the provinces which regulate wages except Nova Scotia. Such extension was initiated during the early

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[1]Sells, op. cit., pp. 269-270. For other analyses which bear out one or more of the above conclusions, see Hetherington, op. cit., pp. 479-480, and Carlson, op. cit., p. 1099.

thirties and completed by 1939. In two of the provinces the same rates have been fixed for both sexes where they are employed in the same class of workplace. In the others the rates differ for the sexes.[1]

In addition to the above legislation, Ontario, Alberta, Saskatchewan, New Brunswick, and Nova Scotia have Industrial Standards Acts which provide that the employers and employees in an industry may petition the provincial Minister of Labour to call a conference at which a schedule of wages and hours for the industry may be decided. The Minister of Labour may then make this schedule mandatory if, in his opinion, it is a proper one. The Minister may also establish advisory committees consisting of representatives of labor and industry to assist him in carrying out the terms of the schedule. Similar provisions are found in Part II of the Manitoba Fair Wage Act.[2]

The Collective Agreement Act of Quebec provides that collective labor agreements may be submitted to the Minister of Labour who may make them mandatory by Orders in Council for the entire industry affected if he believes that the conditions in the agreement apply to a major portion of the

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[1]Canadian Department of Labour, Labour Legislation Branch, Labour Legislation in Canada (Ottawa, 1945), p. 18. For a schedule of the weekly minimum rates for experienced workers under the provincial minimum wage acts see Canadian Department of Labour, Labour Legislation Branch, Provincial Labour Standards Concerning Child Labour, Annual Holidays, Hours of Work, Minimum Wages, and Workmen's Compensation (Ottawa, 1946), p. 7.

[2]Labour Legislation in Canada, p. 18.

industry. This arrangement is regarded as superior to that provided for in the Industrial Standards Acts described above for it operates so as to present the Minister of Labour with a fait accompli, i.e., a completely formulated agreement which he may or may not approve. In the Industrial Standards Acts, however, it is necessary to secure the approval of the Minister to call a conference for the purpose of arriving at such an agreement for subsequent extension under the acts.[1]

It should be noted that wage rates under minimum wage legislation can be made mandatory for an industry without the industry's consent, whereas under the Industrial Standards Acts and the Quebec Collective Agreement Act the consent of the industry is necessary. Furthermore, minimum wage legislation generally covers unskilled labor, whereas under legislation involving the extension of agreements both skilled and unskilled labor are covered.

Some indication of the extent of provincial activity in the field of minimum wage legislation is shown by the record of British Columbia for 1945. During this year the provincial Department of Labour made more than 9,000 inspections. Restitution totalling more than $12,500 was paid to about 350

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[1]The Quebec Act is fully described in L. C. Marsh, "The Arcand Act: A New Form of Legislation," The Canadian Journal of Economics and Political Science, II (August, 1936), 404-419.

workers. Five employers were fined and given the alternative of serving jail sentences.[1]

The Quebec Collective Agreements Act has resulted in a large number of wage increases.[2] Coverage of the workers by this Act is gaining steadily.[3] Coverage has been concentrated largely among the construction and clothing and garment workers. Wages have been standardized.[4]

C. American Experience

Legal minimum wage regulation in the United States is divided between the federal and state governments. Careful attention must be given to the history and problems of state minimum wage legislation for much of what is current in federal labor legislation, especially the Fair Labor Standards Act, is based on the state experience. Furthermore, there can be no real understanding of federal minimum wage control unless one possesses an adequate background of knowledge of state minimum wage legislation with which it is intertwined.

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[1]Province of British Columbia, Department of Labour, Annual Report for the Year Ended December 31, 1945 (Victoria, 1946), pp. 50-52.

[2]These increases are estimated at from $2.00 to $5.00 per capita of those covered, totalling about $8,000,000 in March, 1936. Marsh, op. cit., p. 410.

[3]In March, 1936, 135,000 workers or 28 percent of the workers in Quebec were covered. Loc. cit.

[4]Ibid., p. 411.

1. State Regulation[1]

A number of factors contributed to the enactment of the Massachusetts minimum wage law of 1912, the first law regulating minimum wages in this country. The passage of the first Trade Boards Act in 1909 in Great Britain did not pass unnoticed in this country. In addition, various studies shortly thereafter served to draw the attention of the public to the need for the improvement of labor conditions in America during this period. As a result, a committee consisting of representatives of liberal organizations petitioned the Massachusetts legislature in 1911 for a commission to study the advisability of minimum wage legislation. A bill providing for the establishment of such a commission was enacted although so little money was appropriated for its support that a satisfactory report by it was all but precluded. A report was issued, nevertheless, in January, 1912.[2]

The report showed that a considerable number of women were being paid less than $6.00 per week and some less than $5.00. There seemed to be little relationship between productivity and the wages paid. The commission recommended the

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[1]The reader interested in a thoroughly detailed study of wage regulation during pre-revolutionary and revolutionary America is referred to Chapters I and II of Richard B. Morris' Government and Labor in Early America (New York, 1946).

[2]U.S. Department of Labor, Women's Bureau, History of Labor Legislation for Women in Three States (Washington, 1929), pp. 55-57.

enactment of a law establishing a permanent minimum wage commission to investigate industries paying less than a living wage and, where indicated, to establish wage boards to recommend minimum wages for industry. The commission gave eleven reasons for its recommendations among them being the protection of the health and efficiency of women workers, the elimination of strikes, the elimination of exploitation and sweating, prevention of undercutting of wages and the increasing of employer efficiency.[1]

As a result of the opposition to the bill at the legislative hearings on the proposed legislation, the proponents of the bill made two concessions: the effective date of the act would be postponed for a year, and the enforcement of the act would be on a voluntary basis rather than a mandatory one. As a result of these compromises the bill was enacted with little difficulty. It provided for the establishment of a minimum wage commission which in turn would set up wage boards for particular occupations. The wage boards would investigate and would make recommendations. The boards had to take into consideration the workers' cost of living and the financial conditions of the industries concerned. The commission was to depend on the force of public opinion to

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[1]Commonwealth of Massachusetts, Report of the Commission on Minimum Wage Boards, House Report No. 1697 (Boston, 1912), pp. 7-27.

influence concerns whose names were published as violators.[1]

Weak and inadequate as this law was, it has great significance. It was a notable achievement in that, for the first time in America, government had intervened to give assistance in the field of wages to its poorest citizens. It marked the recognition of government's responsibility for the payment of a living wage. And, in addition, it introduced the wage board mechanism into the United States as a solution to the problem of low wages.

Other state minimum wage laws followed. By 1923 fifteen such laws had been enacted. Two were non-mandatory laws; four provided for flat minimums which were later nullified by price rises; and all of them except that of Massachusetts were enacted in agricultural states. Those providing for wage boards were of the living wage type, i.e., the wages, established by a board, were to be high enough to supply women with the minimum necessary to maintain them in health and welfare. The use of the police power in the Oregon law to enforce the health and welfare standard was held constitutional by the United States Supreme Court in 1917.[2]

The slow advance of state legislation received a serious setback in 1923 when the United States Supreme Court declared District of Columbia law unconstitutional in the well-known

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[1] I.L.O., The Minimum Wage, p. 193.

[2] Stettler v. O'Hara, 243 U.S. 629 (1917).

case of Adkins v. Children's Hospital.[1]

The District of Columbia law was enacted in 1918. It provided for a Minimum Wage Board composed of three members, one each representing employers, employees, and the public. The Board was authorized to fix minimum wages for employed women and minors, with the exception of domestic servants, when it found that wages paid them were inadequate to "maintain decent standards of living and to protect them from conditions detrimental to health and morals." It was authorized to investigate wages, examine payrolls, hold hearings, subpoena records, fix minimum and subminimum rates. Violators were punishable by fines and imprisonment. Workers could sue for unpaid wages and attorney fees.[2]

A year later in accordance with the District of Columbia law the Minimum Wage Board conducted an investigation of the wages of women workers in hotels and restaurants in the District. The investigation showed that many of these women were receiving less than the $16.50 per week which, according to the U. S. Bureau of Labor Statistics, was then necessary to maintain a woman in the District. Accordingly, after a hearing, the Board on May 26, 1920, issued a wage order to the effect that women workers in hotels, restaurants, and certain allied industries with the exception of nurse trainees

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[1]261 U. S. 525 (1923).

[2]American Retail Federation, The District of Columbia Minimum Wage for Women in the Retail Trade (Washington, 1938), pp. 23-24.

were to be paid $16.50 per week henceforth. The Children's Hospital of the District of Columbia and a representative of the Congress Hall Hotel Company sued for an injunction to restrain the Board from enforcing its wage order on the ground that the law was unconstitutional. The matter was eventually brought to the Supreme Court on the question of whether the law violated the Fifth Amendment of the Constitution which provides that Congress shall not deprive a person of life, liberty, or property without due process of law. The law was held unconstitutional on this basis by the Supreme Court by a vote of five to three. The Court's opinion was rendered by Mr. Justice Sutherland; Justices Van Devanter, McReynolds, McKenna, and Butler concurred. Dissenting opinions were written by Mr. Chief Justice Taft, Justice Sanford concurring, and Mr. Justice Holmes. The reasoning of the court majority to the effect that the statute was unconstitutional may be summarized as follows:

Freedom to contract is the rule and restraint the exception. The only justification for abridgment of freedom is the existence of exceptional circumstances. There are four types of statutes interfering with liberty or freedom of contract which the Supreme Court has upheld in the past. The law under consideration is not comparable to these. Nor can women as a class ask to be considered the subject of protective legislation. Since the case of Muller v. Oregon[1] the

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[1]208 U.S. 422. In 1908, the U.S. Supreme Court, in this case, held as constitutional an Oregon law establishing a maximum ten hour day for women in mechanical establishments, factories, and laundries.

passage of the Nineteenth Amendment has nullified the differences between men and women. Finally, legislation for workers as a proper exercise of the police power cannot be upheld because it is impossible to fix a minimum wage which would dispense equal justice to all workers or to all women workers; because there is no basis for the belief that well-paid women are more moral than poorly-paid women; because the employer is not protected under the legislation--he must pay the wages whether he can afford to or not; because workers should receive not a living wage, but a wage commensurate with the value of the services rendered; and, if the minimum wage were justified, it would constitute a precedent for the fixing of maximum wages. Therefore, the law exceeds the limits of reasonable police power and is invalid.

The minority opinion pointed out that the regulation of wages is comparable to a type of statute interfering with liberty of freedom of contract which the Supreme Court had upheld in the past, to wit, the regulation of the hours of women. The regulation of wages is just as much an infringement of the right of contract as the regulation of hours. In addition, the passage of the Nineteenth Amendment in no way changed the physical strength and limitations of women.

The results of the decision were such as to stem effectively the progress of further minimum wage legislation. As a result of the invalidation, only nine laws remained on the

books by 1933 and two of these were not in operation.[1]

With the arrival of the depression of the thirties, the interest of workers and others again turned to the device of the minimum wage law as a means whereby they could be protected from the unchecked wage cutting which characterized the times. Since Justice Sutherland had implied that a wage commensurate with the value of the service performed by the worker would be acceptable in contradistinction to one which aimed to protect the health and morals of the worker, it was proposed that laws be drafted on the former basis. There ensued a trend in minimum wage legislation in which the "fair wage" type of law was predominant. By 1936 there were seventeen state minimum wage laws of which eight were of the "fair wage" type, one a cost of living law, and eight holdovers from the previous period. The administration of these laws was similar to those of the first period.[2]

On June 1, 1936, the proponents of minimum wage legislation received their second major setback. The New York minimum wage law, passed in 1933 and so constructed as to meet the test of law as expressed in the Adkins case, was declared unconstitutional by the United States Supreme Court.[3]

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[1]I.L.O., The Minimum Wage, p. 194.

[2]Alice S. Cheney, "The Course of Minimum Wage Legislation in the United States," International Labour Review, XXXVIII (July, 1938), 29-31.

[3]Morehead v. Tipaldo, 298 U.S. 587 (1936).

Before discussing the decision it is apropos to mention a few points concerning the background of the passage of the New York law. In 1932, 30 percent of the women in New York state who had been working in industry in 1929 were unemployed. Those who remained on the job had their hours cut and their pay reduced. In certain industries, the hours of women and minors rose to twelve and thirteen per day with a half-hour lunch period. Homeworkers were similarly poorly paid and overworked. In order to take some action against these conditions the National Consumers' League called a conference in December, 1932, which was attended by representatives of fifty organizations from twelve states. The conference appointed a committee to draft a standard minimum wage bill. This bill was passed by the state of New York in April of 1933. The law stated it to be "against public policy to employ any woman or minor in an occupation in this state at an oppressive and unreasonable wage" such a wage being "both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health." On October 2, 1933, Directory Order No. 1 covering the laundry industry was issued, establishing a minimum rate of 31 cents per hour for the New York City area and 27½ cents per hour for the remainder of the state.[1]

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[1]New York State Department of Labor, Minimum Wage and the Laundry Industry (Albany, 1938), pp. 12-20.

In August, 1934, an inspector making an inspection at the Spot Light Laundry in Brooklyn found that the records were so inadequate that he was unable to determine how many hours the employees had actually worked. Interviews with the girls working there disclosed that they were not being paid the legal minimum. The owner of the laundry, Joseph Tipaldo, asserted that the violation was unintentional, being due to a bookkeeping error. He promised to make restitution for the unpaid amount. The following week the records were found to be satisfactory but the owner had cashed the girls' checks and had paid them less than was indicated on the checks. Tipaldo was indicted for violation of the minimum wage law and forgery. His attorney challenged the constitutionality of the minimum wage law. The case was carried to the United States Supreme Court which issued its verdict on June 1, 1936. By a five to four decision it declared that the law was unconstitutional in that it violated freedom of contract.[1]

On March 29, 1937, however, the United States Supreme Court decided an appeal from a State of Washington Supreme Court decision which had held that state's minimum wage law constitutional.[2] The Washington law was an out-and-out living wage law lacking all of the "value of service" additions which the New York law had before its invalidation. It was

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[1] Ibid., pp. 21-23.

[2] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)

essentially the same as the District of Columbia law which had been invalidated in 1923. To everybody's surprise the Court upheld the constitutionality of the Washington law and reversed itself on the Adkins case by a vote of five to four.

The Court majority dismissed the allegation that the minimum wage law infringed on freedom of contract and in doing so reiterated its position on the nature of liberty and freedom, to wit: "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulation and prohibitions imposed in the interests of the community." It pointed to the numerous instances in which the Court had approved the restriction of freedom of contract where the public interest required it: limitation of employment in underground mines to eight hours per day; forbidding the payment of seamen's wages in advance; limiting the hours of work of employees in manufacturing establishments; and others.

The Court noted that in Holden v. Hardy[1] it had held that adult employees are not on an equal footing with their employers in the labor bargain. Where such equality is lacking, the State, in the opinion of the Court, had the right to interfere. This principle applies peculiarly to the employment of women. The Court cited numerous instances where the Court had upheld interference by the State where such interference was necessary for the protection of women.

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[1]169 U.S. 366 (1898).

On the basis of these precedents the minimum wage law should be sustained. Accordingly, the Court held that the majority ruling in the Adkins case was an erroneous departure from the "true application of the principles governing the regulation by the State of the relation of employer and employed," principles which had been supported in subsequent Court decisions.

Finally, the Court noted the social and economic implications of the failure of employers to pay a living wage to their workers. Such exploitation not only is injurious to the health and welfare of the workers, it also places a heavy burden on the community. "What these workers lose in wages the taxpayers are called upon to pay." In such cases, the community for its own protection must employ its law-making power to eliminate the abuse.

Progress has been made in state minimum wage legislation since 1937. There are now thirty minimum wage laws in the United States. Such legislation is on the books of twenty-six states,[1] the District of Columbia, Alaska, Hawaii, and Puerto Rico. The coverage of most of these laws is broad, the exemptions few, usually constituting agriculture and domestic service. The most limited is that of Maine which covers only fish packing. Coverage is largely extended to

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[1] Arizona, Arkansas, California, Colorado, Connecticut, Illinois, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Washington, and Wisconsin.

women and minors with the exception of Arkansas, Louisiana, Nevada, and South Dakota, which cover women and girls only, and Connecticut, Massachusetts, New York, Rhode Island, Puerto Rico, and Hawaii which cover men as well as women and minors.

Most of the laws provide for the determination of wage rates by conference or wage boards appointed to make investigations and recommendations to the state agencies authorized to fix minimum wages and issue wage orders. The exceptions are those laws which are of the "flat rate" or "inflexible" variety of which there are four: Nevada, South Dakota, Alaska, Hawaii, and Puerto Rico. That is, the minimum rate is determined by the legislature and detailed in the statute. In Arkansas, however, the minimum rate, although fixed by law, may be varied by the Industrial Welfare Commission after investigation and public hearings.

In the majority of the laws the minimum wage applies to separate industries. However, in Kentucky, Minnesota, and Wisconsin, blanket orders covering all industries in those states have been issued.

In 1942 about one and one-quarter million women were covered by minimum wage laws, the potential coverage being four and one-quarter million women. At the end of 1945 approximately one hundred and fifty wage orders were in effect. Minimum wage rates operate in twenty-three states,[1]

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[1]Laws have been passed in Kansas, Louisiana, and Oklahoma but no rates are in effect in these states.

the District of Columbia, Alaska, Hawaii, and Puerto Rico. The laws of seventeen states,[1] the District of Columbia, Alaska, and Puerto Rico apply either to all manufacturing or to certain branches of manufacturing. The Hawaiian law covers only employment not covered by the Fair Labor Standards Act. In ten states,[2] the District of Columbia, Alaska, Hawaii, and Puerto Rico all manufacturing is covered by general or specific wage orders or by flat rate laws. In twelve states[3] specific orders cover certain branches of manufacturing.[4]

All of the laws except those which are of the flat rate type specify or imply that the cost of living be considered as a factor in determining minimum wage rates. Some of the laws combine this principle with the fair wage principle. Administration is usually in the hands of a state agency

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[1]Arkansas, California, Illinois, Kentucky, Maine, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oregon, Rhode Island, South Dakota, Washington, and Wisconsin.

[2]Arkansas, California, Kentucky, Minnesota, Nevada, North Dakota, Oregon, South Dakota, Washington, and Wisconsin.

[3]California, Illinois, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oregon Rhode Island, Washington, and Wisconsin.

[4]The data above are based on material in U.S. Department of Labor, Women's Bureau, State-Minimum Wage Laws and Orders, Bulletin No. 191 (Washington, 1942), pp. 1-3, and Supplements 1 and 2 to Bulletin No. 191 (Washington, 1945 and 1946 respectively); U.S. Bureau of Labor Statistics, Progress of State Minimum-Wage Legislation, 1943-1945, Serial No. R. 1841 (Washington, 1946); and U.S. Division of Labor Standards, Annual Digest of State and Federal Labor Legislation, Bulletin No. 84 (Washington, 1946).

which enforces the state's labor laws. Generally, the procedure for establishing minimum rates for an occupation is embodied in five steps: the occupation is surveyed; a wage board is established; it issues its determinations in the form of a report; a public hearing is held; and a wage order is issued. Enforcement of the order is in the hands of the administrative authority. Failure to comply with a mandatory wage is subject to either a fine or imprisonment or both.[1]

The utilization of state minimum wage regulation to discourage part-time or underemployment is assuming some importance. This is effected by providing for either a higher hourly rate for part-time employment or a guaranteed minimum wage per week in minimum wage orders. Under the latter arrangement a worker who works less than a week receives a week's wages nevertheless. The payment of the guaranteed minimum wage is mandatory in some states regardless of the number of hours worked, in others only after a specified number of days are worked.[2]

A number of problems in state minimum wage regulation may be briefly described. The problem of interstate competition is one of the major obstacles to the passage of further legislation by the states. Before a state will enact a law it must be convinced that the law will not drive industry from

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[1] I.L.O., The Minimum Wage, pp. 205-216.

[2] Florence Peterson, Survey of Labor Economics (New York, 1947), pp. 395-396.

its borders. A device to counterbalance this argument is the interstate minimum wage compact. It was first suggested by Franklin D. Roosevelt when he was Governor of the State of New York at a meeting of governors in Albany. Subsequently, in May, 1934, representatives of seven states[1] signed the first interstate compact. The objective of the pact was the attainment of more uniform standards in connection with the regulation of the wages and hours of women. The model for the legislation was the New York minimum wage law. The compact was to become effective when at least two states had ratified and Congress had approved it.[2] The compact was abrogated by the legislatures of the ratifying states in 1943.

Another problem is the lack of uniformity which characterizes state legislation. The interstate minimum wage pact was one device which it was hoped would lead to such uniformity. It was also hoped that with time the Fair Labor Standards Act would accomplish the same purpose. After the passage of the Act it was believed that the states would pattern their legislation after it. But none of the states have done so.[3]

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[1]Connecticut, Maine, Massachusetts, New Hampshire, New York, Pennsylvania, and Rhode Island.

[2]Frank T. de Vyver, "Regulation of Wages and Hours Prior to 1938," Law and Contemporary Problems, VI (Summer, 1939), 330.

[3]Ludwig Teller, A Labor Policy for America (New York, 1946), pp. 195-196.

Opinion differs as to the merits of the flat rate or inflexible type of law as opposed to the wage board or flexible type. The opponents of the flat rate type of law point out the difficulties occasioned by a fluctuating price level and the inadequate consideration of such laws for the problems of substandard workers. On the other hand certain administrative advantages are claimed for the flat rate law.[1]

Although most states having minimum wage laws require the boards to consider the minimum amount necessary to provide adequate maintenance and the protection of health in the determination of minimum wage rates, the wage orders issued do not always meet these standards. The same is true of flat rate laws.[2] Arkansas, for example, has a wage order permitting the payment of $1.00 per day to inexperienced females.[3]

The multiplicity of the factors involved in making a

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[1] Loc. cit.

[2] Cf. Frank Pierson, "The Determination of Minimum Wage Rates," The American Economic Review, XXX (March, 1940),

[3] Sec. 85-9094. "Minimum Wage--It shall be unlawful for any employer of labor mentioned in 9084 to pay any female worker in any establishment or occupation less than the wage specified in this section, to-wit, except as hereinafter provided. All female workers who have had six months' practical experience in any line of industry or labor shall be paid not less than one dollar and twenty-five cents per day. The minimum wage for inexperienced female workers who have not had six months' experience in any line of industry or labor shall be paid not less than one dollar per day; . . . ." (Act 191 of 1915, Sec. 7)

wage determination constitutes a major problem. Industries vary in their economic positions, employees vary in their working capacities, prices change, business activity fluctuates both generally and in particular localities and industries. All this requires flexibility in the setting of rates.

Finally, the problem of incomplete state coverage must be faced. Even as late as 1944 there were hundreds of men and women, who unprotected by any law, federal or state, received wages as low as 18, 15, and 12 cents per hour. Even in states with minimum wage laws, the benefits are not as high or as widespread as they might be if the statutes were applied to their fullest extent.[1]

Students of state minimum wage regulation have asserted that its general effect has been to raise wages without adverse effects on the economy. These students conclude that minimum wages have not become maximum wages; that fair employers have been protected from unscrupulous ones; that great benefits have been received by the employees in the lowest-paid occupations; and that the payment of board and room only and the failure to pay any wages except tips, for example, have been eliminated in covered industries.[2]

That such benefits accrue from regulation is the

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[1]U.S. Department of Labor, Women's Bureau, State Minimum Wage Legislation--A Postwar Necessity (Washington, 1944), pp. 2-5.

[2]Kate Papert, "The Importance of Enforcement of Minimum Wage Standards," The American Labor Legislation Review, XXXI (June, 1941), 74.

conclusion arrived at in two studies conducted by the Women's Bureau of the United States Department of Labor. A study of the dry-cleaning and power laundry industries in New York and Ohio in 1938 showed, according to the authors, "conclusively that minimum-wage legislation for women, rightly framed does not interfere with equal opportunity, but does interfere with the unsocial tendency to oppress women workers at the expense of the welfare of the state."[1] The conclusion was reached that the legislation increased the rates of pay and total earnings of the women covered; that there was no substitution of men for women; that the total numbers of women employed did not decrease; and that very few became unemployed as a result of the failure of marginal plants and these, in times of increasing prosperity, became quickly re-employed.[2]

In a later study of the canning industry the Women's Bureau concluded that "all wage data assembled in the detailed report reveal that State minimum-wage orders for women workers have raised materially the level of earnings of women cannery employees above that in States without such orders.[3]

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[1]U.S. Department of Labor, Women's Bureau, The Effect of Minimum Wage Determinations in the Service Industries, Bulletin No. 166 (Washington, 1938), p. v.

[2]Ibid., p. 6.

[3]U.S. Department of Labor, Women's Bureau, Application of Labor Legislation to the Fruit and Vegetable Canning and Preserving Industry, Bulletin No. 176 (Washington, 1940), p. 7.

These enthusiastic conclusions must, however, be tempered by a consideration of other factors than minimum wage regulation on wages and employment. The benefits may not have been achieved as easily in the cleaning and laundry industries, for example, if these industries had not experienced an unusual expansion accompanied by a number of technological improvements during the period covered by the study. In addition, these industries can easily adjust to cost increases by price increases since as service industries their product is produced and consumed locally. In the canning industry consideration must be given to the effects of unionization on the wage level. Thus, when the canning industry study was made, the Washington state minimum wage law provided for a 35-cent minimum but unionized cannery workers in that state were then enjoying a minimum of 40 cents per hour. Finally, rising prosperity in all industry facilitated the absorption of cost increases resulting from the regulation.[1]

2. Federal Regulation before 1938

Aside from the state action surveyed above, American experience includes several examples of wage control by the federal government. Apart from the extensive wartime controls imposed between 1942 and 1946, these federal controls are of several sorts among which is, for example, the Adamson Act of 1916, legislation which to an important degree affected the

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[1]Cf. Z. C. Dickinson, Collective Wage Determination, pp. 567-568.

earnings of railroad workers. We shall briefly note here what is by far the most important precursor of the present wage and hour law, the N.R.A. In addition, we shall give incidental consideration to the principal auxiliary federal wage controls, namely, the Davis-Bacon Act of 1931 and the Walsh-Healey Public Contracts Act of 1936. They have come to affect an increasing number of workers as the scope of federal public control has grown.[1]

The passage of the National Industrial Recovery Act in 1933 marked the first attempt by the federal government to regulate minimum wages in private enterprise. Prior to its passage the state of the economy had occasioned a great deal of thinking as to the best way in which the country could solve its problems. The N.R.A. was presented as a solution on the theory that an increase in payrolls would increase net spending; that an increase in wages paid workers in the lower brackets would not only increase spending, but would also bring into better balance wage relationships between occupations; and that business would improve if prices could be maintained or increased. The act was based on the long-run theoretical considerations that collective action was necessary in order to stabilize business activity; that this would necessitate a more highly organized business structure than was in

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[1] In America as well as elsewhere there have been a succession of fair wage requirements in public purchase contracts. The Davis-Bacon and Walsh-Healey Acts are two conspicuous examples of government control designed to influence wages.

existence; and that stability would be furthered by equalizing income distribution.[1]

The method by which all this was to be achieved was the codes of fair competition. Such codes were drawn for different trades and industries, and, after public hearings, were approved by the President. The initiative for proposing codes came from industry with the interests of labor protected by a Labor Advisory Board.

The minima prescribed by the codes varied from industry to industry. They ranged from 12½ cents an hour in Puerto Rico to 70 cents an hour in New York City. They varied according to geographic area, population of city, where plant was located, sex, and occasionally as to wages paid in 1929. Wages differed with class of work, the wages of unskilled production workers differing from clerical workers, for example. Subminimum rates were provided for learners, apprentices, the aged, and the physically handicapped. The effects of these minima were far-reaching since above minimum rates fluctuate with minimum rates.[2]

On May 27, 1935, the Supreme Court held that the delegation of legislative power to the President of the United States was unconstitutional and that the interstate power of the federal government under the commerce clause did not

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[1]Leverett S. Lyon et al., The National Recovery Administration (Washington, 1935), pp. 25-26.

[2]Lyon, et al., op. cit., pp. 317-318.

extend to purely intrastate activity.[1]

Of special interest to the student of the legal minimum wage is the attempt in the N.R.A. to regulate extensively wages above the minimum. However, the attempt was unsuccessful. The clauses which provided for such control were poorly drafted and resulted in a number of inequities. Varying requirements were applied to competing groups resulting in varying labor costs. Some plants suffered from multiple coverage by conflicting codes. Socially minded employers who had failed to cut rates during the depression were placed at an even greater competitive disadvantage by the codes. That the attempt was a failure has been expressed as follows by one group of students:

> Even though intentions may have been of the best it remains clear that with few exceptions the handling of the clauses governing wages above the minimum was and is inept. In the main, NRA seems to have plunged into legislative and administrative action in this field with few facts for guidance; with few comprehensive or definite policies ever formulated; and with little knowledge of the practical outcome. Innocence of facts, paucity of policy, ignorance of possible outcome--these are serious handicaps in any undertaking, but especially in one of such a complex and far-reaching character as the NRA. If wages above the minimum should be subjected to regulation by the federal government--a question which we may for the moment leave open--it goes without saying that some better means of control is needed than the present code provisions afford.[2]

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[1] Schechter Poultry Corporation v. United States, 295 U.S. 495 (1935).

[2] Lyon, et al., op. cit., p. 364.

Nevertheless, it is clear from an examination of Australasian, British, and Canadian legislation that such regulation, up to a point, can be carried out successfully. The N.R.A., however, was too ambitious an undertaking in this direction. Similarly, that provision in Senate Bill S. 1349, which was considered by Congress in 1945, and which would have permitted the industry committees to maintain reasonable wage differentials between unskilled and interrelated job classifications was not only politically not feasible in this country, it was also an almost impossible administrative task.[1]

In conclusion, although the wage increases which resulted from the N.R.A. were offset largely by price increases, the legislation had profound effects on labor. It marked the entrance of the federal government into the field of minimum wage regulation. Much of future federal wage control had its origins in the N.R.A.

The Prevailing Wage Law, or the Davis-Bacon Act, passed March 3, 1931, permits the federal government to enforce the payment of prevailing wages to laborers and mechanics in connection with the construction, alteration, or repair of public buildings or public works under contracts with the federal government where the contracts or subcontracts amount to more than $2,000. The wage rates prevailing in the locality where the work is to be done are determined by the U. S.

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[1]See pp. 100-101, supra.

Department of Labor. These rates are included in the contract between the federal agency issuing the contract and the contractor.

The Walsh-Healey Public Contracts Act was passed in 1936. It provides that every federal government contract amounting to $10,000 or more, with the exception of subcontracts and contracts involving agricultural commodities, shall include the following stipulations covering labor standards: (1) time and one-half shall be paid for hours over eight per day and forty per week; (2) boys under sixteen and girls under eighteen years of age will not be employed; (3) the work will be performed in compliance with the state health and safety laws; and (4) the minimum wages paid will be the "prevailing" ones.

This brief review demonstrates the increasing trend toward wage regulation all over the world including the United States. It shows the growth of the realization that the world of Adam Smith has undergone a revolution and that ideas concerning government intervention which were current in his day are not accepted now.

Noticeable, too, is the gradual change in the scope of legal minimum wage regulation from the coverage of the rates of only the unskilled low-paid worker to the coverage of the entire structure of wages. This is expressed in Australasia

where wage control is related largely to the maintenance of industrial peace; in England where the wage-board system is frank out-and-out wage regulation as such, a part of the entire system of governmental regulation; and in the United States where general control of wages has been expressed in the N.R.A. experiment. That there are some aspirations in this country for the further expansion of control in this direction will be seen when the proposed amendments to the Fair Labor Standards Act are considered.

The review shows, further, that wage control has not necessarily led to totalitarianism and to the fixing of all wages, prices, and profits by government. Certainly, in the case of state legislation in the United States this has been far from the case. In other countries where laissez fairism has been supplanted by over-all governmental regulation there is no evidence that it has been the direct result of wage regulation. Rather, it seems to have been brought about by a whole complex of factors of which low wages and their accompanying poverty have only been a part.

Finally, the survey of the effects of regulation shows that none of the dour prophesies of the opponents of regulation have materialized. All students of the history of the legal minimum wage point, on the contrary, to the very material benefits of wage regulation wherever it has been applied.

Yet the fact that regulation has so far been successful

does not mean that regulation under any and all conditions would be followed by equally happy results. Regulation has succeeded so far because of a number of factors. It has been introduced gradually and its coverage and scope has been extended slowly. No attempt has been made to solve all of the problems of poverty by the device of the legal minimum wage. The modest wage standards which have been set have made their attainment not too difficult a task. Improved technology and increased productivity have also helped. In the absence of these factors--a cautious approach, reasonable standards, and a productive and prosperous economy--minimum wage regulation might produce more difficulties than benefits.

With this background of theory and history in mind, we can now turn to an examination of the major piece of legislation in this field in this country: the Fair Labor Standards Act of 1938. The examination, analysis, and evaluation of the Act will constitute the remaining portion of the study.

CHAPTER IV

THE FAIR LABOR STANDARDS ACT OF 1938

A. Legislative History

The validation of the Washington state minimum wage law not only gave a new lease on life to state legislation, it also helped make possible federal action in those fields of wage regulation in which the states could not act. Such federal regulation supplementing state regulation was regarded as essential for three reasons. The fact that competitive conditions in one state affect competitive conditions in another has already been noted. The state with high labor standards might find itself eliminated from the sales market because of its higher prices.[1] Another reason for federal legislation was the continuation of the application of purchasing power theory as exemplified in such legislation as the Agricultural Adjustment Act, the Walsh-Healey Act, and the National Industrial Recovery Act. Finally, there was the desire to spread employment by placing

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[1]The same argument may be applied to regional competition. One reason which has been given for the passage of the Fair Labor Standards Act was the fear of northern industrialists of the growing industrialism of the South. Walter E. Boles, Jr., "Some Aspects of the Fair Labor Standards Act," Southern Economic Journal, VI (April, 1940), p. 500.

a "ceiling" over hours, and hence, the enactment of a wage bill coupled with hours regulation. The basis of state minimum wage legislation, the "protection of health and morals of workers" played a relatively insignificant part in the enactment of minimum wage and maximum hour federal legislation.[1]

These are the economic theories on which the Act was based. An examination of the economic conditions of the period immediately preceding its passage is helpful in a determination of the need for its passage. It is necessary to note first the economic consequences of the invalidation of the National Industrial Recovery Act. Its nullification was followed by an upsurgence in wage cutting accompanied by a departure in many instances from the hours provisions of the codes. Although the majority of industrial firms attempted to operate within the code provisions, a small minority refused to do so and imperiled the ability of most employers to maintain higher standards.

A study conducted by the Bureau of Labor Statistics of sixteen manufacturing industries before and after invalidation showed that average weekly hours in all of the industries studied increased substantially after invalidation.[2] In

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[1] Loc. cit.

[2] For example, in blast furnaces, steel works, and rolling mills in May, 1935, only 3.1 percent of all employees were employed average weekly hours in excess of those prescribed in the codes, whereas in May, 1936, this percentage rose to 67.7 percent. Witt Bowden, "Hours and Earnings before and after the N.R.A.," Monthly Labor Review, LXIV (January, 1937), 13-14.

addition, the establishments which increased their hours most were the ones in which hourly earnings were less than average. Finally, those industries in which average hours worked were greater than those prescribed in the codes gained more, insofar as total man-hours worked was concerned, than industries which had kept their average hours within the code maxima. Thus, the industries which raised their hours and cut their pay were the ones which increased the amount of business they were doing.[1]

The size of the average family income immediately after the invalidation of the N.R.A. was extremely low. In 1935-36, for example, more than half of all the white families not on relief in Dubuque, Iowa, had incomes of less than $1,250 a year. Incomes of less than $1,250 per year were being received by 40 percent of such families in Muncie, Indiana;

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[1] Loc. cit. Another example of the lengthening of hours and cutting of wages may be found in an examination of the cotton-garment industry between May, 1935, and May, 1936. In this industry, during this period, the number of man-hours worked increased 13.9 percent, but the number of persons employed in the industry increased only 2.6 percent. At the same time, aggregate payrolls for these employees dropped 1.2 percent. However, what makes these statistics of even greater import is the fact that of the 177 establishments examined, eleven of them cut their hourly earnings by more than 37.5 percent by increasing the length of the workweek without increasing the pay. This small minority, thus made it extremely difficult for the great majority of the decent employers to maintain their standards. U. S. Congress, Senate Committee on Labor and Education and House Committee on Labor, Fair Labor Standards Act of 1937, Joint Hearings on S. 2475 and H. R. 7200, 75th Congress, 1st Session (Washington, 1937), p. 175. Cited hereinafter as 1937 Joint Hearings.

30 percent in Columbus, Ohio, and so on. These incomes represented the earnings of workers on full time.[1]

And what could such an income buy? An income between $1,200 and $1,500 permitted only the most meager of consumption standards. It allowed only $20 per month for rent with only $15 a month for fuel, light, and other supplies for the household. It permitted clothing allowance of $4.00 a month per person for a family of four persons. It made available the expenditure of $8.00 per week for food for an average family of four. Adequate medical care, education, and recreation were inconceivable for families living on such an income.[2]

The magnitude of the problem facing the workers may be guaged from another point of view. In 1937 the average number of families receiving relief and emergency employment was in excess of five millions, such families constituting an average of more than sixteen million persons.[3]

Such a situation called for drastic action. And it was not long in forthcoming. In January of 1936 the eyes of the nation turned to the newly elected 75th Congress with the hope that some minimum wage legislation would be enacted. That month the President informed the members of a press conference that "something must be done" about legal minimum

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[1] 1937 Joint Hearings, pp. 316-317.

[2] Ibid., pp. 323-325.

[3] Leverett S. Lyon, et.al., Government and Economic Life (Washington, 1940), II, p. 1195.

wages.[1] There were those who felt that the only way in which anything could be done was through a constitutional amendment. But President Roosevelt in his message to Congress on January 6, 1937, indicated that all that was necessary was liberal interpretation of the constitution.[2]

The address was followed by immediate action. Drafts of proposed wage-hour bills were prepared by advisers to the administration, by officials of the Department of Labor, and others. Among those who participated were General Johnson, formerly of the N.R.A., who proposed a bill based on the taxing power, and Donald Richberg who proposed the inclusion of substandard labor conditions in the category of unfair methods of competition regulated by the Federal Trade Commission.[3] On February 5 a plan for reorganizing the judiciary was announced. There was some belief that there was a close relationship between the attempt to enact fair labor standards legislation and the President's proposed reorganization of the Supreme Court. The effectuation of the first was supposed to be contingent on the execution of the second. The strategy for securing the enactment of wage-hour legislation consisted in first remolding the Court to

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[1] Time, January 11, 1937, p. 13.

[2] "Annual Message to Congress, January 6, 1945," Nothing to Fear, the Selected Address of Franklin Delano Roosevelt, 1932-1945, ed. by B. D. Zevin (New York, 1946), pp. 84-85.

[3] John S. Forsythe, "Legislative History of the Fair Labor Standards Act," Law and Contemporary Problems, VI (Summer, 1939), 464.

a form more suited to the times and then enacting wage-hour legislation.

However, in the meanwhile, the Supreme Court seems to have experienced a change in its philosophy. First, and of major importance, was the West Coast Hotel v. Parrish[1] decision validating the Washington state minimum wage law. In addition, the constitutionality of the Railway Labor Act was upheld in March of 1937.[2] Finally, there were five decisions upholding the National Labor Relations Act which decisions broadened the concept of the interstate commerce power of the federal government.[3]

As a result, the pressure for the reorganization of the Supreme Court subsided and administrative activity turned to the enactment of a wage-hour law. On May 24, the President sent his message to Congress recommending legislation establishing minimum wages and maximum hours. The President called attention to the fact that one-third of the nation was "ill-nourished, ill-clad, and ill-housed." He suggested that Congress exert its right to regulate commerce by preventing the passage of goods which are produced under

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[1] 300 U.S. 379 (1937).

[2] Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515 (1937).

[3] National Labor Relations Board v. Jones and Laughlin Steel Corp.; National Labor Relations Board v. Freuhauf Trailer Co.; National Labor Board v. Friedman-Harry Marks Clothing Co.; Associated Press v. National Labor Relations Board; Washington, Virginia, and Maryland Coach Co. v. National Labor Relations Board; 301 U.S. 1-148. These cases were all decided on April 12, 1937.

substandard labor conditions through interstate channels. He justified his request on the basis that it would increase the purchasing power of industrial workers, stabilize farmers' markets, increase the national income, and reduce unemployment through the "flexible" handling of working hours.[1]

On the same day, Senator Hugo Black and Representative William P. Connery introduced two nearly identical bills into the congress, S. 2475 and H. R. 7200.[2] The bill provided for the regulation of minimum wages, maximum hours, child labor, and the elimination of certain unfair labor practices, under the commerce power of the federal government.

A labor standards board of five members was created to administer the Act. The statutory minimum and maximum were left blank and were to be determined later by Congress. However, it was generally assumed that the minimum wage would be 40 cents per hour and the maximum workweek 40 hours.

An attempt was made to impart some flexibility to the bill by providing that the wage and hour provisions were to become effective only when ordered by the Board and only for those industries which the Board specified. In addition, the Board could authorize higher standards than the 40-cent

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[1] "Franklin D. Roosevelt's Message to Congress, May 24, 1937," The Public Papers and Addresses of Franklin D. Roosevelt, ed. by Samuel I. Rosenman (New York, 1941), 1937 Volume, pp. 209-214.

[2] There were two unimportant differences between the two, one of which was an oversight. The bills will be discussed as a unit in the following pages.

and 40-hour formula. Under section 5 of the bill the Board was empowered to order the establishment of "minimum fair wages" whenever it had reason to believe that "owing to the inadequacy or ineffectiveness of the facilities for collective bargaining, wages lower than minimum fair wages are paid to employees. . . ."[1] Such wages were to be set after hearings and were not to be so high as to unreasonably curtail opportunities for employment. They were to be limited to 80 cents per hour for seasonal trades and $1,200 per year for non-seasonal employment, exclusive of premium pay. In setting such wages the board was to consider such factors as the reasonable value of services rendered in the absence of a contract; wages for like work in unionized industry; and wages for like work in non-unionized industry.

In issuing its orders, the Board was directed in section 12 to classify employers, employees, and employments within occupations according to localities, population of the communities in which employment occurred, the number of employees employed, the nature of goods produced, and so on according to other appropriate bases. Section 14 provided for tripartite advisory committees which could be appointed at the discretion of the Board to conduct investigations, hearings, and conferences, and make recommendations in regard to the minimum fair wage.

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[1]This principle is similar to the one which was the basis of the British Trade Boards Act of 1918. See p. 55 supra.

The bill covered manufacturing, mining, transportation, and public utilities; excluded administrative, supervisory, and professional workers and agricultural employment as defined by the Board; and was supposed to exclude retailing although such exclusion was not specifically stated.[1]

The House Committee on Labor and the Senate Committee on Education and Labor held joint hearings on it from June 2 to June 22, 1937. Representatives of the administration, labor, industry, and other interested persons from religious, educational, and welfare groups testified.

Although the labor representatives expressed themselves as being in favor of passing a bill, their ideas as to what kind of a bill it should be were quite divergent. The 40-cent statutory minimum received the approval of all of the labor representatives who testified. There was a wide difference of opinion, however, as to the powers of the Board to raise wages above 40 cents per hour. William Green of the American Federation of Labor was in favor of permitting the Board to raise wages to 80 cents an hour. But such regulation, in his opinion, should continue only until private industry could achieve the same objective by collective bargaining. At that point, the Board should withdraw.[2]

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[1]See discussion of the exemption of retailing in 1937 Joint Hearings, pp. 35 and 39-40.

[2]Ibid., p. 221.

John L. Lewis, representing the Congress of Industrial Organizations and the United Mine Workers, expressed vigorous disapproval of such a proposal. He regarded it as "confusing and extremely difficult of application" and as an approach to "wage-fixing."[1] Sidney Hillman, however, representing the Amalgamated Clothing Workers, also of the C.I.O., unlike Lewis argued for such powers for the Board. He felt that these would be an aid rather than a deterrent to collective bargaining. He pointed out that a wage fixed by a board would not preclude the payment of a higher wage which was the result of a collective bargaining agreement, nor would it preclude a strike on the part of the employees for a higher wage if they saw fit to call one. He accounted for his advocacy of this proposal in contrast to Lewis's outright rejection of it by the fact that his was a low-wage industry with wide disparities in the wages paid in different areas, whereas the miners had a nation-wide wage agreement and, furthermore, their wage scale was higher than the 80-cent minimum.[2] All of the labor representatives opposed the writing of any regional differentials into the bill.[3]

Industry generally opposed the bill although there

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[1] Ibid., pp. 274-275.

[2] Ibid., pp. 945-947.

[3] Ibid., pp. 236, 272, and 945.

were some exceptions.[1] The Cotton Textile Institute favored it although its southern contingent wanted a differential favoring the South.[2] The National Association of Manufacturers opposed the bill on the grounds that it was unconstitutional[3] and would lead to overall governmental control.[4] The N.A.M. also regarded the bill as unsound economically arguing that it would lead to "economic confusion" and high costs without eliminating sweatshop conditions.[5] The N.A.M. also opposed

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[1]Industrialists who testified in favor of the bill were Robert Johnson of Johnson & Johnson, ibid., pp. 91-98, and R. C. Kuldell of the Hughes Tool Co., ibid., pp. 151-152.

[2]Ibid., pp. 664-668.

[3]Ibid., pp. 623-642.

[4]Ibid., pp. 664-668.

[5]The economic arguments of the N.A.M. against enactment were summarized by one of its representatives as follows:

> (1) There is not now, and is not here proposed, any equitable national yardstick by which to either measure or fix "fair wages" for all the industries and sections of the country.
> (2) Even if such a yardstick existed it would be just about impossible to administer fairly without creating economic confusion.
> (3) Attempts to fix industrial wages on a basis of "economic fairness" are apparently designed to raise average wages; if this is so, then it will naturally result in increased living costs to the housewives and farmers of the country.
> (4) The proposal favors so-called "big business" as compared with "little business."
> (5) By raising domestic costs it will handicap the manufacturers--and their employees--who export goods abroad.
> (6) By raising domestic production costs it will handicap American firms--and their employees--faced by increased foreign imports.

the section 5 "minimum fair wage" provisions of the bill because it would act as a brake on collective bargaining.[1] The United States Chamber of Commerce expressed its opposition to the bill because of its faulty administrative provisions and for other reasons.[2]

Representatives of southern industry opposed the bill because they feared that it would lead to northern domination of southern interests. If the bill were to pass, they felt that a differential favoring the South should be provided for because of lower living costs in the South, lower efficiency of southern labor, and higher southern freight rates.[3] That freight rates favored "official" or eastern territory was shown by J. Hayden Alldredege, transportation expert of the Tennessee Valley Authority[4] but the allegation that southern labor was less efficient than northern labor was denied by labor representatives.[5] Furthermore, John L. Lewis stressed

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(7) It does not reach the problem of sweatshop labor conditions.
(8) It would tend to make the next depression worse than would otherwise be the case. Ibid., p. 645.

[1] Ibid., pp. 649-650.

[2] Ibid., pp. 935-941.

[3] See, for example, the testimony of John E. Edgerton, president of the Southern States Industrial Council. Ibid., pp. 760-768.

[4] Ibid., pp. 1023-1050.

[5] Ibid., pp. 467 and 951.

the fact that it was the standard of living and not the cost of living which was lower in the South.[1]

Many who argued against the bill requested that their industries be exempted from the provisions of the proposed legislation. They claimed that the peculiar conditions in their industries precluded any possibility of successful regulation. Some claimed they were "sick" industries which could not meet the increased costs. Others cited the perishable nature of their products.[2] Requests for exemption, however, were not confined to the representatives of industry. There were also requests from labor groups to be exempted from the bill's provisions. A number of railroad labor organizations requested exemptions on the ground that the Railway Labor Act gave them sufficient protection.[3] Representatives of organized seamen asked that the workers they represented be excluded from coverage on the basis that the Maritime Commission could better handle their problems.[4]

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[1] Ibid., pp. 272-273.

[2] Representatives of the following industries requested exemptions: trucking, pp. 743-751; bituminous coal, pp. 848-854; pulpwood, pp. 1220-1222; canners employing less than twenty persons, pp. 1219-1220; dairy products, pp. 1205-1211; peach and apple growers, pp. 1119-1121; canners and packers of agricultural products and fish, pp. 1132-1134. 1937 Joint Hearings.

[3] Ibid., pp. 1144-1145 and 1161-1164.

[4] Ibid., pp. 544-549 and 1216-1217.

That the Administration was anxious to see the bill enacted was evident from the impressive contingent of advocates which it sent to the hearings. The constitutional aspects of the bill were thoroughly analyzed. Every effort was made to show the committee that the legislation would be upheld by the Supreme Court.[1] The Administration's representatives argued that labor standards which had deteriorated after the end of the N.R.A. would be improved after the bill's enactment with the result that the workers' purchasing power would be increased.[2]

The public was represented by persons and groups almost all of whom were interested in seeing the bill pass. Some of these wanted to have the bill enacted because of the benefits which it would have for labor generally.[3] Others were interested in the relation of the bill to the problems of particular groups

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[1]See the testimony of Robert H. Jackson, then Assistant Attorney General. Ibid., pp. 1-89.

[2]Leon Henderson, then consulting economist for the Works Progress Administration, traced the history of wages and hours before and after the N.R.A. He felt that the proposed legislation would be much more effective than the N.R.A. because it was much simpler. Ibid., pp. 155-172. Frances Perkins, then Secretary of Labor, cited the successful experience with minimum wage and maximum hour legislation in Great Britain. She suggested that homework be prohibited, that no mandatory differentials be included in the bill, and that there be no exemption on the basis of the size of the employer. Ibid., pp. 173-187. Isador Lubin, then Commissioner of Labor Statistics of the Department of Labor, argued that the legislation was essential for two reasons: the fair employer must be protected and the American standard of living raised. Ibid., pp. 309-363. All of these witnesses discussed the benefits which would accrue from the increased purchasing power which would follow the bill's enactment.

[3]See, for example, the testimony of the representative of the National Consumers League, ibid., pp. 403-310, and that of John A. Ryan, ibid., pp. 403-410.

of workers such as, for example, the Negro worker and the farmer.[1]

On July 8, 1937, Senator Black for the Senate Committee on Education and Labor favorably reported S. 2475, as amended, as the Fair Labor Standards Act of 1937. The bill had been radically changed as follows:[2] (1) Section 5 which provided for a $1,200 and 80-cent minimum at the discretion of the Labor Standards Board was eliminated. There was no definite wage floor or ceiling and wages and hours were to be entirely dependent on what the Board determined as "fair." In establishing wages the Board could not exceed 40 cents per hour and in fixing maximum hours could not go below 40 hours per week. Regional differences in the establishment of standards were permitted. Territories as well as states were included within the bill's coverage. (2) The appointment of advisory committees was made mandatory. (3) The establishment of special standards in connection with the payment of subminimum

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[1] The representative of the National Negro Congress stated that the differentials and exemptions had deprived the Negro worker of many of the benefits of the N.R.A. He made a plea for a fixed minimum, no differentials, and a minimum of exemptions. Ibid., pp. 571-575. The National Committee on Rural and Social Planning sent a representative to ask that the hired farm laborer be included within the bill's coverage. He argued that the low standards under which hired farm laborers were employed made coverage by a wage-hour law imperative. Ibid., pp. 1196-1211.

[2] U.S. Congress, Senate, Committee on Education and Labor, Fair Labor Standards Act, Senate Report 884 to accompany S. 2475, 75th Congress, 1st Session (Washington, 1937).

rates was placed within the Board's discretion. (4) Exemptions were broadened to include certain agricultural employments including "any practice incident to farming." Seamen, railway employees, and certain employees in connection with fishing were removed from coverage. (5) The Tariff Commission was given the power to investigate to determine whether higher tariff rates should be recommended in view of the increased costs of production. This was designed to answer the objections of witnesses at the hearings that higher wages meant higher prices which would result in an increase in foreign competition from cheaper foreign goods.

The bill reached the floor of the Senate for debate on July 26. During the debate it became evident that there was a division of opinion within the A.F.L. as to whether the bill should be supported.[1] Several southern Senators

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[1]At the time the Senate was discussing the bill, William Green issued a statement to the Senate to the effect that, although he was not entirely satisfied with it, he hoped that it would be satisfactorily amended in the House. This qualified advocacy of the bill should be considered in connection with the position taken by other A.F.L. leaders. A statement was addressed to the Senate by John P. Frey and J. W. Williams, heads of the metal and building trades departments, respectively, of the A.F.L. to the effect that the bill should be recommitted because it interfered with the operation of the Walsh-Healey Public Contracts Act. A statement was also received from I. J. Ornburn, of the A.F.L. Union Label Trades Department, to the effect that he was "unalterably opposed to the Senate bill 2475 in its present form." Congressional Record, 1937, Vol. 81, Part 7, p. 7892.

expressed their opposition.[1] They were joined by Senators from the farm states.[2] The bill, nevertheless, passed the Senate on July 31 with a vote of 56 to 28. The following amendments were added by the Senate to the bill: the number of agricultural exemptions was broadened in that delivery to market and preparing, packaging, or storing fresh fruits or vegetables within the area of production were no longer included within the bill's coverage. In fixing wage rates discriminatory freight rates and local economic conditions were to be considered. The Board was authorized to prohibit or restrict industrial homework.[3]

On August 6 Representative Mary Norton, for the House Labor Committee, reported the bill as amended by the Senate including several additional amendments. The most important of these provided that the Board establish a 40-cent minimum as rapidly as possible without adversely affecting employment or industry and that the Board set the number of hours

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[1]Senator Ellison D. "Cotton Ed" Smith of South Carolina wanted a differential favoring the South. Ibid., p. 7882. Senator Harrison of Missouri argued that the bill would be harmful to all elements in the economy and that it should cover only the hours of labor. Ibid., pp. 7872-7874.

[2]The Senators from the farm states were anxious to insure the exemption of farmers from the bill's wage and hour provisions. Although the bill already exempted farm labor, it was proposed that, in addition to this, workers picking, packing, and processing farm products also be exempted. Thus Senator Schwellenbach of Washington introduced the "area of production" exemption. Ibid., p. 7876.

[3]Forsythe, op. cit., pp. 469-470.

as close to 40 per week as possible.[1]

The House was ready to pass the bill. However, the barrier of the House Rules Committee now interposed itself between the bill and its enactment. The Rules Committee consisted of fourteen members, four of whom were republicans and five of whom were southern democrats. This combination was able to prevent the House from voting on the bill by refusing permission for it to be brought on to the floor.[2] A democratic caucus was called for October 19 for the purpose of securing some action on the bill. However, a quorum could not be assembled since some members refused to answer when their names were called.[3] As a result there was no possibility of passing the bill during this session of Congress.

On October 12, 1937, the President issued a proclamation calling Congress into an extraordinary session to be held on November 15. On the day of the proclamation he discussed the legislation to be recommended to Congress during this session in a "fireside chat." In his address he reiterated the necessity of increasing the purchasing power of the low income groups. He called attention to the increased

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[1]U. S. Congress, House, Committee on Labor, Fair Labor Standards Act, House Report 1452 to accompany S. 2475, 75th Congress, 1st Session (Washington, 1937).

[2]Time, August 23, 1937, pp. 11-12.

[3]New York Times, August 20, 1937, p. 9.

demand that would ensue if wages were increased a few dollars per week and jobs were better distributed as a result of a shorter working day.[1] His message to the Congress in the following month again stressed the need for increasing the purchasing power of the workers and the need for the establishment of a higher standard of living.[2]

When Congress met the House Rules Committee still refused to let the bill come to a vote. Representative Mary Norton then started a petition to discharge the House Rules Committee. By December 2, 210 signatures had been secured and only eight more were necessary. Whereupon William Green announced that he had summoned the executive council of the A.F.L. for a special meeting to consider the drafting of a new wage-hour bill--one in which enforcement would be in the hands of the Attorney-General rather than in an administrative board.[3] This proposal was made at a time when the backing of the farm vote in the interests of the bill seemed finally to have been secured in exchange for support of the farm program.[4]

Finally, enough signatures were secured to discharge the bill from the Rules Committee. But it was to encounter a number of other difficulties. Representative Dies of Texas

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[1]Rosenman, op. cit., The 1937 Volume, p. 435.

[2]Ibid., p. 497.

[3]The opposition of the A.F.L. to an administrative board had its origins in its relations with the National Labor Relations Board.

[4]New York Times, December 2, 1937, p. 1.

predicted that although it would help only a "handful" of workers, the cost of living of the entire nation would be increased. Representative Cox of Georgia predicted that its passage would result in the unemployment of a million persons. In addition, the A.F.L. was now sponsoring another bill, one introduced by Representative Dockweiler of California. This bill, which was subsequently rejected by the House, provided for a 40-hour week and 40-cents per hour with enforcement in the hands of the federal courts and the Department of Justice. To meet the objections of the A.F.L. the House Labor Committee changed its bill substituting for the Board an administrator in the Department of Labor with authority to create industry committees.[1]

On December 17 the House voted 216 to 198 to recommit the bill to the Labor Committee ostensibly because of the "need for giving business a rest." The failure to pass the bill was ascribed to a number of factors chief among which was the fact that the A.F.L. refused to join the C.I.O. in support of it and the opposition of southern representatives.[2]

On January 3, 1938, the President addressed the third session of the 75th Congress. He cited the benefits to the nation from the minimum wage legislation which had been enacted by the states. He described the opponents of minimum

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[1]New York Times, December 13, 1937, p. 1.

[2]New York Times, December 18, 1947, p. 1.

wage legislation: those who sincerely believed in the objectives of the legislation but who did not believe that it was a federal responsibility; those who gave "lip service" to the objectives but who objected to every kind of legislation that was introduced; and those who objected to the legislation because they wanted to use labor to attract industry and capital to their communities. He asserted that there was no desire to change the wage structure of the nation. Rather, the objective of the federal government was, he insisted, only to eliminate "starvation wages and intolerable hours." A concomitant objective was to increase national purchasing power.[1]

Little attention, however, was paid to the bill during the first few months of the session. Then came a series of events which led to a reversal of attitude on the part of the Congress. Senator Lester Hill of Alabama was elected to Congress on the basis of his support of the bill. The Florida electorate similarly expressed their approval of Senator Pepper's support of the bill. A poll by the Institute of Public Opinion indicated nation-wide support of wage-hour legislation. After these favorable incidents, the petition to discharge the House Rules Committee promptly received the requisite number of signatures.[2]

On March 1 Representative Norton appointed a subcommittee

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[1]Rosenman, op. cit., The 1938 Volume, pp. 5-7.

[2]Forsythe, op. cit., p. 472.

of the House Labor Committee with Senator Ramspeck of Georgia as chairman to revise the bill for submission to the House. The bill reported by the subcommittee on April 6 placed the administration of the law in the hands of a five-man board selected on a geographical basis. The board was directed to fix wages gradually until the goal of 40 cents an hour and 40 hours a week was achieved. Wage increases were to be limited to 5 cents per hour in any 12-month period.[1]

The House Labor Committee, however, refused to accept this bill and, instead, reported out on April 21 a bill in which administration was placed in the hands of the Secretary of Labor. The minimum wage was fixed at 25 cents per hour with a 5 cents an hour annual increase until 40 cents per hour was reached. Maximum hours were to be 44 per week for the first year with a reduction of 2 hours annually until 40 hours per week was reached. Extra pay for overtime would be at the rate of time and one-half the regular rate of pay. Exemptions were provided for agriculture, fisheries, retail labor, transportation workers, and children in agriculture. The Secretary of Labor would designate the covered industries. Tripartite committees would be appointed for each covered industry to investigate and make recommendations to the administrator regarding wages and hours.[2] On May 24 this bill was

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[1] Loc. cit.

[2] U. S. Congress, House, Committee on Labor, Fair Labor Standards Act of 1938. House Report 2182 to accompany S. 2475, 75th Congress, 3rd Session (Washington, 1938).

passed by the House by a vote of 314 to 97.

The problem of ironing out the differences between the House and Senate versions of the bill remained. Seventeen southern Senators threatened a filibuster unless the South was granted differentials.[1] The conference committee which handled the bill was in the charge of Senator Thomas of Utah and Representative Norton. Questions considered by the committee were regional differentials, flexible versus inflexible standards, and administration. Compromises consisted in having a 25-cent minimum wage the first year, 30 cents the second, with industry committees recommending increases to 40 cents; regional differences would be considered by the industry committees in their recommendations; and the enforcement of the act was placed in the hands of an administrator in the Department of Labor.[2] The joint conference report was signed on June 12, 1938, passed by the House on June 13 by a vote of 291 to 89 and by the Senate on June 14 without a record vote. It was signed by the President on June 25 and became effective on October 24, 1938.

B. Substantive Provisions

The Fair Labor Standards Act, also frequently referred to as the "Federal Wage and Hour Law," provides for the

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[1]Forsythe, op. cit., p. 473.

[2]U. S. Congress, House, Committee on Labor, Fair Labor Standards Act of 1938, House Report 2738 to accompany S. 2475, 75th Congress, 3rd Session (Washington, 1938).

establishment of nation-wide minimum wage standards in the United States to be enforced by the Wage and Hour Division of the United States Department of Labor effective October 24, 1938.[1] The substantive provisions of the Act can best be understood from an examination of its provisions for coverage, minimum wages, industry committees, administration, and enforcement. These provisions will be examined briefly at this point for they will be the subject of more intensive treatment later.

The Act applies to any person acting directly or indirectly for an employer who is engaged in commerce or in the production of goods for commerce. But the Act does not impose blanket coverage on employers. Whether or not an employee is covered depends on the nature of his work. The wage and hour provisions cover all employees engaged in interstate commerce or in the production of goods for interstate commerce. The first of these categories covers employees engaged in industries which serve as actual instrumentalities and channels of interstate commerce or which are an essential part of the stream of commerce. The second covers those employees in manufacturing, processing, and distributing plants where all or a portion of the finished product moves in interstate commerce. Coverage extends to workers other than production workers where their work is deemed necessary for the production of goods for

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[1]In 1942 the Wage and Hour and Public Contracts Divisions were merged.

commerce. Certain classes of employees and certain occupations are exempt from the wage and hour provisions of the Act.

The Act establishes minimum wage standards with progressive increases from a minimum of 25 cents per hour to a maximum of 40 cents per hour over a seven-year period. The 25-cent minimum rate became effective on October 24, 1938. The 30-cent minimum rate was in effect between October 24, 1939 and October 24, 1945, at which time the 40-cent hourly rate was established. The "wage" paid any employee includes the reasonable cost to the employer of furnishing the employee with board, lodging, or other facilities. The cost of facilities primarily for the benefit of the employer are not counted and may not be included in computing wages. The reasonable cost of the facility does not include any profit to an employer or to any affiliated person.

The Act provides for the appointment of industry committees for each covered industry to assist the Administrator in the determination of minimum wage rates in particular industries. These committees are tripartite in nature, representation on them being provided for the public, employers, and employees. The objective of industry committee activity is the attainment of a universal minimum wage of 40 cents per hour. In connection with the determination of wages they may make reasonable classifications of particular industries in order to insure the highest possible minimum wage (not over 40 cents) without substantially curtailing employment in the

particular industrial classifications or giving competitive advantages to particular industrial groups. Classifications may not be made on a regional basis or on the basis of age or sex. Factors which are considered in the fixing of wages as stated in section 8 of the Act are:

> (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.

If the Administrator disapproves an industry committee recommendation, he must refer the wage determination back to the same committee or appoint a new committee. On July 17, 1944, all employees covered by the Act were entitled to a wage of 40 cents per hour under one or another of the wage orders which were issued up to that time.

Administration of the Act is in the hands of the Administrator of the Wage and Hour and Public Contracts Divisions. He is appointed by the President by and with the advice of the Senate. Employees of the Divisions are appointed under and subject to civil service regulations. Under section 4 of the Act the Administrator may "establish and utilize such regional, local, or other agencies and utilize such voluntary and uncompensated services, as may from time to time be needed." On this basis the Divisions have utilized state labor agencies in their investigative activities.

The Administrator and his representatives are authorized to make investigations regarding wages and hours. Such authorization includes the right to enter and inspect industrial establishments, make transcriptions of records, and question employees regarding their wages and hours. The Administrator may prescribe the records to be kept by employers and has issued regulations governing the keeping of such records.

The Act prohibits the transportation in interstate commerce of goods manufactured under labor conditions in which the minimum wage and maximum hour provisions and the regulations providing for subminima rates have been violated; violations of the minimum wage and hour provisions; discharging or discriminating against employees complaining or testifying under the Act; violating the oppressive child labor provisions; failing to keep records as provided in the Act or regulations or keeping false records or making false statements.

There are three methods of enforcing the penalties under the Act. Violators may be criminally prosecuted and penalized by a fine of not more than $10,000, or imprisonment for not more than six months, or both. First offenders, however, cannot be imprisoned. Secondly, employees may sue for twice the amount of wages due and not paid, plus attorneys' fees. Thirdly, the Administrator may secure injunctions to restrain violations of the Act. Such injunctions may be secured in the district courts of the United States.

In this chapter we have traced the origins of the Act, described the committee and congressional debates which preceded its enactment, and detailed the Act's provisions as they finally were formulated by Congress.

The Act which was passed was far different from the original bill which had been presented to the joint congressional committee in 1937. The extensive administrative authority which was given the board in the original bill was replaced by an administrator who had much less administrative discretion. The possibility of wage control up to 80 cents per hour or $1,200 per year was replaced by a minimum starting at 25 cents and ending at 40 cents. Coverage was seriously weakened by the incorporation of a large number of exemptions.

Yet, in spite of these changes, all of which made the Act a much less effective weapon in the struggle against poverty, the Act emerged with strong potentialities for success. The administrative provisions of the original bill, though more desirable from some points of view, would have presented an almost insuperable challenge to those who might have attempted to carry them out. The enacted administrative arrangements presented a much simpler problem. The minimum wage, though low, constituted an approach toward decent living

standards maintained by federal fiat. Coverage, in spite of its being punctured by numerous exemptions, was extended to millions of workers who hitherto had received no such protection. The industry committees constituted a democratic and flexible method of wage determination and one which had had a successful history in other jurisdictions. The enforcement provisions were strong and the penalties severe.

We turn logically to a consideration of the Act's constitutionality. The question of constitutionality was one which was raised repeatedly at the hearings on the original bill and this problem was constantly in the minds of those who drafted it. Regardless of the quality of the legislation, whether or not the Act would take its place as an enduring part of our statutory law depended on the decisions of the Supreme Court regarding it. To a consideration of these, we devote the next chapter.

CHAPTER V

CONSTITUTIONALITY

The constitutionality of minimum wage legislation under the due process clause covering state governments under the Fourteenth Amendment was established in West Coast Hotel Co. v. Parrish.[1] In the same case the validity of such legislation under the due process clause covering the federal government under the Fifth Amendment was established with the reversal of the Adkins decision.[2] With the passage of the Fair Labor Standards Act the Supreme Court was called upon to consider a number of constitutional questions relating to it. Were the minimum wage provisions valid under the Fifth Amendment? Did the Act's provisions come within the commerce power of Congress and, if so, were they or were they not in violation of the Tenth Amendment? And, finally, did the industry committee provisions of the Act constitute a proper delegation of congressional authority? The Court's answers to these questions will be discussed in this chapter.[3]

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[1] 300 U.S. 379 (1937). For a discussion of this decision see pp. 76-78, supra.

[2] For a discussion of the Adkins decision see pp. 70-73, supra.

[3] Two other constitutional questions which were brought

A. Due Process

The Supreme Court has held the wage and hour provisions of the Act as not in violation of "freedom of contract" under the due process safeguard of the Fifth Amendment. In the

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to the attention of the Supreme Court may be noted briefly here. The First Amendment's guarantee of freedom of the press was not violated by the Act in the opinion of the Court in Fleming v. Lowell Sun Company. 120 Fed. (2d) 213, aff'd per curiam (1942) 315 U.S. 784. In this case an acting Regional Director subpoenaed the company's wage, hour, and shipping records. The company refused to comply. It based its refusal on several grounds including the argument that the application of the Act to a newspaper abridges the freedom of the press. The Court refused to accept this argument citing the Supreme Court's opinion in the Associated Press case as having an appropriate application to the question of the constitutionality of the Fair Labor Standards Act: "The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. The regulation here in question has no relation whatever to the impartial distribution of news." Associated Press v. National Labor Relations Board, 301 U.S. 103 (1937). The Court summarized its position in the Lowell Sun case as follows: "To provide for the general well being of employees of newspapers engaged in interstate commerce is a provision for the public good and does not in any way tend to fetter a free press."

The Court has also considered the question of whether those provisions of the Act which authorize the use of the subpoena power and inspection of records are constitutional and not in violation of the Fourth Amendment's guarantee against unreasonable searches and seizures. The leading case on subpoenas under the Fair Labor Standards Act is Fleming v. Montgomery Ward & Co., Inc., et al., CCA-8 (1940), 114 F. 2d 384; cert. denied 311 U.S. 690 (1940). In this case the Court held that (1) the Administrator may inspect the records of an employer without necessarily showing that he has reasonable cause to believe that the employer is violating the law, and (2) the Administrator may issue a subpoena duces tecum commanding the production of records concerning wages and hours and other matters connected with the operation of Act. The fact that the required records may include records of non-covered employees; that they are not necessarily records which the Administrator has indicated must be kept by

Darby Lumber Company case,[1] the Court, in referring to the validity of the wage and hour provisions of the Act under the Fifth Amendment, stated:

> Both provisions are minimum wage requirements compelling the payment of a minimum standard wage for overtime of "not less than one-half times the regular rate" at which the worker is employed. Since our decision in West Hotel Co. v. Parrish, 300 U.S. 379, it is no longer open to question that the fixing of a minimum wage is within the legislative power, and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment. Nor is it any longer open to question that it is within the legislative power to fix maximum hours. . . . Similarly the statute is not objectionable because applied alike to both men and women. . . .[2]

Later, in the Overnight Motor Transportation Company case,[3] the Supreme Court noted that Congress may choose reasonable means necessary for the protection of consumers from the consequences of the production of goods under substandard conditions, such means including the regulation of intrastate activities by minimum wage and maximum hour regulation. The

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the employer; that compliance with the subpoena would impose a seriously onerous burden on the employer; and that there are other sources to which the Administrator may turn for the information he desires--all this does not render the subpoena duces tecum invalid, in the opinion of the Court.

[1] United States v. Darby Lumber Co., et al., 312 U.S. 100 (1941).

[2] Ibid., p. 125.

[3] Overnight Motor Transportation Co. v. Missel, 316 U.S. 572 (1942).

Court then stated that if, for example, the payment of premium pay for overtime as provided for in the Act would in the opinion of Congress help attain this objective, then "private contracts made before or after the passage of legislation regulating overtime cannot take the overtime transactions 'from the reach of dominant constitutional powers.'"

Similarly, in the Carleton Screw Products Company case[1] the Court held that Congress has the right to revoke the right to contract where such contract is in violation of the law. It expressed itself as follows:

> The liberty of contract guaranteed by the constitution is not an absolute one but is a freedom from arbitrary restraint, rather than an immunity from reasonable regulation imposed in the interest of society. Congress may constitutionally deny the liberty to contract to the extent of forbidding or regulating every contract which is reasonably calculated to affect injuriously the public interests. It may deny the right to contract in violation of the established law. For example, a common carrier or shipper cannot legally contract for the transportation of goods or property in interstate commerce at a rate other or different from that specified in the approved published tariffs of the carrier, nor can it contract for preferences or rebates. Neither may individuals in the United States enter into a legal contract for the purchase or sale of lottery tickets.
>
> The constitutional right of contract may not be invoked in support of a supposed right to make or enter into any contracts which are illegal, and Congress may constitutionally regulate the making or performance of contracts where reasonably necessary to effect the purposes for which the National Government was created such as the regulation of interstate commerce.[2]

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[1] Carleton Screw Products Co. v. Fleming, CCA-8, 126 Fed. (2d) 537 (1942).

[2] Ibid., p. 541.

Finally, the Act was unsuccessfully attacked in the Opp Cotton Mills case[1] on the basis that the procedure involved in the recommendation and approval of the textile wage order was in violation of "due process." It was alleged that "either the statute or the demand of due process of law requires the Committee to hold hearings upon notice to interested persons and that its hearings be subject to review before the Administrator and finally as a part of the proceedings before the Administrator to judicial review on petition to the Circuit Court of Appeals, as provided by Sec. 10." However, the Court held that it was not necessary for an industry committee "to conduct a quasi-judicial proceeding upon notice and hearing" and that all that was necessary was a hearing held before the effective date of the final order, a requisite satisfied by the hearing provided for in section 8(b).

B. The Commerce Clause and the Tenth Amendment

The validity of the prohibition of the shipment of proscribed goods in interstate commerce and of the Act's wage and hour requirements under the commerce clause was considered in the case of the United States v. Darby Lumber Co., et al.[2]

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[1] Opp Cotton Mills, Inc. et al. v. Administrator, 312 U.S. 126 (1941).

[2] 312 U.S. 100 (1941). In addition, the Court considered here the constitutionality of the record-keeping requirements of section 15 (a) (5). This was held constitutional since it was a means used by Congress to enforce a law which was valid under the commerce power.

The case involved an appeal from a judgment of a district court which sustained a demurrer to an indictment charging the defendant with having violated several sections of the Act, including 15 (a) (1) which prohibits the shipment of goods produced in violation of the Act and 15 (a) (2) which makes it unlawful to violate the minimum wage and maximum hour provisions of the law in connection with employees engaged in the production of goods for commerce.

In considering section 15 (a) (1), the section which prohibits the shipment of proscribed goods in interstate commerce, the Court held that such prohibition was an appropriate regulation of Congress under the commerce power. It noted the precedent of the proscription from the channels of interstate commerce of such goods as noxious articles, kidnapped persons, and convict-made goods where traffic in such goods was restricted by the laws of the state of destination. The argument that the prohibition was only nominally a regulation of commerce but actually a regulation of wages and hours within a state which preferred to leave wages and hours unregulated was dismissed with the statement that Congress's power to regulate is not limited by the exercise or non-exercise of state power. The fact that either the motice or consequence is to restrict the use of articles of commerce did not make it a "forbidden invasion of state commerce" in the opinion of the Court. In addition, the child labor case of Hammer v. Dagenhart, et al.,[1]

[1] 247 U.S. 251 (1918).

in which it was held that Congress was without power to exclude the products of child labor from interstate commerce since the products of child labor are not necessarily harmful, was overruled.[1] Thus section 15 (a) (1) was held to be a valid exercise of the commerce power.

The Court next considered section 15 (a) (2), which requires compliance with sections 6 and 7 in respect to employees engaged in the production of goods for interstate commerce. The question raised was whether the production of goods for interstate commerce is so related to commerce and so affects it as to be within the reach of the power of Congress to regulate it. The Court held that it was. The obvious purpose of the Act, according to the Court, is not only

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[1]The Court discussed its reversal as follows:

"Hammer v. Dagenhart has not been followed. The distinction on which the decision was 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. . . . The thesis of the opinion that the motive of the prohibition or its effect to control in some measure the use or production within the states of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force. . . . And finally we have declared '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.'"

"The conclusion is inescapable that Hammer v. Dagenhart, was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled." 312 U.S. 116-117.

to prevent the transportation of goods produced under substandard labor conditions but also to prevent their production. Thus, Congress, in the opinion of the Court, intended to include within the phrase "production for commerce" at least those goods which at the time of production were intended to be sent into the channels of interstate commerce. Was such a restriction on the production of goods a permissible exercise of the commerce power? The Court in so holding expressed itself as follows:

> . . . . The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.
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> . . . . . .
>
> We think also that Sec. 15 (a) (2), now under consideration, is sustainable independently of Sec. 15 (a) (1), which prohibits shipment or transportation of the proscribed goods. As we have said the evils aimed at by the Act are the spread of the substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as "unfair," as the Clayton Act has condemned other "unfair methods of competition" made effective through interstate commerce. . . .[1]

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[1] 312 U.S. 118-122.

Having decided that the Act was valid under the commerce power, the Court then turned to consider whether the Tenth Amendment restricted Congress from regulating the production of goods for interstate commerce. The Court held that such was not the case and expressed itself as follows:

> Our conclusion is unaffected by the Tenth Amendment which provides: "The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people." The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it has been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. . .
>
> From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. . . . Whatever doubts may have arisen to the soundness of that conclusion, they have been put at rest by the decisions under the Sherman Act and the National Labor Relations Act which we have cited . . . .[1]

C. The Delegation of Legislative Authority

The problem of the delegation of legislative authority arises from the separation of powers provided for in the Constitution. Traditionally the Supreme Court had held constitutional every delegation of congressional authority that came before it. In 1935, in the Panama Refining Company

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[1] 312 U.S. 123-124.

case,[1] the Court for the first time held a federal delegation of rule-making power void because of the delegation to the President of legislative power without establishing the proper standards and policies to direct his activities.[2]

The second case in which the congressional delegation of power was held unconstitutional by the Supreme Court was the Schechter case,[3] in which the Supreme Court in a unanimous decision invalidated section 3 of the N.I.R.A. which authorized the President to approve codes of fair competition. The Court held that Congress had failed to establish standards and rules of conduct "to be applied to particular states of fact determined by appropriate administrative procedure." Thus, the code-making authority was found to involve an

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[1] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[2] Under section 9 (c) of Title I of the N.I.R.A. the President was authorized "to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law" or order prescribed by a state agency. The Court in holding the delegation of legislative power unconstitutional noted that the statute was "brief and ambiguous"; established "no criterion to govern the President's course"; and did not "require any finding by the President as a condition of his action." It noted that the executive order should itself have included a finding and that there was therein "no statement of the grounds of the President's action in enacting the prohibition." Hence, the legislation was unconstitutional, in its opinion.

[3] Schechter v. United States, 295 U.S. 594 (1935).

unconstitutional delegation of legislative power.

On the basis of the above cases, for a valid delegation of power, Congress would have to prescribe guiding policies and standards; and the administrative officer would apply these policies and standards in the light of relevant findings.[1] In the case of the Fair Labor Standards Act, the Supreme Court had to determine whether the standards outlined in section 8 of the Act for the issuance of wage orders by the Administrator are adequate guides, or whether they are so brief, vague, and ambiguous that the Administrator is, in effect, granted unlimited discretion in wage fixing. The question was settled in the Opp Cotton Mills case,[2] wherein the constitutionality of the 32½-cent minimum wage order for the textile industry was brought into question. The Court noted that the constitution never precluded resort by the

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[1] It has been suggested that for a valid delegation of power Congress must:
(1) itself have power in the premises to regulate;
(2) definitely limit the delegation by:
  (a) defining the subject of the delegation;
  (b) providing a policy, in the form of a primary standard, or criterion, to guide the rule-making authority;
(3) require, in the case of contingent legislation, a finding;
(4) delegate the power to public officers or authorities, not to private persons or groups;
(5) itself provide any penal sanction for violation of resulting rules.
James Hart, An Introduction to Administrative Law (New York, 1940), p. 165.

[2] Opp Cotton Mills, Inc., et al. v. Administrator, 312 U.S. 126 (1941).

legislature to administrative boards which would act as fact-finding agencies in accordance with legislative standards of congressional policy. So far as the delegation of power in section 8 is concerned, the Court held that the standards set up for the guidance of the Administrator are such that there could be no difficulty in ascertaining whether he has abided by the congressional standards. The Court expressed itself thus:

> . . . . 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. These 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.
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> The present statute satisfies those requirements. The basic facts to be ascertained administratively are whether the prescribed wage as applied to an industry will substantially curtail employment, and whether to attain the legislative end there is need for wage differentials applicable to classes in industry. The factors to be considered in arriving at these determinations, both those specified and "other relevant factors," are those which are relevant to or have a bearing on the statutory objective. The fact that Congress accepts the administrative judgment as to the relative weights to be given to these factors in each case when that judgment in other respects is arrived at in the manner prescribed by the statute, instead of attempting the impossible by prescribing their relative weight in advance for all cases, is no more an abandonment of the legislative function than when Congress accepts and acts legislatively upon the advice of experts as to social or economic conditions without re-examining for itself the data upon which that advice is based.[1]

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[1] Ibid., pp. 145-146.

The Act has survived all of the hurdles which it has encountered so far as constitutionality is concerned, in spite of the complications resulting from the presence in the statute of child-labor and premium-pay provisions in addition to its minimum wage provisions. Of the decisions which have been mentioned above the most important is that in the Darby case. Here the Court made the significant judgment that production is intimately related to commerce and that through the commerce power Congress is able to regulate conditions of labor involved in the production of goods for commerce.

There remains now a question closely allied to that of constitutionality--coverage. Coverage presents one of the most complicated problems in the Act. Not until the Supreme Court had had an opportunity to make its decisions in pertinent cases did the scope of coverage assume any clarity. These decisions and other aspects of coverage are subjected to analysis in the following chapter.

CHAPTER VI

COVERAGE

It is interesting to note that the nature of coverage varies with the theory under which the legislation is enacted. If the prevailing theoretical concept of minimum wage regulation is purchasing power theory, there will be universal regulation in order that as much as possible of the total population be covered and purchasing power be maximized accordingly. If the chief purpose of regulation is a minimization of labor disputes by the application of compulsory arbitration, then the regulation may be confined to those sectors of the economy where labor disputes are peculiarly fraught with danger, the railroads, for example, or it may be employed in the settlement of disputes which involve the whole community or society in which case there is universal state regulation of wages. If the sponsors of minimum wage regulation are middle class reformers, then regulation may be confined to the sweated industries with wages in the rest of the economy determined on the basis of individual or collective bargaining. If the sponsors have an individualistic or free enterprise type of philosophy, then regulation is confined to women and children with men regarded as being capable

of fending for themselves.[1] In the United States the desire to increase purchasing power was a basic factor leading to the passage of the Fair Labor Standards Act. The coverage of the Act is limited to low-paid workers, the wages of other employees being determined by individual or collective bargaining.

The problem of coverage is an extremely complex one. First of all, those who drafted the original wage-hour bill wished to insure its constitutionality so far as it was possible to do so. The simplest type of coverage would have been achieved through a flat minimum wage high enough to be of real benefit to the workers and covering all industry. But such a wage would have worked hardships on some employers and employees and would have thus run the risk of being declared in violation of the Fifth Amendment because of its unreasonableness. If an attempt had been made to avoid invalidation by enacting a very low uniform minimum, then the workers would not have received adequate protection. On the other hand, if a high minimum had been enacted, and the discretion had been delegated to a board to mitigate the more obvious cases of hardship, the risk would have been incurred of having the Supreme Court invalidate the law because of the unconstitutional delegation of congressional

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[1]Paul Douglas, "The Economic Theory of Wage Regulation," University of Chicago Law Review, V (January, 1939), 194.

legislative power. The Act's resulting formula of a low flat minimum wage and industry committees with power to raise the minimum for particular industries was a compromise which, although it minimized constitutional hazards, seriously complicated the problem of coverage.[1]

Another source of complication is the large number of exemptions which the Act provides for various types of industries and workers. In the original bill exemptions were few whereas the Board was vested with considerable power to make exemptions at its discretion. As the bill progressed to the point of enactment, this situation was reversed: the number of statutory exemptions expanded and the authority of the Board was gradually curtailed until finally the Board was eliminated altogether. In addition to the exemptions which resulted from the requests made by various groups for exclusion from coverage, there were exemptions which were based on the experience of the states in minimum wage regulation. On this basis exemptions were provided for handicapped persons, learners, and other groups. Some of these exemptions were vague and ambiguous and provide serious administrative difficulties.[2]

This haphazard background of exemption is applied to a highly complex economy in which there are a multitude of

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[1]Cf. the discussion of this problem in the original bill. 1937 Joint Hearings, pp. 19 and 85.

[2]Boles, op. cit., pp. 495-500.

organizational patterns in business so that legal and administrative decisions applying to given situations may not be applied readily to other similar situations for the latter, though similar on the surface to the former, under close examination reveal themselves to be essentially different, at least so far as coverage is concerned.[1] These intricate economic business patterns, furthermore, are not static. The continual change and expansion of business structure and organization necessitate the constant revision of the concepts of coverage of particular situations.[2]

There are other difficulties. Coverage of the Act is predicated on the activities of employees and not on the activities of the establishments in which employees are working. Thus, some employees of an employer are covered and others are not. Competitive relationships between firms are disregarded with the result that of two competing firms, one might be covered and the other not. Finally, the Act does not satisfactorily distinguish, so far as coverage is concerned, between economic activities which are essentially local and those which are essentially of an interstate nature.[3]

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[1]Malcolm M. Davisson, "Coverage of the Fair Labor Standards Act," Michigan Law Review, XLI (June, 1943), 1060-1.

[2]Cf. Kirschbaum Co. v. Walling, 316 U.S. 517 at 520.

[3]Harry Weiss, "Economic Coverage of the Fair Labor Standards Act," Quarterly Journal of Economics, LVIII (May, 1944), 460-461.

A. The General Scope of Coverage

There is no blanket test of coverage, no single formula which may be employed to determine whether a particular employee is covered. The Act does not cover particular industries as a whole. Rather the test of coverage is the activity of the employee in relation to interstate commerce or the production of goods for commerce. Thus, only a portion of the employees in an industry may be covered. An employee may be covered one week and exempt another. The facts in each situation must be carefully analyzed if coverage is to be accurately determined.

One of the first issues which had to be decided was the scope of the commerce power on which coverage is based. The Act applies to employees engaged in commerce and employees engaged in the production of goods for commerce. To clarify the question of coverage the administrator issued interpretative bulletins in which he set forth his interpretation of the meaning of these phrases. These interpretations are not final rulings however. In the final analysis, the interpretation of coverage rests with the Supreme Court.[1]

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[1]The legal problems of coverage have been analyzed in the following articles: Frank E. Cooper, "The Coverage of the Fair Labor Standards Act and Other Problems in its Interpretation," Law and Contemporary Problems, VI (Summer, 1939), 332-352; Malcolm M. Davisson, "Coverage of the Fair Labor Standards Act," Michigan Law Review, XLI (June, 1943), 1060-1088 and XLIII (April, 1945), 867-900; E. Merrick Dodd, "The Supreme Court and Fair Labor Standards," Harvard Law Review, LIX (February, 1946), 321-373; and Leon H. Wallace, "The Fair Labor Standards Act," Indiana Law Journal, XXII (January, 1946), 113-149.

1. "Employees Engaged in Commerce"

The Supreme Court's approach to the question of the coverage of employees "engaged in (interstate) commerce" has been somewhat inconsistent. At first it took a broad and liberal approach basing its decision on a comprehensive view of the "stream of commerce" rather than on a consideration of isolated and independent transactions. In this connection it paralleled the interpretation of the Administrator.[1] For example, it has held as covered employees of wholesalers receiving goods under certain conditions from other states for local distribution.[2] Similarly, it has considered as "engaged in commerce" employees operating a drawbridge over which passed vehicles hauling goods for interstate commerce.[3] However, in more recent decisions there is evident a trend toward a narrower interpretation of the phrase. For example, in a five to four decision the majority of the Court has held

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[1]According to the Administrator the phrase "engaged in (interstate) commerce" applies, "typically but not exclusively, to employees in the telephone, telegraph, radio and transportation industries, since these industries serve as the actual instrumentalities and channels of interstate commerce. Employees who are an essential part of the stream of interstate commerce are also included in the phrase 'engaged in commerce'; for example--employees of a warehouse whose storage facilities are used in the interstate distribution of goods." 29 Code Fed. Reg., c. 5, pt. 776.

[2]Walling v. Jacksonville Paper Co., 317 U.S. 564 (1943).

[3]Overstreet v. North Shore Corporation, 318 U.S. 125 (1943).

as not covered a cook employed by a commissary company to prepare and serve meals to maintenance-of-way employees of an interstate railroad.[1] The trend toward narrower construction of the phrase is further illustrated in another case in which the Court held that "the test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to the production for commerce."[2]

2. "Employees Engaged in the Production of Goods for Commerce"

The Supreme Court's decisions in connection with the coverage of employees engaged in the production of goods for commerce have been notable in that they have been based on economic as well as legal principles. In this connection the Court has to a large extent upheld the interpretation of the Administrator.[3]

Whereas, an examination of the 1937 hearings and the

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[1] McLeod v. Threlkeld, 319 U.S. 491 (1943).

[2] Armour & Co. v. Wantock, 323 U.S. 126 (1944).

[3] The Administrator regards the phrase "engaged in the production of goods forcommerce" as applying "typically, but not exclusively, to that large group of employees engaged in manufacturing, processing, or distributing plants, a part of whose goods moves in commerce out of the State in which the plant is located. This is not limited merely to employees who are engaged in actual physical work on the product itself, because by express definition in Section 3 (j) an employee is deemed to have been engaged 'in the production of goods, if such employee was employed . . . in any process or occupation necessary to the production thereof, in any State.'" 29 Code Fed. Reg., c. 5, Pt. 776.

congressional debates which preceded enactment would lead one to believe that "production" was intended to refer to strictly physical work on the goods produced, the definition adopted by the Court and the Administrator is one which would be accepted by an economist. Thus, the Court has held that it is not necessary that the employees engage in physical production before they can be considered as being engaged in the production of goods for commerce and on this basis has held as covered the building service employees of the owner of buildings leased to clothing manufacturers.[1] This decision gave considerable impetus to the enforcement of the Act. Hitherto coverage had been based largely on the fact that "production of goods for commerce" involved a goods produced by the employee which actually moved in commerce. By this decision the Court extended coverage to employees who were engaged in activities necessary to the production of goods for commerce.[2]

The coverage of the Act has been held by the Court to be even less closely connected with production than the maintenance employees described above. Thus, employees engaged in the construction of oil derricks which were subsequently used for the drilling of wells were held to be covered on the theory that they were engaged in a process or occupation necessary

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[1] Kirschbaum v. Walling, 316 U.S. 517 (1942).

[2] Dodd, op. cit., p. 67.

to the production of goods for commerce.[1]

In connection with activities which are regarded as "necessary" to the production of goods for commerce, the Court has not held this as meaning that the activities must be indispensable. Thus it has expressed itself as follows regarding the requirements of section 6 (a):

> . . . . This does not require the employee to be employed even in the production of an article which itself becomes the subject of commerce or transportation among the several states. It is enough that the employee be employed, for example, in an occupation which is necessary to the production of a part of any other "articles or subjects of commerce of any character" which are produced for trade, commerce or transportation among the several states. This does not require an employee to be employed exclusively in the specified occupation. This does not require that the occupation in which he is employed be indispensable to the production under consideration. It is enough that his occupation be "necessary to the production." There may be alternative occupations that could be substituted for it but it is enough that the one at issue is needed in such production and would, if omitted, handicap the production.[2]

In brief, the Court has based its decisions on the theory that "production is the creation, not of matter, but of utility."[3]

One of the major conclusions which may be drawn from an examination of the decisions of the Supreme Court is that the Act is construed more narrowly in the case of employees

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[1] Warren Bradshaw Drilling Co. v. Hall, 317 U.S. 88 (1942).

[2] Roland Electric Company v. Walling, 326 U.S. 657 (1946).

[3] Jean-Baptiste Say, A Treatise on Political Economy, (Philadelphia, 1834), p. 66.

engaged in commerce than in the case of those engaged in the production of goods for commerce because the latter case includes processes or occupations necessary to production. That this sort of differentiation is economically unsound has been recognized by the Court which defends such reasoning on the basis that it is limited by the wording of the Act and cannot engage in "judicial legislation."[1]

B. Exemptions

In providing for exemptions in a minimum wage law, those who write the law are confronted by a dilemma. If they permit exemptions of particular industries and particular groups of employees, they legally sanction low standards of living on the part of the workers involved. Furthermore, the higher wage standards of other employers are threatened. On the other hand, if the exemptions are denied, then the marginal industries are eliminated and their employees become unemployed with the result that although higher standards prevail for that portion of labor which remains employed, the income to labor as a whole may be decreased. The rebuttal to this argument, of course, is that the inefficient establishments will eventually be replaced by more efficient ones so that the income of society will be higher in the long run. What makes the problem all the more difficult is that a scientific determination of whether or not granting an exemption will create

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[1]Davisson, op. cit., Vol. XLIII, p. 889.

unemployment is all but precluded by the fact that statistical analysis of such a problem has not progressed to the point where it can provide a satisfactory answer.[1]

Employees specifically exempt from the wage and hour provisions of the Act are detailed in Section 13 (a).[2] These

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[1]Paul F. Brissenden, "Economic Implications of the Wages and Hours Act," Vital Speeches, V (February 15, 1939), 287-288.

[2]Sec. 13 (a): "The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semi-weekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, surburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other daily products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations."

exemptions are to be narrowly construed. In this connection the Supreme Court has held that: "The Fair Labor Standards Act was designed to 'extend the frontiers of social progress' by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work' . . . . Any exemption from such humanitarianism and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people. . . ."[1]

A few comments regarding some of these exemptions are appropriate at this time. Among the most important of them is the section 13 (a)(1) exemption for executive, administrative, professional, etc., employees. No authorization need be secured from the Administrator in order to apply them. All that is necessary is that exempted employees fall within the scope of the Administrator's definitions of the exempt classes.

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[1] A. H. Phillips Inc. v. Walling, 324 U.S. 490 (1945) at p. 493.

Such definitions have been issued.[1] The present definitions have been partly outmoded by the current inflation since among the criteria used in determining the application of the exemption is the salary of the employee involved.

The importance of the 13 (a) (2) retail and service exemption is indicated by the fact that a very substantial portion of the labor force may be found employed in retail and service establishments. The Administrator holds that a retail or service establishment which derives more than 25 percent of its "semiannual total gross receipts from nonretail selling or nonexempt servicing" is not entitled to the benefits of the exemption.[2]

The section 13 (a) (10) "area of production" exemption has proved the most difficult to administer of all of the exemptions in the Act. It represents an attempt to exclude from coverage small rural establishments engaged in packing and other operations related to farming. The definition of the "area of production" is formulated by the Administrator. Because of the difficulty in arriving at a satisfactory

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[1] 29 Code Fed. Reg., c. 5, Pt. 541. See also, U.S. Department of Labor, Wage and Hour Division, Report and Recommendations of the Presiding Officer, in the matter of Proposed Amendments to Part 541 of Regulations with Respect to the Definitions of the Terms, Executive, Administrative, Professional . . . Outside Salesman. (Washington, 1940). This report, known as the Stein Report, constitutes an excellent analysis of the problem of defining the different members of this group.

[2] 29 Code Fed. Reg., c. 5, Pt. 779.2.

definition, it has frequently been changed. This exemption is discussed in detail in Chapter VII below.

The section 13 (a) (11) exemption is the result of an amendment to the Act on August 9, 1939. It exempts telephone operators from the Act's wage and hour provisions when they are employed in public telephone exchanges having less than five hundred stations. The exemption applies to telephone operators only, maintenance and other employees not being included. According to a congressional report, the reason for the exemption is the inability of the small telephone companies to pay the legal minimum wage and the impracticability of the hours provisions in view of the sporadic nature of the demand for telephone service.[1]

C. Distribution of Coverage

A 1943 analysis of the economic coverage of the Act[2] still merits examination at this date because its general implications are still valid. Table 1, a statistical summary of this analysis, has been described as a "crude approach to a quantitative set of estimates of the industrial coverage of the Act."[3] In addition, it shows the number exempt from coverage. A more recent estimate of the number of employees

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[1]U.S. Congress, House, Committee on Labor, Amendment to the Fair Labor Standards Act of 1938, House Report 1448 to accompany S. 1234, 76th Congress, 1st Session (Washington, 1939).

[2]Weiss, op. cit., pp. 460-481.

[3]Ibid., p. 462.

subject to sections 6 and 7 of the Act but giving no information on exemptions or on the number of employees in the labor force not covered is shown in Table 2. It should be noted that the value of these statistics is limited for our purposes because coverage is assumed when the hour as well as the wage provisions of the Act are applicable.

An accurate count of coverage in any particular period is possible but exceedingly costly. Its value is further limited by the fact that the number of employees covered varies continually in that coverage depends on the nature of the work done by the employees, a factor which constantly varies. Furthermore, the number of employees regarded as covered will increase or decrease as the courts issue their decisions relating to coverage and the Administrator amends his interpretations accordingly.

The possibilities of greater coverage lie within the hands of Congress. In 1947, of a total of between 35 and 40 million wage and salary workers in the United States, excluding government employees, about 20 million received the benefits of the Act. At least 10 million more workers could have received these benefits under the federal commerce power. About two-thirds of these 10 million were covered but exempt. The remaining third was not covered but could have been covered if the commerce power had been fully extended.[1]

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[1] U.S. Department of Labor, Wage and Hour and Public Contracts Divisions, Annual Report, Fiscal Year, 1946 (Washington, 1947), pp. v-vi. Cited hereinafter as 1946 Annual Report of the Wage and Hour and Public Contracts Divisions.

TABLE 1

THE LABOR FORCE[1] IN THE UNITED STATES IN RELATION TO COVERAGE AND EXEMPTIONS UNDER THE FAIR LABOR STANDARDS ACT, AUGUST, 1943

Industry Group	Total Number of Employees	Number Covered by the Fair Labor Standards Act and Subject to Sections 6 or 7	Number Not Covered or Exempt		
			Total	Number Exempt by Specific Provisions of Act	Number Not Exempt and Engaged in Intrastate Commerce
All groups, total	45,200,000	21,485,000	23,715,000	19,945,000	3,770,000
Agriculture, forestry and fisheries	5,000,000	.....	5,000,000	5,000,000	.....
Manufacturing	16,000,000	15,000,000	900,000	800,000	100,000
Mining and quarrying	800,000	725,000	75,000	35,000	40,000
Construction	1,000,000	200,000	800,000	50,000	750,000
Wholesale trade	1,500,000	1,000,000	500,000	400,000	100,000
Retail trade	5,000,000	100,000	4,900,000	4,900,000	.....
Banking, finance and insurance	900,000	600,000	300,000	285,000	15,000
Transportation and allied services	2,900,000	2,200,000	700,000	600,000	100,000
Communication and other public utilities	870,000	800,000	70,000	70,000	.....
Services, total	5,230,000	760,000	4,470,000	1,805,000	2,665,000
Agricultural and business services	450,000	150,000	300,000	100,000	200,000
Automotive repair and other repair services	130,000	50,000	80,000	80,000	.....
Personal services	2,400,000	50,000	2,350,000	1,000,000	1,350,000
Professional and related services	1,200,000	200,000	1,000,000	100,000	900,000
Non-profit membership organizations	400,000	250,000	150,000	100,000	50,000
Hotels, rooming houses and other lodging houses	400,000	.....	400,000	400,000	.....
Amusement, motion pictures and other recreational services	250,000	60,000	190,000	25,000	165,000
Government (federal, state and local)	6,000,000	.....	6,000,000	6,000,000[2]	.....

Source: Preliminary estimates of the Statistics Section, Economics Branch, Wage and Hour Division. Figures are based on Census, Bureau of Labor Statistics, Social Security Board and trade association reports.

[1] The labor force is defined to include only employees. Total employment thus excludes approximately 6,000,000 farm owners and tenants; about 1,000,000 unpaid farm family labor; and approximately 2,500,000 proprietors of unincorporated businesses. Also excluded are members of the armed forces.

[2] Strictly speaking, the exemption of governmental employees is quite different from the other exemptions, since they are excluded entirely through the definition of "employer." The effect, so far as the application of the wage and hour provisions is concerned, is the same.

Cited in Weiss, op. cit., p. 463.

TABLE 2

NUMBER OF EMPLOYEES SUBJECT TO SECTIONS 6 AND 7 OF THE FAIR LABOR STANDARDS ACT [1]

All industries, total	20,510,000
Manufacturing, total	13,980,000
Food products	1,000,000
Tobacco products	100,000
Textile-mill products	1,300,000
Apparel and other finished textile products	1,170,000
Leather and leather products	370,000
Rubber products	280,000
Logging, lumber products and furniture	1,070,000
Paper and allied products	420,000
Printing, publishing and allied industries	550,000
Chemicals and allied products	600,000
Products of petroleum and coal	200,000
Stone, clay and glass products	400,000
Metals and metal products	6,000,000
Miscellaneous manufacturing industries	520,000
Mining	730,000
Construction	440,000
Transportation and allied service	2,150,000
Communication and other public utilities	840,000
Trade	1,100,000
Banking, finance, insurance and real estate	670,000
Services and miscellaneous industries	600,000

[1] Personal letter to the author from Harry Weiss, Director of the Economics Branch, Wage and Hour and Public Contracts Divisions, April 2, 1947.

1. Coverage by Industry Groups

It is evident from the two preceding tables that the greater portion of covered employees are in manufacturing industry. This is necessarily so because of the extent to which coverage extends back to include such manufacturing activities as the production of containers in which goods are shipped in interstate commerce, or the production of products which become parts of ingredients of goods which move in interstate commerce. The only substantial portion of manufacturing industry which is not covered are such industries as lumber, brick, and other clay products which because of their bulk do not ordinarily leave the state of production. Nevertheless, in such industries employees who are engaged a substantial portion of their time in ordering and receiving raw materials from other states are covered.[1]

Most of the extractive industries are covered. Exceptions are the crushed stone, sand, and gravel industries which usually are locally used because of prohibitive shipment costs.[2]

Generally, both the Divisions and the courts have taken the position that new construction is not covered.[3] The basis of this position is that there is no assurance at the time of construction that the structure will be used in the production of goods for commerce. But, in such construction,

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[1]Weiss, op. cit., pp. 462-465.

[2]Loc. cit.

[3]Ibid., p. 466.

employees ordering and receiving materials from other states are covered. On the other hand, the maintenance, repair, and reconstruction of instrumentalities of commerce or buildings used in the production of goods for commerce has been held by both the Administrator and the courts to be covered since these activities are necessary for commerce or for the production of goods for commerce.[1]

The Administrator holds all light and power utilities covered by the Act on the grounds that power is sold across state lines or that light and power are used by factories producing goods for commerce. Telephone and telegraph companies are covered except for one exemption.[2]

Wholesalers who sell across state lines are covered. Wholesalers who sell within a state goods received from other states are covered under certain situations, to wit: direct consignments from factory to retailers; transactions based on prior orders or understandings with retailers; and, possibly, continuous purchases in anticipation of customers' needs. Furthermore, coverage extends to employees of wholesalers ordering and receiving goods from other states under all conditions.[3]

The Administrator regards banking, insurance, and

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[1] Ibid., pp. 465-466.

[2] Section 13 (a) (11).

[3] Walling v. Jacksonville Paper Co., 317 U.S. 564 (1943).

financial institutions as covered either because they are engaged in the production of "goods," intangible though they are, for commerce, or where the business is strictly local in nature, coverage may be presumed as a result of the use of the United States mails, the use of correspondent banks, and similar connections with agencies in other states. But such strictly local financial institutions as personal finance companies may not be covered.[1]

All interstate transportation, except where specifically exempted, is covered.

2. Coverage by States

Some idea of the nature of the distribution of coverage of the Act among the states and the number of employees that have been affected by the Act's provisions by states may be obtained from an examination of a study conducted in 1939 by the U.S. Bureau of Labor Statistics.[2] This study shows that there were twelve states--Vermont, Delaware, the Dakotas, and the Mountain states--in which the total number of covered employees comprised only 3 percent of the total number of covered employees as a whole. Coverage, on the other hand, was concentrated in the northern industrial states with New

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[1]Weiss, op. cit., p. 468.

[2]A. F. Hinrichs and A. Sturges, Estimated Number of Workers in April, 1939, Subject to Provisions of the Fair Labor Standards Act Effective October 24, 1939, cited in U.S. Department of Labor, Wage and Hour Division, Annual Report for the Calendar Year 1939 (Washington, 1940), pp. 34-43. Hereinafter cited as 1939 Annual Report of the Wage and Hour Division.

York, Pennsylvania, Illinois, and Michigan leading. But though the northern states led with the number actually covered, the percentage of employees in those states who received less than 30 cents per hour was comparatively small. The southern states, led by Mississippi with 40 percent of its covered employees getting less than 30 cents per hour, were the ones on whom the impact of the minimum wage, according to this study, would impinge most sharply.

The geographic distribution of covered employees by states is shown in Table 3, and of those receiving less than 30 cents per hour in Table 4.

Some conclusions may be drawn from this brief survey of the Act's coverage:

(1) In general, coverage of the Act has been extended by a liberal, pragmatic, and economic interpretation of the commerce clause of the constitution by both the Administrator and the Supreme Court.

(2) The Court is tending to construe coverage of the Act as applying to "employees engaged in commerce" more narrowly than in the case of "employees engaged in the production of goods for commerce" although there is no economic justification for a distinction between the two.

TABLE 3

ESTIMATED NUMBER OF EMPLOYEES COVERED BY THE FAIR LABOR STANDARDS ACT IN APRIL 1939, BY STATES[1]

United States[2] ...	12,652,700	Montana	40,500
		Nebraska	64,200
Alabama	173,300	Nevada	10,100
Arizona	25,300	New Hampshire	63,600
Arkansas	66,600	New Jersey	569,100
California	505,800	New Mexico	25,300
Colorado	69,800	New York	1,516,100
Connecticut	314,700	North Carolina ...	322,200
Delaware	28,900	North Dakota	18,800
District of Columbia	31,300	Ohio	848,400
Florida	102,700	Oklahoma	104,600
Georgia	215,000	Oregon	95,000
Idaho	28,000	Pennsylvania	1,280,100
Illinois	975,900	Rhode Island	125,600
Indiana	370,700	South Carolina ...	156,200
Iowa	141,000	South Dakota	22,000
Kansas	110,400	Tennessee	212,000
Kentucky	181,500	Texas	330,000
Louisiana	136,500	Utah	32,200
Maine	90,000	Vermont	36,400
Maryland	211,300	Virginia	213,400
Massachusetts	643,200	Washington	144,900
Michigan	729,700	West Virginia	216,900
Minnesota	175,200	Wisconsin	297,700
Mississippi	71,400	Wyoming	20,700
Missouri	332,400	Puerto Rico	104,100

[1]Based on data in U. S. Bureau of Labor Statistics, "Estimated Number of Workers in April, 1939, Subject to Provisions of the Fair Labor Standards Act Effective October 24, 1939," by A. F. Hinrichs and A. Sturges, October 1939, cited in 1939 Annual Report of the Wage and Hour Division, p. 37.

[2]The United States total includes 41,000 covered employees of mail-order houses. These employees are not included in the State figures. The United States total also includes a roughly estimated total of 11,000 covered employees in the Territories of Alaska and Hawaii.

TABLE 4

ESTIMATED NUMBER OF EMPLOYEES COVERED BY THE FAIR LABOR STANDARDS ACT RECEIVING LESS THAN 30 CENTS PER HOUR IN APRIL, 1939, BY STATES[1]

United States[2]	690,000	Montana	100
		Nebraska	3,700
Alabama	38,200	Nevada.....	100
Arizona	400	New Hampshire	5,900
Arkansas	17,100	New Jersey	16,600
California	4,300	New Mexico	600
Colorado	2,100	New York	29,400
Connecticut	5,600	North Carolina	60,600
Delaware	1,800	North Dakota	400
District of Columbia	700	Ohio	12,900
Florida	23,800	Oklahoma	5,700
Georgia	57,000	Oregon	900
Idaho	1,400	Pennsylvania	36,300
Illinois	15,300	Rhode Island	2,600
Indiana	4,500	South Carolina	41,400
Iowa	5,800	South Dakota	1,500
Kansas	4,200	Tennessee	43,200
Kentucky	13,500	Texas	35,500
Louisiana	22,600	Utah	600
Maine	4,600	Vermont	1,900
Maryland	14,000	Virginia	26,600
Massachusetts	19,800	Washington	700
Michigan	11,900	West Virginia	1,900
Minnesota	1,800	Wisconsin	5,500
Mississippi	26,000	Wyoming	200
Missouri	18,800	Puerto Rico	40,000

[1]Based on data in U.S. Bureau of Labor Statistics, op. cit., cited in 1939 Annual Report of the Wage and Hour Division, p. 39.

[2]Does not include homeworkers, estimated at about 135,000 in continental United States and 60,000 in Puerto Rico; also excludes longshoremen and employees of mail-order houses.

(3) The Court has held that exemptions from coverage are to be construed narrowly.

(4) The benefits of the Act could be extended to 10 million additional persons if Congress would remove the present exemptions and fully utilize the commerce power.

(5) Although the South does not have the greatest number of covered employees, it has relatively the greatest number of employees who are underpaid. Therefore, the South has felt and will feel the effects of the Act more markedly than the other regions of the country.

CHAPTER VII

ADMINISTRATION

The basic administrative problem of the Act is this: The purpose of the Act is to increase employment and purchasing power. Yet in both the committee hearings and in the congressional debates which preceded enactment, it was frequently argued that instead of increasing employment and purchasing power, the Act would be detrimental to both. The question was not fully resolved during the course of enactment and it became an administrative problem: throughout the Act occurs the admonition to the Administrator that there be "no substantial curtailment of employment" as a result of administrative action.

What sort of organization has been established to deal with this and other problems connected with the carrying out of the Act's provisions? What problems have been met in the staffing of this organization? How are the Divisions organized? The organization of the Wage and Hour and Public Divisions is the first of the problems which we will consider in this chapter.

Secondly, we will deal with the problems involved in the operation of the industry committees. Here the scope of

administrative discretion is broad indeed. The Administrator appoints the committees. The time of their convening rests with him. He accepts or rejects their recommendations. Although the chief goal of the industry committees--a 40-cent minimum wage for the continental United States--has been reached, an evaluation of the industry committee method at this time is important. We will want to know how effective it has been for it may be used again in the approach to a higher minimum wage.

Thirdly, the Administrator is authorized to issue regulations in connection with the employment of apprentices, messengers, learners, and handicapped workers at subminimum rates "to the extent necessary in order to prevent curtailment of opportunities for employment." We will want to know how the Administrator has been able to control the payment of subminimum rates without curtailing the opportunities for the employment of these workers.

Fourthly, how has the Administrator handled the problem of determining the reasonable cost of board, lodging, and other facilities? How has he insured the payment of the full minimum wage to employees by preventing employers from making unreasonable charges for these items?

Fifthly, the Administrator is asked to define certain terms which are used in the Act. The term which he has found the most difficult to define is the "area of production." We will want to know the reason for this difficulty and why, in

the opinion of the Administrator, the term should be eliminated from the Act by congressional action.

Sixthly, the Administrator has issued regulations prohibiting or restricting homework in certain industries. Why have such regulations been necessary? How effective have they been? How do they operate?

Finally, how has the Administrator met the problem of the payment of tips as wages? What are the provisions in the Act with respect to this form of wage payment? What are the problems which the Administrator has had to meet in this connection and how has he met them? These are the problems which we will consider in this chapter.

A. The Wage and Hour and Public Contracts Divisions

Section 4 (a) of the Act provides for the creation of a wage and hour division in the Department of Labor which division is headed by an administrator who is appointed by the President by and with the consent of the Senate.[1] Section 4 (b) provides that the Administrator may appoint his assistants subject to civil service regulations, may establish and utilize regional and other agencies, and that the attorneys who

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[1]The following have held the office of Administrator:
Elmer F. Andrews, August 15, 1938, to October 16, 1939
Philip B. Fleming, March 4, 1940, to December 10, 1941
L. Metcalfe Walling, March 6, 1942, to March 15, 1947
Wm. R. McComb, April 4, 1947, to date.
Personal letter from the Wage and Hour and Public Contracts Divisions, July 22, 1947.

represent him shall be under the direction and control of the Attorney-General. It provides, further, that all appointments and promotions must be on the basis of merit and efficiency and precludes the consideration of political qualifications. Section 4 (c) provides that the Administrator's principal office be located in the District of Columbia.[1]

The organization of the national office of the Divisions is described below:[2]

(1) The Administrator plans and directs the work of the Divisions. He is assisted by a deputy and a special assistant who performs special assignments.

(2) The Deputy Administrator is in charge of the Divisions in the absence of the Administrator. With the Administrator he considers and acts upon major problems in connection with the Act. He is the Administrator's executive assistant.

(3) The Field Operations Branch, under a director, directs, coordinates, analyzes, and reviews the enforcement of the Divisions' field staff.

(4) The Information and Compliance Branch, under a director, handles the public relations and information program of the Division.

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[1] In February of 1942 the Wage and Hour Divisions' national office was temporarily moved to New York City. In October of the same year, the Wage and Hour and Public Contracts Divisions were consolidated. On March 3, 1947, the Divisions' national office was retransferred to Washington.

[2] 29 Code Fed. Reg., c. 5, Pt. 200, Sec. 500.2, issued September 11, 1946, revised October 28, 1947.

(5) The Wage Determination and Exceptions Branch, under a director, handles problems of economic research.

(6) The Business Management Branch handles all problems and policies in connection with the management functions of the Divisions.

(7) The Child Labor Branch, under a director, handles all of the Divisions' problems in connection with the employment of children and young people.

Inspection and enforcement work in the field is under the direction of regional offices in the Department of Labor and of the Territorial Representative in Puerto Rico. Considerable administrative authority has been delegated to Regional Directors, Assistant Regional Directors, the Territorial Representative in Puerto Rico, and the Commissioner of Labor in North Carolina.[1] The enforcement of the Act in North Carolina and Minnesota has been delegated to the respective state departments of labor.

Two of the more important functions of the Business Management Branch of the Divisions are the administration of personnel within the Divisions and the maintenance of fiscal

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[1]This includes the granting, denial, or cancellation of homework certificates and the holding of hearings in connection therewith and similar powers of issuance, denial, or cancellation of handicapped workers certificates, certificates covering the employment of handicapped workers in sheltered workshops, and certificates issued in connection with employment at subminimum rates under the Veterans Administration vocational rehabilitation program. Regional offices answer questions with reference to matters on which the Administrator has taken a position. Ibid., Sec. 500.3.

and budgetary control of funds which the Divisions have available. The problems are related. Proper administration of the Act is dependent on adequate personnel which, in turn, is dependent on the funds which are available to hire and train such personnel. The passage of the Act did not mean that Congress was no longer able to control its progress. Congress has the power to pass on appropriations and through such control can expand or contract the administrative and enforcement activities of the Divisions just as effectively as it can by amending the Act.[1]

The recruting of personnel during the early days of the Division proved to be a real problem. It was solved with the assistance of other federal agencies which loaned not only

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[1]The early experience of the Act, so far as availability of funds was concerned, was an unhappy one. Although $500,000 was asked to carry the Division through the fiscal year ending June 30, 1939, only $400,000 was appropriated of which $50,000 was allocated by the Department of Labor to the Children's Bureau. As a result no effective administration was possible. In January, 1939, there were only 75 field inspectors to handle a job which required an estimated 603. Samuel Herman, "The Administration and Enforcement of the Fair Labor Standards Act," Law and Contemporary Problems, VI (Summer, 1939), 370. The Division then asked for a deficiency appropriation and received $850,000 to carry it through the 1939 fiscal year. This sum was still inadequate. Industry soon became aware of this and by April, 1939, a break-down of the Act's enforcement was imminent. Non-compliance spread and complaints rose to more than 20,000. By June, 1939, there were only 109 inspectors for the entire country. Congress was again asked for funds--a deficiency fund of $2,000,000. Accordingly, Congress in the Third Deficiency Act of 1939 appropriated $1,200,000 of which $915,000 was available for personnel services. 1939 Annual Report of the Wage and Hour Division, pp. 122-123.

personnel, but supplies, space, and equipment in addition.[1]

In 1943 there was a reduction in the Divisions' appropriations on the theory that personnel had been trained and that funds would be unnecessary for training purposes. Personnel problems were also accentuated by the drains on the staff by selective service and the war agencies. Turnover, as a result, was about 50 percent.[2]

The present outlook for funds is not a promising one. The Divisions' 1946 annual report shows that the total available funds for the 1947 fiscal year is about $6,000,000 as

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[1]Since the Act provides that all of the employees have to be appointed under the civil service laws, examinations had to be held and registers established before appointments were made, an extremely slow procedure for an agency in immediate need of a large staff of enforcement and other personnel. The problem was met, in part, by borrowing from other government agencies, especially from those in the Department of Labor. Staff members of the Division of Labor Standards helped prepare regulations, organize and plan the enforcement program, and train new personnel. The industry committee program was started on its way by the Bureau of Labor Statistics and the Women's Bureau. Space, supplies, and equipment were extended to the field personnel of the Division by the Social Security Board. Personnel was secured from the Works Progress Administration and the Treasury Department. An arrangement was made with the Civil Service Commission which provided for the provisional appointment of qualified persons as inspectors until a register could be set up as the result of examination. 1939 Annual Report of the Wage and Hour Division, pp. 124-125.

[2]U.S. Department of Labor, Wage and Hour and Public Contracts Divisions, Annual Report for the Fiscal Year Ended June 30, 1943 (New York, 1944), pp. 2-3. Hereinafter cited as 1943 Annual Report of the Wage and Hour and Public Contracts Divisions.

compared to about $7,000,000 in 1946.[1] Budget cuts for the 1946 fiscal year caused reductions in personnel which resulted in the dismissal of staff members who had been with the Divisions as far back as 1941 and who represented an investment of thousands of dollars in training. There were additional serious reductions in personnel during the 1947 fiscal year.

Most inspection control functions are centered in the Field Operations Branch of the Divisions. Officers of the branch plan the inspection of nation-wide firms, prepare studies of compliance problems in important industries, lay the basis for compliance drives in such industries, issue the various inspection manuals and field operations bulletins, and help in the training of inspection type field personnel.[2]

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[1] 1946 Annual Report of the Wage and Hour and Public Contracts Divisions, p. 87.

[2] The nature of the controls on inspection procedure may be briefly noted. The inspector's findings are incorporated in a report containing such exhibits as are necessary to establish coverage, compliance, or non-compliance. This report is analyzed and reviewed at the regional office and the case is recommended to be closed if the inspection has been properly made and no litigation is indicated. The report is sent to Washington where it is subject to further analysis and review. The Washington review of the report is designed to insure uniformity in inspection technique, to determine whether Washington policy is being carried out, and to develop improved inspection techniques. The inspector is informed of any comments regarding the quality of his inspection which would be of help to him. The work of the different regions, field offices, and inspectors are analyzed on a competitive basis. If the inspection procedure is found to be inadequate or inaccurate the report is returned to the regional office for further action. If the inspection has

Special inspection techniques have been developed for the investigation of nation-wide firms. The inspection of industrial homework has similarly required special treatment. A homework unit in the Field Operations Branch trains homework inspection personnel and analyzes their inspection reports. It cooperates with federal and state agencies in negotiating agreements for the exchange of information and coordination of homework inspections.[1]

The research activities of the Divisions are centered in the Wage Determination and Exceptions Branch. This Branch engages in the research and statistical studies which are required for the effective carrying out of the activities of the Divisions. The Administrator has classified its activities as follows:[2] (1) The preparation of data which the Administrator is required to submit to the industry committees in connection with their deliberations; (2) studies requested by the Solicitor's Office which help clarify economic questions in connection with litigation; (3) studies of the economic

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been properly handled, the case is closed and the files returned to the field office. U.S. Department of Labor, Wage and Hour Division, Annual Report for the Fiscal Year Ended June 30, 1941 (Washington, 1942), pp. 94-95. Hereinafter cited as 1941 Annual Report of the Wage and Hour Division.

[1] Ibid., pp. 95-98.

[2] Ibid., p. 62.

effects of administrative decisions, rulings, and regulations; (4) the statistical analysis of the quality and quantity of enforcement work; (5) studies requested by congressional committees of the economic effects of proposed amendments to the Act.[1]

The Branch is constantly preparing for the Solicitor's office economic data for use in court cases. This work involves the development of the economic background of each case so as to present to the courts a picture of the pertinent industrial and labor practices involved in addition to the legal problems in the question they are trying to decide. Accordingly, the Branch is frequently engaged in the intensive study of various phases of the history of hours, wages, and working conditions and their regulation by government.[2]

There have been many studies made in connection with administrative decisions and regulations. The Branch has developed the procedure to be used in determining the "reasonable cost" for board, lodging, and other facilities in connection with Section 3 (m). In connection with the authorization of subminimum rates for learners and apprentices, studies have been made of the length of the learning period required in different occupations and of the subminimum rates which should be paid. The Branch has explored the question of

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[1] 1941 Annual Report of the Wage and Hour Division, p. 62.

[2] Ibid., pp. 62-63.

whether it is possible to enforce homework regulations effectively under the Act. Special studies have been made of industries in connection with the interpretations of exemptions. In addition to engaging in studies like these, the Branch reports monthly on the statistics of field operations which cover the activities of the field staff and also prepares special statistics for the Divisions for various purposes.[1]

Every effort is made by the Divisions to disseminate information regarding its activities among persons who are interested in and affected by them. The Administrator has taken the position that it is impossible for the Act to be adequately enforced until these persons are made aware of its provisions. Adequately informing employers of the Act's provisions keeps the number of unwitting violators at a minimum. When employees know what the Act provides for, the number of complaints made without any legal basis is discouraged.

All public relations and information activities designed to achieve voluntary compliance with the Act are in the charge of the Information and Compliance Branch. The Branch has engaged in a wide variety of informational activities. In accordance with section 8 (g) of the Act which provides that information regarding any hearings in connection with wage orders shall be published in the Federal Register and

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[1] Ibid., pp. 62-64.

otherwise placed in the hands of interested parties, the Divisions have issued news releases to newspapers and press associations, utilized the radio and otherwise disseminated information regarding the hearings. Industries have been informed of compliance drives. Information regarding restitution settlements have been given wide publicity. Trade associations and labor unions have been addressed by representatives of the Divisions. A Trade Magazine Service Section in the Branch reaches interested employers through their trade organs. The Divisions have submitted solicited articles on compliance problems to various journals. Hundreds of thousands of announcements and explanatory pamphlets have been distributed.[1]

This is the organization which is charged with the administration of the Act. The manner in which such administration has been carried out is detailed below. We start with a consideration of the industry committees.

B. Industry Committees

Sections 5 and 8 of the Act provide for a method whereby employers, employees, and the public can participate in the achievement of the Act's objectives. The Act provides for the payment of 25 cents per hour during the first year of the law's operation, 30 cents per hour during the second, and

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[illegible] See also the 1939 Annual Report of the Wage and Hour Division, pp. 125-127, and the 1946 Annual Report of the Wage and Hour and Public Contracts Divisions, pp. 140-148.

[1] Ibid., pp. 98-103.

40 cents per hour thereafter. But higher rates could be paid (not in excess of 40 cents per hour) where tripartite industry committees recommended their establishment. The industry committees were designed to make the progress toward the universal 40-cent minimum to be gradual and to be geared scientifically to such factors as technology, business conditions, labor productivity and employer efficiency. The committees decided how far, in the light of these factors, wages could be raised to 40 cents per hour without substantially curtailing employment opportunities. The committees considered the economic effects of the proposed wage rates. They determined whether separate rates should be recommended for different segments of industry. In such determinations regional classifications based solely on regional considerations were precluded unless they were necessary to achieve the highest minimum which would not substantially curtail employment and would not provide a competitive advantage to any particular group. In the establishment of classifications the committees considered the following:

> (1) competitive conditions as affected by transportation, living, and production costs;
> (2) the wages established for work of like 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.[1]

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[1] Sec. 8 (c).

In addition, classifications based on sex were not permitted.

These committees achieved their goal, the universal 40-cent minimum for the United States on July 17, 1944. We will briefly review the procedure under which these committees operated and will evaluate their place in minimum wage determination in more detail.

The Act provides for five basic steps in the issuance of wage orders: (1) appointment of an industry committee; (2) investigation of the industry by the committee; (3) recommendation of a minimum wage rate by the committee; (4) hearing conducted by the Administrator on the committee's recommendations; and (5) rejection of the recommendations by the Administrator, or their acceptance by him and subsequent issuance of a wage order.

Since the Act does not prescribe any method whereby one industry should be chosen in preference to another, the Administrator followed a selection policy in which the wage standards of the greatest number of workers would be improved most rapidly. Industries were chosen in which the workers were poorly paid but which were so organized as to permit the fixing of higher wages without major economic dislocation.[1] Other factors considered in selection were the availability of the economic data required by the committees and the interests of labor and industry in particular industries.[2]

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[1] 1941 Annual Report of the Wage and Hour Division, pp. 2-3.

[2] Harry Weiss, "Minimum Wage Fixing under the United States Fair Labor Standards Act: The Working of the Industry Committees," International Labour Review, LX (January, 1945), 20-21. Cited hereinafter as Weiss, Industry Committees.

Once the decision was made to select a particular industry, the industry had to be defined--a particularly difficult problem in view of the intricate structure of business in the United States. The definitions used by the N.R.A. and by the Census Bureau were helpful but a tremendous amount of work in the form of economic and industrial research remained, nevertheless, in the defining of industries. Such research included conferences with manufacturers, labor organizations, and government agencies.[1]

The committees consist of employee, employer, and public members. A public member is chairman. In the appointment of members, consideration was given to geographical regions. Trade associations and other manufacturing groups were consulted in connection with the appointment of employer representatives. Labor representatives were appointed on the

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[1] 1941 Annual Report of the Wage and Hour Division, p. 3. These definitions have been considerably criticized. The Divisions' use of a variety of criteria as a basis for definitions--raw materials, trade association affiliations, markets, and processes--instead of one uniform approach has been regarded as improper. The Divisions have also been criticized for making no independent study of classification problems and for relying exclusively on the records of other agencies. E. B. Mittleman, "Wage Determinations: The Evidence Before the Wage and Hour Division," Political Science Quarterly, LXIX (December, 1942), 569-574. These criticisms have not been permitted to pass unchallenged. It has been pointed out that the use of more than one criterion as a basis for definitions is justified on the grounds of expediency, i.e., the method of definition was immaterial since the committees were only temporary devices to be used only in the achieving of the 40-cent minimum. Weiss, Industry Committees, p. 25. The real test of these definitions is this: Did they work? They obviously were carefully planned for there was not a single jurisdictional dispute which could be traced to them. Elroy D. Golding, "The Industry Committee Provisions of the Fair Labor Standards Act," The Yale Law Journal (May, 1941), 1155-1156.

basis of union recommendations. Public members were chosen from a variety of occupational groups with careful investigation preceding the choices.

Difficulties were encountered in the selection procedure. The selection of employer and employee members has been criticized on the basis that due weight was not given different segments of industry and labor.[1] Although every effort was made to select public members capable of making sound judgments, they too have been criticized.[2]

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[1]Golding (op. cit., pp. 1157-1158) notes the failure to provide for the participation of unorganized labor on the committees. He regards the Administrator's assumption that union officials are representatives of unorganized labor as unsound. For example, unorganized southern labor was represented on the textile industry committee by northern union officials whose interests were largely in the direction of the elimination of southern competition. A similar criticism is made by Z. Clark Dickinson in "The Organization and Functioning of Industry under the Fair Labor Standards Act," Law and Contemporary Problems, VI (Summer, 1939), 364-365. Cited hereinafter as Dickinson, Industry Committees. However, at least one labor spokesman regards it as "absurd" to have unorganized labor represented on the committees. Harold November, "Industry Committees under the Fair Labor Standards Act," American Federationist, XLVII (March, 1940), 279-280. The British wage boards, on the other hand, frequently have as labor representatives unorganized workers. Weiss, Industry Committees, p. 27.

[2]See, for example, the statement made by a representative of the Cotton Textile Institute to the effect that the background of the public members was inadequate for the problems which they had to solve. U.S. Congress, Senate Committee on Education and Labor, Amendment of the Fair Labor Standards Act, Hearings on S. 1349, 79th Congress, 1st Session (Washington, 1945), p. 394. Cited hereinafter as Hearings on S. 1349.

Although the optimum size of a committee would have been from fifteen to twenty-four members they ranged as high as forty-eight members. Efforts to keep membership down resulted in the exclusion of some groups with the result that securing their cooperation became difficult. In addition, the financial burden involved in large committees had to be considered. This burden was lightened somewhat by the appointment of the same person to more than one committee.[1]

In accordance with the requirements of the Act, the Administrator furnished these committees with the information they required. The Administrator called upon the various governmental agencies for assistance in the preparation of economic data for their use. These included the Bureau of Labor Statistics, the Interstate Commerce Commission, the Tariff Commission, and the Department of Commerce. In addition, the N.R.A. experience was utilized. This material was supplemented by original studies conducted by the Divisions and the Women's Bureau. All of this information was presented to the various committees prior to their first meetings. This economic material has generally been regarded as inadequate.[2]

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[1]Golding, op. cit., p. 1153, and Dickinson, Industry Committees, p. 356.

[2]The criticisms may be summarized as follows: (1) no information was submitted on the indirect effects of minimum wage increases; (2) the effects of increased labor costs on consumer prices was ignored; (3) information on the effects of the increased minima on employment was lacking; (4) information regarding cost of living and transportation costs was inadequate; and (5) the Divisions failed to evaluate adequately the labor standards of employers not operating under collective bargaining agreements. Cf. Golding, op. cit., pp. 1161-1175, and Mittleman, op. cit., pp. 584-591.

Yet its inadequacy was not entirely the fault of the Divisions. The critics should bear in mind that the Divisions' research staff was newly recruited and not as large as it might have been had there been adequate funds available. The background of experience on which the Divisions' research techniques had to be built was limited. The Divisions have pioneered in this field and further industry committee work therefore will be that much more scientific.

Each committee had to make a decision as to what was the highest minimum wage up to 40 cents per hour which would not result in a substantial amount of unemployment. Usually the committee was informed of the number of workers getting less than any possible minimum wage between 30 cents and 40 cents per hour. Thus, it was possible to estimate the total direct increase involved in any proposed minimum. However, there was no information as to the wage increases accruing to workers being paid more than the proposed minimum. Even where this question was finally resolved, there remained the question of the effect of the increase on profitability. Finally, the question of the meaning of the word "substantial" in connection with the effect of wage increases on employment was considered. Some of the committees regarded the closing of a few or even one marginal plant as a matter for concern. With the rise of war conditions there came an increasing tendency of the committees to pay less attention to economic data and to make decisions on the basis of general business

conditions.[1]

Hearings were held by the Administrator on the recommendation of each industry committee. At the conclusion of a hearing the Administrator either accepted or rejected the committee's recommendation. The issuance of the wage order followed acceptance. The Act provides that there may be a review of wage orders in circuit courts of appeal on the petition of persons who hold themselves adversely affected by such orders.

Although the industry committee device has been generally regarded favorably by students of the problem of legal minimum wage determination, there are some who regard it adversely. Let us consider first some of its defects and disadvantages.

(1) Industry-committee decisions have not been scientific determinations. For example, the statement has been made by one representative of labor that there "has been a tendency to arrive at wage recommendations blindfolded by drawing lots rather than by carefully weighing of all available facts."[2] A similar view is shared by another student who feels that the industry committees have acted essentially as arbitration boards since the evidence presented to them was not of a professional caliber.[3]

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[1]Weiss, Industry Committees, pp. 31-33.

[2]Boris Shiskin, "Wage-Hour Law Administration from Labor's Viewpoint," American Labor Legislation Review, XXIX (June, 1939), 63.

[3]Mittleman, op. cit., p. 1597.

(2) Industry committees have been too large in both size and in number. They have been so numerous that it has been exceedingly difficult for the small staff of economists in the Divisions to serve them efficiently.[1]

The industry-committee method was utilized only because of its political expediency. One of the severest critics of the method regards it essentially as a compromise designed to conciliate those representatives of industry who did not wish to pay the 40-cent minimum in 1938. He regards the system as "cumbersome, expensive, and complicated." He calls for a fixed minimum wage with increases effected through legislative action, amendments prescribing new minimum wages being periodically enacted rather than leaving such increases to industry committies.[2]

The first two of the above criticisms refer to defects which are remedial. Time will solve these problems. The third criticism, the fact that the device is a compromise, does not detract from its many advantages.

Let us consider these advantages. They are numerous and overwhelmingly cancel out any alleged defects in the method.

(1) It was the most flexible device which was available

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[1]Dickinson, Industry Committees, pp. 363-364.

[2]Ludwig Teller, A Labor Policy for America (New York, 1945), p. 208.

to control the progress of the rise of the minimum wage toward 40 cents for it could determine fairly accurately how much above 30 cents (but not more than 40 cents) an industry could pay without substantial curtailment of employment. A major advantage of the method is the fact that the committee can quickly adjust the established minimum to any changes in the capacity of industry to pay wages as a result of changes in managerial efficiency, labor productivity, technological change, changes in market conditions, and general improvement in business conditions.[1]

(2) It is the most scientific approach to the problem of fixing minimum wage rates. The special facts, techniques, and skills in the hands of the three different types of members of the committee all contribute to an economical and equitable decision on the questions faced by the committee. The committees rely not only on information presented by interested parties such as the trade associations and labor organizations involved, but also have available to them the results of original research by the economists of the Divisions.[2]

(3) It is a democratic method. The industry committees are an expression of the democratic method of pooling differences and arriving at compromises which result in decisions best for the common good. In these committees employers meet

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[1] 1939 Annual Report of the Wage and Hour Division, pp. 88-89.

[2] Loc. cit.

with employees and become aware of some of the problems each faces. There is a growth of understanding, a diminution of conflict, and a merging of common interests.[1]

(4) It is superior to alternative methods which have been suggested for the determination of wages. The flat statutory minimum, for example, is regarded as inferior in that it makes no allowance for industries that cannot afford to pay the legally established minimum, although, of course, it does the job more quickly and over a wider area. And, so far as speed is concerned, the industry committees can acquire more speed with more funds.[2]

Compared to traditional collective bargaining as a method, although it has many of its characteristics, it is superior to it for it has the advantage of the presence of the Administrator who can guide and plan the industry committee program so that the speediest, most practical, and most ethical program is effected. Such planning is lacking in collective bargaining as it is presently practiced. In addition, it has one other element which is wanting in collective bargaining. The statistical and other devices for obtaining information on the

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[1] Loc. cit.

[2] There was a constant reduction in the average time elapsed from the date of the committee appointment to the effective date of the wage order from twelve months for the first fifteen wage orders to six months for the next fifteen. Thereafter, there was an increase so that for the last eleven committees the average time was eight months. Weiss, Industry Committees, pp. 43-44.

question at hand which are available to the committees are superior to those ordinarily used in collective bargaining, and, furthermore, these devices, with use, can be perfected so as to furnish an invaluable tool in wage determination.[1]

There are other ways in which the method is superior to that of traditional collective bargaining. Arguments presented before the committees must be based on facts. The public members of the committees are a decided influence in steering the investigation along strictly factual lines. The committee members know that their meetings and hearings are open affairs subject to the critical examination of the public. In addition, the representatives of both labor and industry are, to some extent, aware that they are serving the government as well as those whom they represent and this exercises a salutary effect on the objectivity of their decisions.[2]

In conclusion, it may be noted that there is room for all methods of arriving at what wages should be paid. There should be a statutory minimum below which no wages should be tolerated. The industry committees can then be utilized to bring about a rise to a higher wage level, one which permits somewhat more than a health and decency standard of living. For wages which are not related to minimum standards of

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[1]Golding, op. cit., pp. 1175-1179.

[2]Weiss, Industry Committees, pp. 41-42.

living, collective bargaining has its traditional place.

C. Problems in Administrative Regulation

Five examples of administrative regulation are considered in this section: The Administrator has been given the authority to permit the employment of learners, apprentices, messengers, and handicapped workers at subminimum rates. He is authorized to determine the reasonable cost to an employer of furnishing an employee with board, lodging, and other facilities in connection with the payment of the minimum wage. He has been given the power to define certain statutory phrases such as, for example, the "area of production" in connection with the section 13 (a) (10) exemption. He regulates industrial homework in connection with the issuance of wage orders. Finally, he has been active in connection with the problem of tips as wages.

1. Subminimum Rates

Section 14 of the Act provides that the Administrator shall issue regulations providing for the employment of learners, apprentices, and messengers at subminimum rates under special certificates issued by him to the extent necessary to prevent curtailment of opportunities for employment. The Administrator must also prescribe limitations as to the time, number, proportion, and length of service, in addition to the wages paid these workers in connection with these certificates. In addition, workers whose earning capacity is impaired by age, physical or mental deficiency, or injury

may also be employed at subminimum rates under regulations and special certificates issued by the Administrator.[1]

In connection with the employment of learners, apprentices, and messengers, the question then arises: Under what conditions would the issuance of certificates for their employment at subminimum rates be necessary in order to prevent the curtailment of employment opportunities? The answer, of course, varies with different industries. For example, in an industry in which the wages of experienced workers are far in excess of the applicable minimum wage, there would be no need for the payment of subminimum wages in order for employment opportunities not to be curtailed. Furthermore, the number, proportion, and length of service of learners and apprentices also varies with different occupations and industries.

Great flexibility characterizes the issuance of learner certificates. Every effort is made to control their issuance on the basis of an examination of the facts involved and an

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[1]Sec. 14: "The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates."

analysis of these facts so that they are issued only to the extent necessary to prevent the curtailment of employment opportunities. Learner exemptions are granted either on a general or industry basis. The general learner regulations provide for the issuance of certificates to miscellaneous industries.[1] Under these regulations applications are received and processed from a large variety of businesses some of which cannot be definitely classified with any particular industries, or they may belong to industries in which the need for learner certificates is not acute. In practically all cases employers are asked to supplement their applications with additional information regarding wage rates, occupations, periods of training, the availability of experienced workers in the community, and so forth.[2]

However, since effective administration of this section of the Act necessitates an approach to the problem on an industry or branch of industry basis, learner regulations applicable to particular industries have been issued. Their issuance is preceded by public hearings held to determine their scope and content. Such hearings are attended by persons thoroughly acquainted with the various phases of the industries involved and consist of representatives of employer

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[1] 29 Code Fed. Reg., c. 5, Pt. 522.

[2] U.S. Department of Labor, Wage and Hour Division, Annual Report for the Fiscal Year Ended June 30, 1940 (Washington, 1941), p. 125. Cited hereinafter as 1940 Annual Report of the Wage and Hour Division.

associations, trade unions, and other interested parties.[1] Special regulations have been issued governing the employment of learners in twelve industries.[2] In addition, special regulations have been issued governing the part-time employment of student learners in vocational-training programs.

Apprentices may be classified as those beginners in trades requiring at least 4,000 hours of training. They should be distinguished from learners who are beginners in skilled occupations in which the learning period is much shorter. The regulations define the word "apprentice" as including a person at least sixteen years of age learning a skilled trade in connection with an apprenticeship agreement providing for at least 4,000 hours of employment, participation in an approved schedule of work, and 144 hours of supplemental classroom instruction on the subject. The written apprenticeship agreement, when it is approved by either a recognized local joint apprenticeship committee or by a state joint apprenticeship council constitutes a temporary special certificate authorizing the employment of apprentices at

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[1] Ibid., p. 116.

[2] Apparel industry, artificial flower and feather industry, cigar industry in continental United States, custom-made branch of the millinery industry, hosiery industry, independent telephone industry, knitted wear industry, popular priced branch of the millinery industry, single pants, shirts, and allied garments industries, textile industry, women's apparel industry, woolen industry.

subminimum rates until a special certificate is issued by the Administrator.[1]

Special regulations apply to the employment of handicapped workers. Certificates are issued only if necessary to prevent curtailment of employment opportunities. The authorized wage rates must not be less than 75 percent of the applicable legal minimum unless the necessity for the payment of a lower rate is demonstrated. Certificates are effective for twelve months or less and are renewable on application to the Administrator.[2]

The issuance of certificates is a carefully controlled procedure. The regulations provide that the handicap must be described in detail and must be shown to be a handicap for the proposed employment of the individual. Certificates are not issued where low earning capacity appears to be due to low piece rates rather than to a physical or mental defect. Where the handicap is not obvious, a medical certificate is required. Where the handicap is remedial, the fact is brought to the attention of the employer and a temporary certificate of three to four months is issued to provide for employment at a subminimum rate during the period necessary for remedial treatment.[3] Special regulations have been issued with respect to

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[1] 29 Code Fed. Reg., c. 5, Pt. 521.

[2] Code Fed. Reg., c. 5, Pt. 524.

[3] 1941 Annual Report of the Wage and Hour Division, pp. 79-80.

sheltered workshops[1] and vocational and veteran rehabilitation.

2. Deductions

The Act in Section 3 (m) permits the payment of wages in forms other than cash. Both the minimum wage and the overtime payments required by the Act may be made with credit being given the employer for the reasonable cost to him of board, lodging, or other facilities customarily furnished by him to his employees. There must be no "kickbacks" involved. The board, lodging, or other facilities are "wages" under the Act only where they are primarily furnished for the benefit of the employee and when they are voluntarily accepted. Regulations outlining the principles which may be used in the determination of the cost of board, lodging, or other facilities have been issued by the Administrator.[2] The regulations provide for hearings in the determination of the reasonable cost in individual cases.

Section 3 (m) has been the source of a number of difficult problems for the Administrator. Such difficulties have been attributed to the fact that "some employers regard the

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[1] These have been defined in Regulations 525 as charitable organizations and institutions conducted not for profit but for the purpose of carrying out a recognized program of rehabilitation for handicapped individuals and of providing such individuals with remunerative employment or other occupational rehabilitating activities of an educative or therapeutic nature.

[2] 29 Code Fed. Reg., c. 5, Pt. 777.

term 'other facilities' as including practically everything necessary to life and comfort." The practice of paying wages in cash may be found in many industries especially in lumbering, mining, and textile manufacturing in certain areas. In such industries patronage of workers at company stores and the furnishing of housing, board, and lodging by employers is quite usual. Payroll deductions are also very frequent in industries where wage levels are low.[1]

Some examples of the task which the Administrator faces may be cited in order to illustrate the complexities of the situation. In 1940 the Atlanta, Birmingham & Coast Railroad Company petitioned for the determination of the reasonable cost of board, lodging, and other facilities which it was furnishing its employees. Among the issues decided was the reasonable cost to the railroad of furnishing discarded railroad ties to its maintenance-of-way employees for fuel. The Administrator decided that no cost was thereby incurred by the railroad, a determination which the railroad accepted.[2]

Several of the nation's largest railroads have been accused by the unions of manipulating deductions from wages

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[1] 1941 Annual Report of the Wage and Hour Division, pp. xii-xiii, and 1946 Annual Report of the Wage and Hour and Public Contracts Divisions, pp. 41-42.

[2] 1941 Annual Report of the Wage and Hour Division, p. 88.

so as to avoid the minimum wage requirements of the Act.[1] Deductions are also a problem in connection with facilities furnished by the Hawaiian sugar companies to their employees.[2]

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[1]The railroads have been accused by the railroad unions of using deductions for board, lodging, and other facilities as a means of avoiding the payment of the legal minimum wage, of having deducted from wages for facilities not furnished, and of having charged unreasonably for such facilities as it has furnished. The unions have accused them of raising the charges for board, lodging, and other facilities as the statutory increases in the Act took effect so that the wage provisions of the Act never benefited many of their employees. Worse yet, they assert that low-paid employees were charged for board and lodging which not only were frequently not furnished, but when they were furnished, proved to be unsanitary. For example, one railroad was accused of the following:

"It set up a lot of items for deductions from the employees' pay check sufficient in number and amount to recapture the difference between the 20 cents an hour it had previously paid and the amount it was required to pay under the Fair Labor Standards Act of 1938. It charged its poorly paid section men rent for houses the men did not live in. It charged them for water from wells that did not exist. It made deductions for police protection that did not exist locally against mobs that had never been formed nor threatened so far as we know in the entire history of the railroad. It made deductions for shade trees that had never been planted. It charged men for riding in motorcars that belonged to the section foremen and not to the company. In short, it set up a lot of imaginary expense items and made deductions for them in order to steal back the difference between the 20 cents it wanted to pay and the amount the first Fair Labor Standards Act required it to pay, and continued this practice until forced by a federal court to stop it and reimburse the men who had been so victimized."

Hearings on S. 1349, p. 679.

[2]These companies furnish their employees with housing, fuel, water, and medical care. An industry-wide charge of 6 cents per hour is charged for these "perquisites." In addition, employees are charged for electric current for lighting purposes, purchases at company stores, meals at company restaurants and boarding houses. 1946 Annual Report of the Wage and Hour and Public Contracts Divisions, p. 42.

3. "Area of Production" Exemptions

We quote from the Act:

> Sec. 13. (a) The provisions of section 6 and 7 shall not apply with respect . . . . (10) to any individual employed within the area of production (as defined by the Administrator) engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; . . . .

The important thing to note is that the phrase "area of production" is to be defined by the Administrator. If the employee's work is of an agricultural nature as specified above, but it is not within the "area of production" as specified by the Administrator, then the only exemption that is available is that permitted under Section 3 (f) wherein agriculture is defined.

What was the reason for providing for the "area of production" exemption? The exemption was incorporated into the Act in accordance with the desire of Congress to exempt "(a) establishments located in rural areas on, or close to farms, and (b) employers with small rather than large establishments." This presented an involved problem in economic analysis. The drafting of a definition which would not cause competitive maladjustments by exempting employees of some establishments and denying exemptions to other establishments which were similar to and in competition with them, was an

exceedingly difficult task.[1] The frequency with which the definition of the phrase "area of production" was changed by the Administrator may be ascribed to the difficulty of formulating a satisfactory definition.

Regulations issued on October 20, 1938, defined "area of production" as used in Section 13 (a) (10) to include an individual engaged in canning "if the agricultural or horticultural commodities are obtainable by the establishment where he is employed from farms in the immediate locality and the number of employees in such establishment does not exceed seven" and also, effective April 20, 1939, to perishable or seasonal fresh fruits and vegetables, included an individual employed in an establishment located in the open country or in a rural community which establishment obtained all of its products from farms in its immediate locality. "Open country" or "rural community" were defined as excluding any town of 2,500 or more population and "immediate locality" as excluding any distance of more than ten miles.

The validity of these regulations was brought into question in the case of Addison v. Holly Hill Fruit Products, Inc.[2] The Court accepted the "ten mile" and "2,500 population" limitations in the definition as valid. However, it

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[1] 1939 Annual Report of the Wage and Hour Division, p. 111.

[2] 322 U.S. 707 (1944).

rejected the validity of the definition which provided for a limitation on the number of employees to seven per establishment. It held that "if Congress intended to allow the Administrator to discriminate between smaller and bigger establishments within the zone of agricultural production, Congress wholly failed to express its purpose."

Having so decided, the problem of the proper disposition of the case remained. The entire definition of the Administrator was invalidated, in the opinion of the Court, when the portion concerning the number of employees per establishment was invalidated. The Court, therefore, decided that the case should be returned to the district court where it should be held until the Administrator should redefine the "area of production" in line with the Act's provisions, and that the new definition should be applied retroactively.

The Divisions then set about the task of redefining the "area of production." Consideration was given to a definition which would be in line with the Court's instructions that it include a "delimitation of territory in relation to the complicated economic factors that operate between agricultural labor conditions and the labor market of enterprises concerned with agricultural commodities and more or less near their production" and which would correspond with congressional intent that it distinguish between rural communities and urban centers. Numerous studies and conferences then followed. Six formal hearings were held between December,

1944, and March, 1945, for six different industries. It was felt that the definition which would best avoid economic discrimination and achieve congressional purpose was that which had been invalidated and that the next best definition would have to be based on the following criteria: "(1) the distances from which the enterprises obtained the commodities on which they performed the operations named in the statute; and (2) the nature of the community in which they were located, as indicated generally by a population test." In addition, consideration was to be given to criticisms of previous definitions.[1]

During the hearings the proposals made by the representatives of industry were such as would have exempted practically everybody in the industries under discussion. The representatives of labor, on the other hand, proposed definitions which would have in effect denied the exemptions to all but a very few establishments. Considerable complaint arose from the fact that the proposed definitions would result in discrimination. Nevertheless, in view of the legal and economic limitations of the problem, no way could be found of eliminating discriminatory effects.[2]

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[1]U.S. Department of Labor, Wage and Hour and Public Contracts Divisions, Findings of Fact Made by the Wage and Hour Administrator in Redefining the Term "Area of Production," as used in Sections 7 (c) and 13 (a) (10) of the Act. Release D-147, December 18, 1946. Cited hereinafter as Release D-147.

[2]Loc. cit.

The new definition issued by the Administrator became effective on March 1, 1947. It provided that:[1]

An individual is employed in the "area of production" under section 13 (a) (10) in the specified occupations if the establishment in which he is employed (a) is located in the open country or in a rural community and (b) during the preceding calendar month received 95 percent of its commodities from normal rural sources of supply located not more than certain specific air line distances from the establishment, such distances varying with the products worked on by the establishment.

For the purposes of the definition, "open country or rural community" does not include any city, town, or urban place of 2,500 or greater population or any area within one mile of the limits of an urban place of 2,500 to 50,000 population, three miles from a city of 50,000 to 500,000 population, and five miles from cities of 500,000 or more.

The distances set up in the definition according to products and operations ranged from ten miles for the ginning of cotton to fifty miles for the compressing and compress-warehousing of cotton and certain operations on other products.

In issuing the definitions the Administrator stated that he felt that "some economic discrimination as between

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[1] 29 Code Fed. Reg., c. 5, Pt. 536.

establishments within the exemption and those outside of it" was within the intent of Congress; that such discrimination made for difficulties in administration and was unfair and unsound; and, finally, that the only satisfactory solution of the problem lay in a legislative revision of the Act.[1]

4. Industrial Homework

Industrial homework has been defined as "the use of the home as a work shop of the home maker and her children as producers by profit-making industries.[2]

The origins of homework in the United States may be traced to the establishment of the New York artificial flower industry in the 1830's and to the rise of the glove manufacturing industry in the 1860's in Fulton County, New York. homework in these and other industries has flourished since the late nineteenth century because of a number of favorable factors. Among the most important of these were two: (1) the influx of thousands of ignorant and unskilled immigrant men, women, and children furnished the homework contractors a large reservoir of cheap labor, and (2) the invention of the power-driven sewing machine made possible the conversion of tenement houses to miniature factories. But the very nature of homework was such that it engendered forces to

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[1] Release D-147.

[2] U.S. Department of Labor, Women's Bureau, The Commercialization of the Home Through Industrial Home Work, Bulletin No. 135 (Washington, 1935), p. 1.

combat it. The employers organized to eliminate cutthroat competition. The unions added their efforts to the drive for better working conditions for the workers. And the public represented by a number of great humanitarian leaders, participated in the struggle to eliminate this industrial practice.[1]

The early attempts to control homework by legislation were effectively met with the objection that the prohibition of homework was unconstitutional in that it arbitrarily deprived the homeworker of his property and his personal liberty. The attempt to prohibit homework was dropped, therefore, and the efforts to control it were turned in the direction of regulatory legislation. Laws were enacted which were intended to safeguard the public against the spread of infectious diseases and these exercised some indirect control over the homework industries. A law prohibiting certain types of homework was passed in New York state in 1913 and was subsequently held as constitutional by the courts. Unfortunately, the character of the legislation which followed in other states was of the regulatory rather than the prohibitory type. As a result, a considerable amount of homework was still flourishing in the 1920's and 1930's.[2]

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[1]Ruth Crawford, "Development and Control of Industrial Homework," Serial No. R. 1659, Bureau of Labor Statistics, United States Department of Labor, reprinted from the Monthly Labor Review (June, 1944) (Washington, 1944), pp. 2-3.

[2]Ibid., pp. 3-5.

Some progress was made with the passage of the National Industrial Recovery Act. Homework was prohibited or regulated in 107 of the codes. The gains were not entirely lost with the invalidation of the N.R.A. because many of the manufacturers who had eliminated homework as a result of the N.R.A. never reverted to this form of industry. The struggle for the abolition of homework continued. The passage of the Walsh-Healey Public Contracts Act in 1936 resulted in its abolition in work performed in connection with public contracts covered by the act. A major advance was made in Oregon when all homework was prohibited in 1937.[1]

The argument that the enforcement of homework regulations would result in a diminution of employment because of the elimination of the industries in which homework was prevalent and because homeworkers would be unable to secure other employment is regarded by some students to be without any factual basis. Both the N.R.A. homework code provisions and the New York state legislation, it is claimed, have demonstrated the fallaciousness of these contentions. Studies made of the effects of these laws show that their passage was followed by more stable employment conditions in the industries affected and in more efficient methods of production. The homeworkers themselves had little difficulty in adjusting to factory work.[2]

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[1] Ibid., pp. 5-6.

[2] Ibid., pp. 10-12.

Such optimistic conclusions should not, however, be accepted without question. Some adverse effects may accompany the regulation of industrial homework. It is not too certain, for example, that the line between the elimination of exploitation on the one hand, and excessive governmental regulation on the other, has been accurately drawn. Undoubtedly, many homeworkers who were in no sense exploited have found themselves without employment. Moreover, many small employers who may have used homeworkers with a fairly high degree of efficiency have in all probability been eliminated. The disappearance of such "cutthroat" competition is regrettable to some extent because it had acted as a curb to certain uneconomic practices of unions which raise costs and prices unnecessarily. All of these effects are entirely possible but they are rarely considered in any discussion of the problem by representatives of government or labor organizations. These groups regard the elimination of exploitation worthwhile regardless of whether adverse effects follow. The gains, they believe, far outweigh the losses.

The passage of the Fair Labor Standards Act in 1938 served as an impetus to state legislation and a number of states in addition to those already having such laws passed prohibitive legislation. To insure the compliance of the homework industries with the Act's provisions, the Administrator issued special regulations relating to record keeping by

employers of homeworkers.[1] Yet, in spite of these regulations, grave difficulties were encountered by the Divisions in their attempts at enforcement of the Act in connection with homeworkers. Many of the homeworkers are semi-literate and belong to foreign language groups. These workers falsified their records to show that they were earning the legal minimum wage. As a result, on the face of the records there was compliance, but investigation frequently showed that flagrant violations were widespread. Inspection activity on the part of the Divisions was not always fruitful. It was difficult to determine how many workers had participated in the production for which a worker was paid. Since the employer could not always control the working hours once he had turned the raw materials over to the worker, he had no way of knowing the number of hours actually worked and the Divisions could not find out either. In view of these circumstances, record keeping violations were the rule rather than the exception in homework industries.[2]

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[1]In addition to the data which must be maintained for ordinary workers, these regulations provide for the recording of the date and hour at which work is given out to the worker and of its return, the kind of articles worked upon, the operations performed, and so forth. Furthermore, a separate handbook for the recording of this data is provided for each worker by the Divisions. This handbook must be maintained by the employer for each worker and must be in possession of the employee at all times. 29 Code, Fed. Reg., c. 5, Pt. 516, Sec. 516.11.

[2]Ruth Crawford, op. cit., pp. 9-10.

Because of this unsuccessful experience with homework enforcement, the Administrator turned to the administrative authority provided him in section 8 (f) of the Act which relates to the issuance of wage orders. This section reads in part: "Orders issued under this section shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. . ." Since the regular enforcement measures of the Act had proved ineffective in controlling homework, the Administrator issued regulations to control industrial homework under wage orders in industries in which homework constituted a problem.[1] Homework was prohibited except under certain conditions.

The power of the Administrator to restrict industrial homework in the embroideries industry on the basis that the wage order could not be effectively enforced if homework were permitted was unsuccessfully challenged in the Circuit Court of Appeals for the Second Circuit by employers and employees in the industry who asked for a review of the Administrator's order. The inability of the Administrator

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[1]These regulations apply to the following industries: button and buckle manufacturing, Part 625; embroideries, Part 633; gloves and mittens, Part 621; handkerchief manufacturing, Part 628; jewelry manufacturing, Part 607; knitted outerwear, Part 617; needlework industries in Puerto Rico, Part 545; and women's apparel, Part 605.

to enforce the order without restricting homework was not questioned, but the petitioners questioned, nevertheless, his power to do so. The case was appealed to the Supreme Court which held that the Administrator had the power "to include in an industry wage order a prohibition against homework, where he finds on substantial evidence that the prohibition is necessary to make the order effective, to prevent its circumvention and evasion, and to safeguard the minimum wages to which workers in the industry are entitled whether under the order or under the Act."[1]

5. Tips

The question of whether tips are a part of an employee's wage has created some difficulty in the administration of the Act. This section deals briefly with some of the theoretical aspects of tipping in connection with minimum wage legislation and follows with a consideration of the major tipping problem under the Act--the payment of tips to redcaps or railroad station porters.

Tipping is a decidedly undemocratic practice. It gives the tipper an undue sense of superiority and the worker an undue sense of servility. The tip is not a wage paid for a service but rather a gratuity whose size has little or nothing to do with the service rendered. In the enactment of a minimum wage law tips should not be counted in determining what

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[1] Gemesco v. Walling, 324 U.S. 244 (1945).

the minimum wage should be. Furthermore, in enforcing a minimum wage law, tips should not be counted as part of the legal minimum wage.[1]

The reasons for not considering tips in setting legal minimum wages are as follows: if tips were taken into account in determining a legal minimum wage, then the worker would not be sure from one week to the next of receiving the minimum since tip income is uncertain and irregular. Such an arrangement would shift the legal responsibility for paying minimum wages from the employer to his customers. Therefore, the "legal" minimum wage must equal the amount the wage board finds necessary to meet the standards set up by the minimum wage law, and casual tips received by the workers must not be taken into account in determining that amount."[2]

Tips should not be counted as a part of the legal minimum wage in the enforcement of such a wage because it would lead to the dismissal of the more costly employees, i.e., those for whom the difference between the tips received and the legal minimum wage is large. This in turn would lead employees to report tips that were larger than what was actually received. On this basis, in spite of a minimum

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[1]Mary Anderson, "Tips and Legal Minimum Wages," The American Labor Legislation Review, XXXI (March, 1941), 12.

[2]Loc. cit.

wage law, the employees would not receive the designated legal minimum wage.[1]

Yet, it should be noted, if wages are not to be counted as a part of the legal minimum wage, the effects may not be entirely desirable. For example, the imposition of a legal minimum wage for waitresses may result in a windfall to those waitresses who are accustomed to receiving tips. Such a worker now gets the legal minimum in addition to her tips for the public does not readily change its tipping habits, i.e., discontinue tipping because of the imposition of the minimum wage. Thus, the cost of the service may be increased with the quantity and quality of the service remaining the same.

With this theoretical background we can turn to the major tipping problem encountered in the Act: the payment of tips to railroad station porters, the "redcaps."

Of all covered workers, the largest number receiving tips are the redcaps. They totalled about 4,300 in 1941. Most of them are Negroes. They frequently include skilled workers among whom are college graduates and holders of professional and technical degrees. Unable to enter their chosen professions because of racial discrimination, they have turned to redcapping. The job is not filled by casual labor. Many redcaps have held the same job for years. The

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[1] Ibid., p. 13.

jobs have enabled them to marry, raise their families, and, in some cases, to send their children to colleges and universities.[1]

Before the passage of the Act 70 percent of the redcaps worked exclusively for tips. They averaged 30 cents per hour. Of the remaining 30 percent who did not work exclusively for tips, about half were paid nominal wage rates and averaged about 30 cents per hour in tips; the other half received about 25 cents per hour in wages and averaged about 17 cents per hour in tips. The latter arrangement was common in a few eastern terminals and in many of the west coast terminals.[2]

Generally, they had no employment status being accorded a pseudo-independent status by their employers. The payment of social security taxes was thus avoided. But actually the redcap was subject to the control of his employer as much as any other type of employee who enters into an employer-employee arrangement. In 1938, prior to the passage of the Act, as a result of an investigation made by the Interstate Commerce Commission, the redcaps were found to be employees within the

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[1]"Redcaps in Railway Terminals under the Fair Labor Standards Act, 1938-41," U.S. Department of Labor, Wage and Hour Division, reprinted in U.S. Congress, House, Committee on Labor, Proposed Amendments to the Fair Labor Standards Act, Hearings, 79th Congress, 1st Session (Washington, 1945), pp. 492-498. Cited hereinafter as Redcaps in Railway Terminals.

[2]Redcaps in Railway Terminals, p. 514.

meaning of the Railway Labor Act. At the same time, they began to organize into trade unions of which there were two which included redcaps.[1]

Since the Act does not mention tips the question arose as to whether the tips received by redcaps could be counted as a part of the legal minimum wage. The railroads decided that they could be so counted and during the summer of 1938 evolved the "Accounting and Guarantee Plan." Under this plan the redcaps reported the tips they received and the number of hours worked. If the tips received did not amount to the legal minimum, the railroads made up the difference. The plan was put into effect without the employees being asked whether they agreed to it. By October 31, 1938, more than 70 percent of all the redcaps were working under it.[2]

The plan operated as was to be expected. Redcaps reported more in tips than they actually received in order to avoid discharge. The International Brotherhood of Redcaps protested to both the railroads and the Division that they were not in agreement with the plan and asked that they be paid the 25-cent minimum wage prescribed in the Act regardless of the amount of tips received. The union's protest was followed by a hearing held in June, 1939, by the Division to examine

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[1]The Brotherhood of Railway Clerks of the American Federation of Labor and the International Brotherhood of Redcaps which later became the United Transport Service Employees of America. Ibid., pp. 498-501.

[2]Ibid., p. 501.

the problem of the reporting of tips. It was found that redcaps were reporting more tips than they received and that tip records were inaccurate. The presiding officer at the hearing recommended an early adjudication of the question of whether tips were wages and that, in the meanwhile, the railroads keep accurate records of the hours worked, tips received, and the wages paid.[1]

At the end of 1939 and the beginning of 1940, the redcaps sued the railroads in nine of the largest cities in the country for wages due under section 6 of the Act. The suits finally reached the Supreme Court in Williams et al. v. Jacksonville Terminal Company and Pickett v. Union Terminal Company.[2] The majority of the Court in a decision by Justice Reed held that tips were wages under the Act and under the "Accounting and Guarantee Plan." Justices Black, Douglas, and Murphy dissented.

In February, 1940, while the "Accounting and Guarantee Plan" was being litigated, the railroads turned to a new plan which they hoped would stand on firm grounds in the courts. The new plan involved the institution of a service charge replacing the tipping system. Under this plan, the "Check and Charge Plan," the public would pay for the minimum wage legally due the redcaps from their employers under the Act.

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[1] Ibid., pp. 502-503.

[2] 315 U.S. 386 (1942).

Henceforth, the public was to pay 10 cents for each piece of baggage handled by a redcap. The redcap was placed on the payroll at the minimum wage. What the redcap received in excess of 10 cents per bag was retained by him.

The redcaps opposed this plan too. They wanted the ten-cent charge eliminated and all payments by passengers turned over to them. Eventually, the unions were able to present their complaint before the Interstate Commerce Commission. Mrs. Ida M. Stopher, a patron of the Cincinnati Terminal Company, complained on behalf of the United Transport Service Employees of America to the Commission that the charge of two ten-cent baggage fees which she had paid was illegal. On June 25, 1941, the Commission found the charge a permissible one. The unions then turned to the Senate and asked for an investigation of the plan.[1]

On May 15, 1941, the Senate adopted a resolution asking the Administrator to investigate the problem of the redcaps.[2] The Administrator was directed to inquire into "the wages, hours, and other conditions and practices of employment of redcaps by railroad or terminal companies in view of the minimum wage requirements of the Fair Labor Standards Act . . . ." and to report to the Senate--

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[1] Ibid., pp. 506-508.

[2] Sen. Res. 105, 77th Congress, 1st Session.

(1) The extent to which such conditions and practices violate the letter or the spirit of the Fair Labor Standards Act of 1938 or other federal statutes, if at all;
(2) The extent to which such conditions and practices are susceptible to regulation under the Fair Labor Standards Act in its present form; and
(3) What legislation, if any, should be enacted for the purpose of further regulating wages, hours, and other conditions and practices of employment of redcaps under the Fair Labor Standards Act of 1938.

Hearings were held in Chicago, St. Louis, New York, and Washington and depositions were taken in Dallas. The investigation showed that the "Accounting and Guarantee Plan" resulted in the failure, in many cases of redcaps to receive the minimum which the law guaranteed them. When business was bad for any reason and redcaps failed to receive the minimum in tips, they nevertheless reported the receipt of tips amounting to the minimum because they feared they would be discharged if they did not do so. The redcaps were, in fact, threatened with discharge by their employers if the number of redcaps was found to be so large as to make impossible the earning of the 30-cent minimum by all of them.[1]

So far as the "Check and Charge Plan" which supplanted the "Accounting and Guarantee Plan" was concerned, the report showed that the redcaps had three objections to it: (1) They

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[1]U.S. Department of Labor, Wage and Hour and Public Contracts Divisions, Report to the Senate on Conditions and Practices of Employment of Redcaps in Railroad and Terminal Companies by L. Metcalf Walling, Administrator, Release, R-1908, November 9, 1942. (New York), pp. 1-3. Cited hereinafter as R-1908.

felt that the railroads had no right to compel them to give up their tips to them since they were personal gratuities and not the property of the railroads. (2) They felt that the plan forced them to handle more baggage than formerly in order to earn the minimum. (3) They complained, too, that the plan had resulted in a decrease in the receipt of tips and, therefore, of their total earnings. There were also objections to the working arrangements under the plan. Certain technological changes suchas the use of hand trucks enabling the servicing of more than one customer at a time resulted in disputes. These complaints were solved to some extent through collective bargaining.[1]

The investigation also revealed some of the economic effects of the change in status of the redcaps between 1938 and 1941. Earnings, hours, and working conditions of the redcaps improved substantially during the period. Hourly earnings, consisting of tips and wages increased from 30 cents prior to the Act to 40 cents by the middle of 1941. While total weekly earnings increased, hours were reduced from 56 to 48 hours per week. In addition, the redcaps had attained the status of employees and therefore could claim the benefits of retirement and unemployment compensation legislation as well as of collective bargaining. The organization of the redcaps into unions secured for them other

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[1] Ibid., pp. 3-4.

privileges. The employment of redcaps decreased during the 1938-1941 period although passenger traffic increased during the same time. This reflects the more careful organization of the work force so as to minimize the increased labor cost which accompanied the improvement in the redcaps' status.[1]

The cost of redcap service to the railroads gradually rose as hourly rates paid redcaps rose during the period. Had the redcaps been paid wages and been permitted to keep all tips, the railroads would have had to pay about $2,000,000 more for the service. It should be noted that such a sum is a minor fraction of the total operating expenses of the railroads.[2]

As a result of the investigation, the Administrator arrived at the following conclusions and recommendations:[3]

(1) Neither of the plans discussed above violated the letter of the Act. However, the "Accounting and Guarantee Plan" violates the spirit of the Act. It results in failure of the redcaps to receive the minimum wage, in the keeping of improper records, and in inadequate control of its operation by the Divisions.

(2) The "Check and Charge Plan" is regarded as susceptible to regulation by the Divisions in the form in which it presently is.

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[1] Ibid., pp. 4-5.

[2] Ibid., p. 6.

[3] Ibid., pp. 7-8.

(3) The Divisions made the recommendation that "the Fair Labor Standards Act of 1938 be amended to prohibit the application of tip receipts toward the payment of the minimum wage. This amendment would eliminate the use of tip accounting plans in the railroad and bus industries, where they still prevail, would prevent the re-establishment of such a system by railroad companies which discarded it in 1940 and 1941, and would prevent its institution in other tipping trades covered by the Act."

Our brief survey of the Act's administration enables us to draw the following conclusions:

The agency charged with the administration of the Act is well organized and strongly integrated. It has been administered by a staff which has sincerely tried to carry out the desires of the Congress which passed the Act. But its efforts have been hamstrung by niggardly appropriations. These have now reached such a low point as to seriously impair the ability of the Divisions to operate efficiently.

Although opinion regarding the value of industry committees is divided, the consensus of opinion is that they are a valuable aid in legal wage determination in this country just as the wage boards have been in other English speaking countries. The faults which now characterize them are not

inherent but rather are defects which will be eliminated with the passage of time.

The payment of subminimum rates is a carefully controlled procedure whose aim it is to make sure that no learner, apprentice, messenger, or handicapped worker will be in danger of losing his job because of his inability to earn the legal minimum. Just as in the industry committees, it is the administrative objective to act on the basis of all of the facts, arrived at as the result of careful investigation. This is a laborious procedure, slow and tortuous, but one which is most likely to insure justice to all of the parties involved in the authorization of the payment of subminimum rates.

In the handling of the problem of deductions, the Administrator has made a contribution to the progress away from the ancient truck system to modern forms of wage payment. Here, too, fact-finding and hearings have been employed in an effort to ascertain whether the employee is really getting his legal minimum wage. That unwarranted and improper deductions from the wages of workers in this country have been made cannot be doubted and it is an especially sad commentary on American affairs that the chief offenders in this respect have been the American railroads.

The problem of the "area of production" has not been solved by the issuance of a new definition in accordance with the instructions of the Supreme Court. In fact, the

problem has been made more complicated for the new definition is not as satisfactory as the old.

It is in connection with the regulation of homework that we can credit the Act for one of the great advances in labor conditions. The Administrator has tried to eliminate this industrial cancer by the simple expedient of prohibiting it in connection with wage orders. The approach has been a remarkably successful one.

The problem of tips has been far from solved but the status of redcaps who constitute the biggest group of covered employees paid by tips has been immeasurably improved. Some legislative action in connection with tips is indicated. The "Accounting and Guarantee Plan" is still legal and competitive pressure from the airlines and busses may force the railroads to abandon the "Check and Charge Plan" and revert to it. The only permanent solution is to amend the Act so that tips be excluded as wages. This is the case in most state minimum wage legislation and is an equitable arrangement consistent with good administration.

We turn now to an allied and equally important problem. How wellhas the organization which we have just described enforced the law which is the subject of this study? The enforcement of the Fair Labor Standards Act is our next topic.

CHAPTER VIII

ENFORCEMENT

The enforcement of the Act involves problems which are common to the effectuation of all laws. The Divisions, like most other agencies, have a police force, referred to as inspectors. These make the investigations, referred to in the Act as inspections, and effect informal settlements with employers who are in violation. There has to be met, first of all, the problem of building up this force: recruiting the staff, training it in the handling of the particular problems of the agency involved, and organizing it so that it becomes an effective enforcement tool. The only precedent in the field of legal wage enforcement to which the Administrator could turn was the N.R.A. experience and the experience of the states in enforcing their minimum wage laws. Although some inspection experience and personnel could be garnered from these sources, these proved to be too inadequate a core on which to base a staff necessary for a nation-wide enforcement agency. There was therefore present in the early days of the Act a huge training as well as recruiting problem.

In addition, as in any law, there is the problem of enlisting the cooperation of the various groups who are

involved in the enforcement problem. Such groups vary with the different regulatory laws. In the case of the Act, these are the employers, employees, and their organizations: the trade associations and the labor unions. These groups had to be educated in the philosophy of the legal minimum wage, the law itself had to be explained and interpreted to them, and their rights and responsibilities made clear. The law is a complicated one and an informational program was necessary in order that employers might not be able to claim ignorance of it as an excuse for failure to comply. Moreover, it was expected that labor organizations would cooperate in the enforcement program with vigorous and energetic assistance. In the interest of labor, they would lend what support they could, to effectuate the Act's provisions. This would be especially true in the early stages of the Act's history when funds for enforcement were meager.

Although administrative disposition of violations may be found in many agencies, it is of major importance in the enforcement of the Act. Here we find most of the Act's violation cases being summarily disposed of by means of administrative action. An understanding of the Act's enforcement is incomplete unless one is aware of the role of administration in such enforcement.

Those cases which do not lend themselves to this type of settlement, are handled, as in other laws, by litigation. But here litigation is not merely a matter of criminal

proceedings followed either by acquittal or the imposition of a penalty. Provisions are made, of course, in the Act for such proceedings, and the penalties which follow conviction are extremely severe as well they should be in view of the extremely low standards which the Act sets forth. But there are other elements in litigation which supplement the criminal proceedings and, so far as effecting enforcement is concerned, they are just as important. For example, goods produced under conditions proscribed by the Act may be barred from the channels of commerce. Purchasers of such goods may find themselves prevented from distributing such goods through the channels of commerce and the loss of money which has been paid for such goods may far exceed any fine which may be imposed under the criminal penalties of the Act. Litigation may take the form of injunctions which seek to restrain violators from continuing their transgressions. In such cases, continued violations leave the violator open to prosecution for contempt of court. Finally, employees may sue for double their unpaid wages and their attorney fees. Such suits frequently reach such proportions as to threaten the firms sued with bankruptcy.

Relationships between the Divisions and the state minimum wage enforcement agencies constitute another enforcement problem. Cooperation between these agencies is suggested in the Act but how this is to be brought about is not detailed. It is a problem which has to be worked out empirically between

the enforcement officials themselves.

Finally, there are the enforcement problems which are implicit in a legal minimum wage law itself. There are the various devices which have always been used and continue to be used to evade and avoid compliance. The making of improper deductions, the use of the "independent contractor" device, and the maintenance of inadequate and inaccurate records are only a few of the many with which the inspector must contend. There is also the problem of overcoming the opposition which many persons still retain against this type of wage control. Such opposition may be found not only among employers but even among some of the lower courts themselves. There is the problem of insufficient personnel. Minimum wage enforcement requires a large staff of inspectors. That the staff has always been inadequate may be inferred from an examination of almost all of the Administrator's annual reports. Finally, the numerous exemptions have so complicated the Act that not only employers, employees, and their legal representatives do not fully understand them, but even inspectors charged with the Act's enforcement find them unduly complicated.

Since we will continuously refer to the enforcement provisions of the Act in this chapter, it may be well to summarize them at this point. The Act bars from the channels of commerce goods produced in violation of the minimum wage and maximum hour provisions as well as the section 14 administrative exemptions; outlaws discrimination against employees

who assert their rights under the Act; and specifically prohibits record keeping violations.[1] The penalties for violating the Act are a fine of not more than $10,000 or imprisonment for not more than six months or both.[2] As noted above, employees may sue for back wages due, plus an equal amount in liquidated damages and their attorney fees.[3] The Administrator may effect enforcement by means of civil proceedings designed to secure permanent injunctions restraining further violations.[4] Finally, there is a provision that the Act shall not justify the reduction of wage-hour standards higher than those provided in the Act. There is no penalty, however, for violations of the provision.[5]

A. Enforcement by Administrative Procedure

Section 11 provides the Administrator with authority to enforce the Act. Under this section he is authorized to make his investigations and inspections and inspections of covered establishments and to cooperate with state agencies making similar investigations.

The Administrator's objective, so far as inspection is concerned, is to make a sufficient number of inspections of

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[1]Sec. 15 (a).

[2]Sec. 15 (b).

[3]Sec. 16.

[4]Sec. 17.

[5]Sec. 18.

covered establishments so as to insure uniform compliance throughout the nation. The necessity of inspecting at frequent intervals has been demonstrated by the experience of the states and of other countries. The goal of adequate frequency of inspection is still to be attained.[1]

Inspection procedure involves an examination of pertinent records: invoices, and similar records to determine whether there is coverage; payroll and time records to determine whether there is compliance with the Act's wage and hour provisions; and other records such as union contracts and statements of personnel policy in order to obtain a comprehensive view of the establishment's wage policy. A representative number of employees are interviewed as are also the employer and members of his staff. If the inspector finds that there is no coverage, he recommends to his superior officer that the case be closed, and in due time, such disposition is made of the case. If coverage is established but no violations are discovered, he also recommends closing. If violations are found, the inspector's action will vary, depending on the seriousness of the violations. If they are minor, technical in nature, and not intentional, the inspector

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[1]A goal of an annual routine inspection of all covered establishments was originally set by the Division. 1939 Annual Report of the Wage and Hour Division, p. 45. Such frequency is regarded as unnecessary now by the Administrator. U.S. Congress, House, Committee on the Judiciary, Limiting the Time for Bringing Certain Actions under the Laws of the United States, Hearing on H. R. 2788, 79th Cong., 1st Sess. (Washington, 1945), p. 152. Hereinafter cited as the Hearings on the Gwynne Bill.

instructs the employer to compute and pay the restitution due his employees. The payment of restitution is witnessed by the inspector if he is in the vicinity of the establishment when the payment is made. Otherwise, he subsequently makes a spot check by mail of employees to whom restitution is due to determine whether they have been paid. The amounts paid are also checked against the inspector's sample transcriptions to insure accuracy of computation. Before the inspector finally leaves the employer, he fully instructs him on how he can get into and remain in compliance with the Act. All of these steps having been taken, closing of the case is recommended and follows in due course.

However, if the violations are serious, the inspector refers the case to the office of the Solicitor of the Department of Labor. If the violations are not wilful, an injunction is secured to prevent the continuance of violations and the shipment of goods produced in violation of the Act. But if the violations are flagrant, or if falsification of records is involved, the case is referred to the Attorney-General's Office in the Department of Justice for handling. Such a case is closed when the court issues an injunction or orders restitution paid in addition to applying criminal penalties.[1]

The importance of the administrative handling of cases

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[1] 1941 Annual Report of the Wage and Hour Division, pp. 45-46.

by inspectors cannot be exaggerated. Most cases are closed on an informal, non-litigatory basis. Inspectors are usually not lawyers. The violator who approaches the problem of settlement strictly from a legal viewpoint is making a grave error. A much better approach is one in which the violator simply indicates a sincere desire to comply and a willingness to make such amends as are indicated by the nature of the case. Such an employer fares far better than one who turns to legal technicalities in an effort to "fight the case." The administrative procedure keeps innumerable cases from clogging the courts, secures justice for workers without the necessity of litigation, and results in a more cooperative spirit on the part of employers.

This is, in general, the procedure followed in inspections. Inspections have varied in nature and, over the course of time, at least four different types have been developed. The type of inspection which is dominant in any particular period has varied with such factors as the funds available, the progress that has been made in securing compliance on the part of employers, the drain of the war on personnel, and the knowledge of the result of different inspection techniques that have been acquired over the course of time. Each has its particular usefulness, depending on the objective of the inspection activity.

Complaint inspections arise as a result of the receipt of information to the effect that the Act is being violated.

They are received from a large variety of sources: employees, their friends and relatives, labor organizations, competitors of employers, and trade associations. Whether signed or anonymous, every complaint results in an inspection.[1] The complaint is referred to an inspector who familiarizes himself with the allegations it contains. He calls on the complainant prior to making the inspection and secures from him a supplementary statement regarding the nature of the alleged violations and pertinent information regarding the nature of his activities and those of his employer in order to determine whether there is any basis for coverage. The inspector then calls on the employer and informs him that an inspection is to be made but he does not, however, inform him that a complaint regarding him has been received. Such information is withheld in order to fully protect the complainant. Every effort is made to keep his identity secret and when the

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[1]The last accumulation of statistics published by the Division covering complaints received and classifying such complaints by type of complainant and by the nature of violations alleged in complaints indicating violation appeared in the 1940 Annual Report. Although six years have elapsed since these statistics were published, conclusions may be drawn from them which are currently applicable. From the effective date of the Act to the end of the 1940 fiscal year, a total of 56,278 complaints had been filed. Of these, 89 percent were valid in that they indicated violations. The remaining 11 percent were complaints against employers whose employees were not covered or who were not considered in violation. About 73 percent were filed by employees; 4.5 percent by labor unions; and 4.8 percent by employers and trade associations. 1940 Annual Report of the Wage and Hour Division, pp. 91-94.

inspection has been completed, the employer is not sure whether the inspection has been made because of a complaint or whether it is merely a routine inspection.[1]

Routine inspections are made necessary by the fact that many employees do not complain of violations because of fear of discharge or discrimination by the employer or because of ignorance of the provisions of the Act. Large numbers of employers, knowing that their employees will not complain, take chances of not being caught and do not fall in line until brought to book by the physical presence of an inspector.[2]

Most routine inspections are made in connection with industry drives which are designed to bring into compliance all establishments in particular industries throughout the country. Thus, the advantage which firms which violate have over their competitors is eliminated. Such drives have frequently been initiated at the request of trade associations

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[1]Cf. 1939 Annual Report of the Wage and Hour Division, pp. 47-48, and 1941 Annual Report of the Wage and Hour Division, pp. 46-47.

[2]Although the Act had been in effect for about three years in 1941, 70 percent of the complaint inspections and 61 percent of the routine inspections in the 1941 fiscal year revealed violations. During the same period, in several industries (knitted outerwear, hats, millinery, embroidery, apparel, food and kindred products, and insurance, banking, and other financial institutions) routine physical inspections showed that more than 40 percent of the covered establishments inspected involved restitution. 1941 Annual Report of the Wage and Hour Division, p. 48.

which wish to eliminate the wage-cutters from their industries.[1]

The AD-85 procedure is a type of investigation which has occasionally been used by the Divisions in the past. Where an immediate physical investigation is not feasible, the Divisions use a form designated as "Form AD-85." The form, a questionnaire, is mailed to the employer and is so constructed as to elicit the type of information sought during physical inspections. It covers questions of coverage and compliance. After the employer has filled it out and returned it to the Divisions, an examination of it reveals whether the employer is covered, and if covered, whether he is in compliance with the Act. If violations are indicated, he is asked to make restitution to his employees. These employers are scheduled for a physical inspection as soon thereafter as possible.[2]

The cooperation of industry and labor groups in the enforcement of the Act has been secured. Thus, in 1941 the

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[1]One such drive occurred in the lumber industry in June, 1940. The drive, manned by more than 100 inspectors, covered all lumber establishments of every kind throughout the country. Of about 3,400 establishments inspected, about 900 were found to be in compliance, about 1,600 in violation, and about 800 were not covered. Most of the employers contacted were cooperative and readily agreed to make the restitution the inspections indicated was due to their employees. Approval of the drive was expressed by a number of lumber trade associations and some of the employers in the industry. 1940 Annual Report of the Wage and Hour Division, p. 88.

[2]1941 Annual Report of the Wage and Hour Division, pp. 50-51.

Division initiated a series of agreements with representatives of several industries.[1] These agreements provided that the employers who were parties to them would refrain from violations in the future. The Division, in turn, pledged itself not to seek restitution for violations which had occurred prior to the signing of the agreement. The agreements incorporated the Division's interpretation of how the Act applied to the particular industries. Most of the agreements provided for the suspension of inspections in the industries concerned for a period of six months during which the industries were to get themselves into compliance.[2]

The cooperation of labor was also enlisted. During the early days of the Act both the American Federation of Labor and the Congress of Industrial Organizations prepared complaint forms which employees could file at the union offices. The A.F.L. stated, in part, in the letter which accompanied its complaint form:

> The Fair Labor Standards Act of 1938 is your Act. As is the case with any other law, the Act is only as good as is its enforcement. The real responsibility for the enforcement of this Act rests with organized labor. Be sure you are correctly informed

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[1]The industries included were: road construction and building equipment dealers; cigarette vending machine operators; livestock marketing agencies; oil well drilling contractors; motion picture producers, insurance, credit and finance companies; citrus and pimento packers; arboreal and floral nurseries; retail-wholesale dealers.

[2]Bureau of National Affairs, Inc., Wage and Hour Manual, 1941 Edition (Washington, 1941), pp. 713-714. See pp. 714-717 for a copy of a typical compliance agreement. Cited hereinafter as 1941 WH Man.

about the provisions of the Act, its administrative machinery, and its enforcement. Do not run the risk of playing into the hands of those who will try to block or circumvent the law. Be sure to consult with us before taking action.[1]

The C.I.O. also urged its employees to fully report any violations. In a letter to its members it stated, in part:

> In cases where there may be some question in the employer's mind as to whether or not certain employees are under the Act, unions should investigate thoroughly and, if in their judgment, such employees are under the Act, they should so notify the employer in a formal letter. Such a letter should point out that it is the union's opinion that the employees in question are covered by the Act, and that the union demands at least 25 cents an hour minimum for these employees and time and a half payment for overtime. The letter should point out that violations are subject not only to criminal prosecution but that the union has the right, under the Act, to sue for twice the amount of wages which the employer has illegally failed to pay.[2]

There was other action on the part of the unions in the interest of the Act's enforcement. Some unions struck to secure compliance with the Act on the part of the employers. They were helpful at hearings held by congressional committees, acting as a check on the information filed by employers.[3] Both the C.I.O. and the A.F.L. prepared detailed interpretative bulletins which explained the rights which employees had

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[1]Bureau of National Affairs, Inc., Wage and Hour Manual, 1942 Edition (Washington, 1942), p. 727. Cited hereinafter as 1942 WH Man.

[2]Ibid., p. 725.

[3]Irving Richter, "Four Years of the Fair Labor Standards Act of 1938: Some Problems of Enforcement," The Journal of Political Economy, LI (April, 1943), p. 108.

under the Act and even went so far as to try to interpret the law's provisions. These interpretations did not always agree with those issued by the Division, however.[1]

The Divisions conducted 38,549 inspections of covered establishments under the Fair Labor Standards Act during the 1947 fiscal year. This was the smallest number of inspections made in any year during the Act's history. In 1942, for example, 67,630 inspections of covered establishments were made.[2]

There has been a steady decline in the proportion of closed inspection cases that involved violation of the Act's minimum wage provisions. Whereas nearly one-third of the inspections of covered establishments made during the 1942 fiscal year involved minimum wage violations of either or both the Fair Labor Standards and Public Contracts Acts, only 9 percent of the inspection cases closed during the 1947 fiscal year indicated such violations, and only 5 percent of the establishments inspected were paying less than 40 cents per hour at the time of the inspection.[3]

The violations were fairly evenly distributed throughout

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[1]Samuel Herman, "The Administration and Enforcement of the Fair Labor Standards Act," Law and Contemporary Problems, VI (Summer, 1939), 385.

[2]U.S. Department of Labor, Wage and Hour and Public Contracts Divisions, Annual Report for the Year Ended June 30, 1947 (Washington, 1947), p. 11. Cited hereinafter as 1947 Annual Report of the Wage and Hour and Public Contracts Divisions.

[3]Ibid., p. 16.

the nation, as shown in Table 5 below. Although the table includes violations of the Public Contracts Act, such violations are a minor portion of the total, inspections under this Act constituting only 6 percent of all the inspections made by the Divisions.[1]

Although violations of the minimum wage provisions of the Act have declined, violations of other basic provisions of the Act have continued to be excessive. The Administrator ascribes this to the inadequacy of his enforcement staff. There were serious reductions in the size of the inspection staff during the 1947 fiscal year. As a result of the reduction in the number of inspectors, it was also necessary to reduce the number of regions into which the Divisions are divided from 13 to 9.[2]

B. Enforcement by Litigation

Although the part played by the inspection staff in enforcement is of major importance, and although the Administrator's interpretative bulletins provide employers with guide posts as to what the Act means, in the final analysis, enforcement is dependent on the decisions of the courts. Litigation is the vital factor in the determination of the final and conclusive interpretations of the Act.

At first the Administrator moved with caution.

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[1] Ibid., p. 17.

[2] Ibid., pp. 1-2.

TABLE 5

CURRENT VIOLATION OF THE MINIMUM WAGE PROVISIONS OF THE FAIR LABOR STANDARDS AND PUBLIC CONTRACTS ACTS DISCLOSED BY INSPECTIONS REPORTED DURING THE FISCAL YEAR 1947, BY REGION

Region		Number of covered establishments inspected	Establishments in violation of the minimum wage provisions at time of inspection	
			Number	Percent of inspected covered establishments
Total,	all regions	38,622	1,758	5
I	Boston	2,926	80	3
II	New York	6,398	189	3
III	Philadelphia	4,110	166	4
IV	Richmond	1,242	71	6
V	Atlanta	1,703	116	7
VI	Birmingham	1,643	137	8
VII	Nashville	1,632	142	9
VIII	Cleveland	2,836	72	3
IX	Chicago	4,920	96	2
X	Minneapolis	1,426	56	4
XI	Kansas City	3,055	129	4
XII	Dallas	1,893	71	4
XIII	San Francisco	3,291	42	1
	North Carolina	882	46	5
	Puerto Rico	665	346	52

Satisfactorily completed inspections are necessary for successful litigation. Furthermore, there was a desire to avoid the appearance of ruthless and uncompromising action against deliberate and unwitting violators alike. The emphasis was on properly informing the employer rather than immediately taking him to task. The first cases were designed to settle only the basic questions regarding the operation of the Act. These issues were gradually resolved. Judicial precedent became substantial. Eventually, the point was reached where there remained comparatively little excuse for violating the law and violations no longer could be considered unintentional but were obviously wilful and flagrant.[1] Litigation takes two forms. If the violations are serious, the case is referred to the Office of the Solicitor of the Department of Labor. If the violations, though serious, are not wilful, a suit follows for injunction to restrain further violations and to prevent the shipment of goods in interstate commerce. If the violations are "aggravated," the case is handled by the Department of Justice on a criminal basis.[2]

A number of possible judicial actions are available in connection with litigation: the use of the "hot goods" clause,

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[1] 1939 Annual Report of the Wage and Hour Division, p. 61, and United States Department of Labor, Annual Report of the Secretary of Labor for the Fiscal Year Ended June 30, 1946 (Washington, 1947), p. 23.

[2] 1941 Annual Report of the Wage and Hour Division, pp. 45-46.

actions involving the question of discrimination against employees who seek the protection of the Act, criminal proceedings, employee suits, and injunctions.

The "hot goods" clause prohibits the shipment of "any goods in the production of which any employee was employed in violation of" the Act's provisions.[1] Thus, manufacturers who purchase such goods risk having their products excluded from the channels of interstate commerce, even when the violations of the Act have occurred in the plants of the suppliers of the goods rather than in their own plants. Such exclusion extends to transporting, offering for transport, shipping, delivering, or selling with the knowledge that shipment, delivery or sale in commerce is intended. The liability for violation of the "hot goods" clause extends not only to manufacturers but to sellers of illegally produced goods.[2] The Supreme Court has held that the clause is a valid exercise of the congressional commerce power.[3] The use of certificates of compliance or indications or labels on invoices on merchandise that the goods were produced in compliance with the Act's provisions is not a bar to prosecution of violations under

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[1] Sec. 15 (a) (1).

[2] 1939 Annual Report of the Wage and Hour Division, p. 18.

[3] United States v. Darby Lumber Co., et al., 312 U.S. 100 (1941).

the "hot goods" clause of the Act.[1]

Employers may not discriminate against employees who complain or testify in asserting their rights under the Act.[2] Violation of this provision subjects an employer to the criminal and civil provisions of the Act. On this basis, for example, discrimination against employees paid restitution under the Act has been prohibited by means of a consent decree, the reinstatement of an employee discharged because of his testimony has been ordered in injunction proceedings. Even the blacklisting of an employee who has sued and who has left the company has been held as a violation in the opinion of the Divisions.[3]

The law provides severe criminal penalties where there are wilful violations of a serious nature.[4] Such penalties are invoked in only a small proportion of the cases handled by the Divisions. Actions which provide for fines and imprisonments are instituted by the Attorney-General of the United States. To his office are referred those cases which involve extensive violations of the minimum wage and maximum hour

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[1]Commerce Clearing House, Labor Law Service, Federal Wage-Hour Guide, Par. 26, 250.151.

[2]Sec. 15 (a) (3).

[3]Commerce Clearing House, Labor Law Service, Federal Wage-Hour Guide, Par. 26,300, passim.

[4]Sec. 16 (a).

provisions of the Act accompanied by falsified records designed to conceal them.[1]

There were 155 establishments against which the Divisions took criminal action during the 1947 fiscal year. As a result of these cases, 79 establishments paid more than $125,000 in restitution to about 3,000 employees.[2]

The Act provides for the recovery of unpaid wages, an equal amount in liquidated damages, and the employee's attorney fee by means of an employee suit.[3] In the early days of the Act the Division intervened in such suits where there were questions of jurisdiction of the courts to entertain such suits. The government does not now participate in these suits unless there are constitutional issues or the validity of the Divisions' authority is questioned.[4]

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[1]Two examples of the consequences of criminal prosecution may be cited. As a result of a conviction of criminal contempt of court a Puerto Rican nightgown manufacturer was sentenced to six months in a federal jail. The contempt charge arose as a result of continuing violations of the Act. The employer in the case made restitution totalling in excess of $30,000 and was released on condition that he make additional payments due his employees or "strip himself of all assets." Commerce Clearing House, Labor Law Service, Federal Wage-Hour Guide, Par. 26,402.52. Another example is that of the textile mill in Pennsylvania which was ordered to pay a fine of $15,000 and to place $50,000 in escrow in order that the payment of wages in accordance with the Act's provisions might be guaranteed its homeworkers. Ibid., Par. 26,402.52.

[2]1947 Annual Report of the Wage and Hour and Public Contracts Divisions, p. 9.

[3]Sec. 16 (b).

[4]1941 Annual Report of the Wage and Hour Division, pp. 60-61.

Although provision for a suitable fee is made in the Act, no fixed amount is specified. The amounts that have been allowed have varied in the different courts. Wage claims under the Act are given preferential treatment under the Federal Bankruptcy Act if the wages involved are "restricted in amount and earned within a prescribed period." The liquidated damages which have been claimed have been held to be compensation to the employee and not a punishment of the employer.[1]

The amount of back wages and liquidated damages obtained through suit by employees is considerable, although the exact sums are not readily available. However, the amount thus recovered is but a small portion of the sums actually due the employees. Furthermore, it is very probable that the restitution which will be paid in the future will be even less than heretofor in view of the passage of the Portal-to-Portal Act of 1947.[2]

The Administrator is authorized to institute civil suit for injunction.[3] Such injunctions permanently restrain violations under the Act. Most such suits end in consent judgments. Those employers who contest complaints filed by the Divisions

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[1]Commerce Clearing House, Labor Law Service, Federal Wage-Hour Guide, Par. 26,451, passim.

[2]1947 Annual Report of the Wage and Hour and Public Contracts Divisions, p. 20. The problem of employee suits is dealt with in detail in Chapter IX below.

[3]Sec. 17.

risk having their goods immobilized by temporary restraining orders, and where the Divisions are successful, by permanent orders. This risk is avoided when the employer enters into a consent judgment prohibiting future violations and agrees to make whatever restitution is due to his employees. An additional inducement to employers to enter into such agreements is the possibility of avoiding employee suits. A decline in employee morale following the refusal to make such restitution as the Divisions have found due is thus avoided.[1] There is no limit as to the period in which the Divisions may bring such action in the courts. Payment of restitution on installments over a period of years may be approved by the regional director or his designated subordinate. If spread over more than a year, then the consent of the national office must be secured. If the employer fails to comply with an injunction, whether or not part of a consent decree, contempt proceedings are instituted. Some of these contempt proceedings on several occasions have involved kickbacks or "repayment of wages or a portion of wages by an employee acting under the compulsion of his employer."[2]

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[1] 1942 WH Man., p. 717.

[2] Commerce Clearing House, Labor Law Service, Federal Wage-Hour Guide, par. 26,601, passim.

C. Federal-State Cooperation in Enforcement

The Act provides that the Administrator may seek the aid of officials of state labor agencies on a reimbursable basis for the purpose of carrying out the provisions of the Act.[1]

This type of arrangement has a number of precedents in the federal services. Among the agencies which have provided for federal-state cooperation are the Department of Agriculture, the Department of the Interior, and the Social Security Board. It is essential in such an arrangement that uniform standards be provided for the state agencies which are doing the helping and, furthermore, that coordination effect an elimination of duplication of inspection effort between the agencies.[2]

The first coordinating arrangement was the result of the Fifth National Conference on Labor Legislation held in Washington in November, 1938, at which representatives of the labor departments of 41 states, Alaska, Puerto Rico, and the District of Columbia agreed to render certain services without

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[1]Section 11 (b) provides that--

"With the consent and cooperation of State agencies charged with the administration of State Labor laws, the Administrator and the Chief of the Children's Bureau may for the purpose of carrying out their respective functions and duties under this Act, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes."

[2]1939 Annual Report of the Wage and Hour Division, p. 69.

incurring any additional operational costs. They agreed to help by:

> (1) Reporting to the Wage and Hour Division situations that appear to be in violation of the wage and hour provisions. (2) Supplying the Division with lists of low-paid industries and establishments in their states. (3) Distributing to interested persons official rulings and interpretations sent out from the Washington office. (4) Referring complaints to the Division. (5) Referring requests for interpretations of the Act to the Division.[1]

There was not much more in the way of cooperation which could be put into effect in the early days of the Act because the Division had no funds with which it could reimburse state departments of labor; because standards had to be set up first for the state departments; and because complete control by the Division was essential in this early period in order that uniform policies be developed.

In September, 1939, the United States Department of Labor issued a Joint Regulation for Utilizing the Services of State Agencies in Making Investigations and Inspections under the Fair Labor Standards Act.[2] This provided for more extensive cooperation on a formal basis.

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[1] 1939 Annual Report of the Wage and Hour Division, pp. 69-70.

[2] 29 Code Fed. Reg., c. 5, Pt. 481 and c. 5, Pt. 515. The regulation, as amended, provides that a plan submitted by a qualified state agency may be examined by the Secretary of Labor, the Administrator of the Wage and Hour Division, and the Director of the Division of Labor Standards, and, if they approve of the plan, they may enter into an agreement concerning the furnishing of certain services by the state at cost. The regulation specifies that the state agency must be

On November 1, 1939, North Carolina became the first state to enter into a cooperative agreement with the Wage and Hour and Labor Standards Divisions. The Divisions maintain a technical adviser in the offices of the North Carolina State Department of Labor to insure the enforcement of the Act in accordance with federal standards. The work of the state department of labor is subject to review in Washington. The chief saving which has come from this arrangement has been the elimination of work when one inspector makes inspections for compliance with both state and federal laws.[1]

Eight states and one territory[2] have enacted laws authorizing cooperation by their labor departments with the

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primarily engaged in the administration of state labor laws, directed by a full time executive, must be enforcing comparable state labor laws, and must set up an administrative division of the agency and assign qualified inspectors adequately supervised to make inspections under the Act. The plan submitted must include a description of the organization of the state agency, the manner in which the investigations will be conducted; plans as to personnel working for the Wage and Hour Division and the Division of Labor Standards; a statement of the state requirements regarding fiscal practice and the appointment of personnel; and a statement from the state attorney-general to the effect that the state agency has the authority to enter into such a plan. The state department of labor agrees to follow the procedures of the Wage and Hour Division and to make the necessary reports regarding costs. State enforcement is limited to civil actions only.

[1] 1941 Annual Report of the Wage and Hour Division, pp. 92-93. For detailed information regarding the North Carolina agreement see the 1940 Annual Report of the Wage and Hour Division, pp. 103-107.

[2] California, Hawaii, Montana, New Hampshire, North Carolina, Oregon, Rhode Island, South Carolina, and Vermont.

Wage and Hour Division and the Divisions of Labor Standards. Two states[1] and the District of Columbia, in addition to North Carolina, have entered into agreements to investigate violations of the Act for the Wage and Hour and Labor Standards Divisions.

Since the states have almost completely ignored the possibilities of formal agreements, the suggestion has been made that the informal agreements entered into in 1938 be expanded so that their possibilities may be more fully exploited. Thus, informal plans could be made regarding the coordination of federal and state inspections and the exchange of information between the federal and state agencies. Inspectors could be instructed in both the federal and state laws. At present inspectors are trained in the law which they are engaged in enforcing but are relatively ignorant of other wage and hour laws intimately related to their work. Employers expect inspectors to know both laws and lose their respect for an inspector who cannot adequately inform them on all important wage-hour legislation. Am employer's regard for governmental regulation takes an additional drop when state and federal labor inspectors follow closely on one another's heels, tieing up his accounting force and his records for twice the time he thinks is necessary. Many employers are not too well acquainted with the distinctions between federal and state regulation and tend to identify

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[1]Connecticut and Minnesota.

the enforcement agents of one with those of another.

An exchange of information regarding violations would lead to several savings: flagrant violators could be singled out for special attention by both agencies; more information would be available on which industry drives could be planned; violators of one law could be promptly informed by the agency enforcing the law of the requirements of related labor laws; and there are other advantages.

There should be conferences between supervisors regarding cases in which restitution is due employees under both laws. This would insure the receipt by the employee of all of the restitution to which he is entitled.

The problem of compliance and enforcement would be immeasurably simplified if terms in both laws were defined on a common basis. This is impossible where the statute has already defined them, but there is room for considerable coordination when definition is the prerogative of the administrators. Employers would welcome uniform records, as likewise would the inspectors who must examine them. In the interests of nation-wide uniformity the Administrator should define the terms and set the standards after consultation with state administrators. The states could then bring their standards in line with those of the federal government.[1]

Another student of the problem, heartily concurring in

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[1]Clara M. Beyer, "Wage-Hour Inspection, A Federal Program," The American Labor Legislation Review, XXXI (June, 1941), 84-85.

these suggestions, adds that industry drives jointly fostered by state and federal agencies would be especially valuable. She also suggests the employment of uniform statistical reporting plans for both agencies. Her major suggestion is that coordinating committees be set up to act as informational clearing houses and as coordinators of inspection standards and activities. These committees could define such common terms as "employee" and "independent contractor." Such questions as whether rest periods constitute time worked, the length of training periods, and a uniform policy on deductions could be worked out for both agencies on a common basis. This student would go so far as to advocate one inspection staff in each state for the enforcement of minimum wages, maximum hours, industrial homework, and child labor for both federal and state laws.[1]

One views the proposed solutions to these problems without too much optimism. The problem is one for which a solution can be expected only in the very long run. The current trend seems to be more and more in the direction of states rights and local controls. Local agencies are showing more and more jealousy of federal interference and are refusing to cooperate. In the long run, however, there will be uniformity based on federal standards since the public will eventually awaken to the great savings inherent in such uniformity.

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[1]Anne S. Davis, "Wage and Hour Law Administration," The American Labor Legislation Review, XXXI (March, 1941), 24-28.

D. Problems in Enforcement

Some of the difficulties which the Administrator must face in enforcing the law have already been touched upon in the last few pages. Much, however, yet remains to be said of the factors which militate against the Administrator in his efforts to carry out the congressional mandates as expressed in the Act.

The devices which employers use to evade compliance with the act are legion. In the words of one union official, ". . . . cases abound with instances where employers have devised various devious means for deceiving employees as to their rights under the law, and where employers have launched complex bookkeeping systems for accomplishing results contrary to law."[1]

The problem of deductions has already been considered and the difficulties of enforcement which arise in that connection need no further discussion at this point.[2] An equally difficult problem is that of meeting evasions of the act which are the results of attempts to employ the "independent contractor" device. Attempts on the part of industry to nullify the expressed intent of Congress regarding wage and hour

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[1]U.S. Congress, Senate, Committee on the Judiciary, Portal-to-Portal Wages, Hearings on S. 70, 80th Cong., 1st Sess. (Washington, 1947), pp. 178-179. Hereinafter cited as Hearings on S. 70.

[2]See pp. 188-190, supra.

standards was shown in the early history of the Act when employers entered into contracts with "former" employees, such contracts being designed to remove these employees from the Act's coverage. For example, The Southern Lumberman of March 1, 1939, carried an article entitled, "Fewer Employees Reduce the Lumberman's Troubles and Taxes." It specifically advised "having certain work done by independent contractors instead of employees."[1] Another example may be found in the railroads, some of which, at the time of the passage of the Act and for several years thereafter, maintained that their redcaps were independent "licensees" in their efforts to avoid paying them the legal minimum wage.[2] It is true, of course, that the use of the "independent contractor" device was widespread prior to the Act's effective date for the purpose of avoiding the impact of other protective legislation. Our interest centers primarily on those employers who promptly after the passage of the act, or soon thereafter, converted their employees into "independent contractors" thereby depriving them of the Act's benefits.

The enforcement of the record keeping regulations of the Act constitutes a problem. In some industries employers

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[1]Irving Richter, "Four Years of the Fair Labor Standards Act of 1938: Some Problems of Enforcement," The Journal of Political Economy, LI (April, 1943), p. 108.

[2]U.S. Congress, House, Committee on Labor, Proposed Amendments to the Fair Labor Standards Act, Hearings, 79th Cong., 1st Sess. (Washington, 1945), p. 501.

have never kept records and have carried all of the information regarding their establishments in their heads. This was obvious during the compliance drive in the waste paper and scrap iron industry. Records were rare, and where at all in evidence, were usually illegible. The problem is made even more difficult in such industries by the fact that the labor employed is frequently semi-literate, has a poor conception of time, is a poor source of information even to the most careful interviewer, and is easily intimidated by employers so that the latter's statements and records are substantiated even when they are inaccurate.

Bookkeeping manipulations take a wide variety of forms. Thousands of employers, in violation of the Act, promptly reduced the hourly rates or weekly salaries of their employees on the effective date of the Act so that, with extra pay for overtime, employees received exactly the same total weekly earnings, although according to the records they were now getting premium pay for overtime. Although hours worked per week may vary from week to week, the records may show no variation in hours worked over long periods of time. Time cards may be punched but the employees may work many hours in excess of those indicated on the cards.

When records are so inadequate or inaccurate as to make the accurate reconstruction of hours worked impossible on the basis of the records themselves, the employees may be asked to estimate these hours. In some cases, employees

have taken advantage of this situation to make extravagant claims which were obviously not based on facts. Such claims are rejected by inspectors. Usually the restitution actually paid is less than what is due for the amounts that should be paid are reduced by the fact that some employees have left and cannot be located, with the result that they are never paid any restitution at all; some of the employees are not available to testify as to what is due them; and some hesitate to make claims for the full amounts due because of fear of retaliation by the employers.[1]

Opposition to the Act is another factor which causes enforcement difficulties. Such opposition is concentrated in the South but by no means confined to it.[2] The refusal of Congress to raise the minimum above 40 cents per hour in 1945 and thereafter, in spite of the inflation which has occurred since 1938, is a refusal to revitalize the law and make it effective. Such opposition has a most deleterious effect on enforcement. It tends to make some employers operate on the basis that the Act will be abolished or effectively emasculated. This leads to a relaxation of compliance and the creation of additional enforcement problems.

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[1] Cf. Richter, op. cit., p. 107.

[2] See articles by southern students of the problem, e.g., John H. Van Sickle, "Geographical Aspects of a Minimum Wage," Harvard Business Review, XXIV (Spring, 1946), 277-294. Richter, op. cit., discusses the opposition of southern industry and southern congressmen at length on pages 98-99.

The fact that the inspection staff has been inadequate and that it is presently being cut far below its minimum requirements has already been touched upon. That some segments of industry have adjusted their compliance policies in line with the size of the inspection staff is obvious from the available evidence. In 1939 a trade association informed its members that they would probably not be subject to inspection for a period because of the Divisions' budget problems. As a result 75,000 to 100,000 workers throughout the country went without the benefits of the Act for two years.[1] A more recent example of this sort of "advice" is of interest. A business labor law advisory service informed its subscribers early in 1947 that "there will be less chance of the Wage-Hour Division inspecting your company if the Senate goes along with the House appropriation cuts for the Labor Department. The House has approved (H.R. 2700) a 25% slash in the sum requested for the Division."[2]

High labor turnover rates make enforcement difficult. Small unstable industries which employ large numbers of "independent contractors" frequently are able to avoid inspection and prosecution because they "fold up and disappear" at the first sign of any inspection activity, or because they are naturally short-lived. It is difficult to find their

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[1]Richter, op. cit., p. 101.

[2]Prentice-Hall, Wage and Hour Law Service, Labor Report, Vol. 4, No. 40, April 3, 1947.

employees either to secure testimony from them or to see to it that they get the sums the Divisions find due them.[1] This problem became a major one during the war because of the increased mobility of labor.

The Act is regarded as a peculiarly difficult law to enforce. One of the major problems which inspectors must face is that of determining coverage together with the proper application of the many exemptions under the Act. Only a few examples need be cited to illustrate this problem. The inspector, in applying the section 13 (a) (2) retail and service exemption to an establishment performing retail and service operations, but not exclusively so, must make an analysis of the business to accurately determine whether it is predominantly retail or wholesale, and if he determines that it is predominantly retail, then he must ascertain whether the extent of its interstate commerce is sufficiently large as to remove it from the scope of the exemption.

An equally difficult problem is the determination of what employees are exempt under the section 13 (a) (1) exemption for administrative, professional, executive, retail service, and outside salesman employees. As time goes on the inspector finds himself spending more and more time on this sort of exemption determination than formerly.

The "area of production" exemption is one of the most

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[1]Richter, op. cit., p. 107.

complicated of all. It is a rash inspector indeed who approaches an inspection which involves such an exemption without a careful study of its problems and without making the inspection with the utmost care and caution. This type of exemption illustrates another problem. The definition of the "area of production" has been changed frequently since the Act's effective date. This has made for great difficulty in inspection for the inspector has had to determine compliance with the Act not only in accordance with the definitions as they presently are in force, but also with previous definitions.

Enforcement of the Act has tended to be an informal type of control. The tendency has been to settle questions of compliance and restitution as equitably as possible over the conference table. The Divisions' policy has been to obtain for the employee the back wages due him and to secure from the employer a sincere expression of his intention to comply in the future. This administrative policy has been accompanied by other efforts to secure compliance through cooperation rather than by compulsion. Agreements have been concluded between industries and the Divisions in which nationwide compliance was insured in return for a willingness to handle past derelictions on an administrative basis. The

assistance of labor organizations has also been of considerable help in furthering the enforcement program.

But for those employers who deliberately and willfully persist in violating the law, the Act provides ample restrictive and punitive measures. These have been applied with vigor wherever their application has been indicated. All of these punitive devices are effective and it is a bold employer who ventures to risk their application. Although the bare outline of the provisions for employee suits has been given above, this subject will be given the space it well deserves in Chapter IX below.

The hope that was present in the early days that with the passage of time the enforcement problems which arise from the presence of both state and federal agencies in the field of the legal minimum wage would be eliminated has not been fulfilled. Comparatively little progress has been made in securing cooperation between these agencies in the enforcement of minimum wage laws and little can be expected in the immediate future.

Of all the enforcement problems which the Administrator faces, the most serious is that of inadequate personnel. With a strong inspection staff the other problems which he faces could be solved. Nevertheless, the tendency has been to constantly deplete the Administrator's inspection staff by the continual curtailment of the funds available for his use.

CHAPTER IX

AMENDMENTS

Our examination of the Act has revealed its principle weaknesses. Coverage of the Act is inadequate. Such coverage as there is, is vitiated by a large number of exemptions. Soon after the Act's passage, it was clear that some of these exemptions were difficult to administer. No valid reason could be found for others. Furthermore, this faulty structure of coverage and exemption was responsible for much discrimination in the application of the law.

There were, in addition, a number of troublesome administrative and enforcement problems. The problem of tips was not covered in the Act and remains a problem pending solution by congressional amendment. Federal-state cooperation did not materialize to any substantial extent. There was no statute of limitations on employee suits in the Act. The absence of administrative rule making power coupled with the fact that the interpretations of the Supreme Court are the governing ones in the final analysis, created endless difficulty for the Administrator, employers, and employees, all of whom had to wait for the Court to slowly grind out its decisions. And, finally, with the passage of time it became obvious that inflation had

made an increase in the minimum necessary.

On the other hand, there was a large body of opinion to the effect that the best course in the interests of the American economy lay in the direction of narrowing the scope of the Act's provisions, restricting its coverage, amending the Act's enforcement provisions in order to protect the employer's interest in the wage bargain, and leaving the minimum at the 40-cent level. We will examine the interplay of these different forces.

A. Attempts to Narrow the Scope of the Act

During the Seventy-sixth Congress[1] more than 60 bills designed to amend the Act were introduced. One bill[2] which provided for the exemption of switchboard operators in telephone exchanges having less than 500 stations was enacted. In addition, Public Resolution No. 88, approved June 26, 1940, was passed. It provided, among other things, for the appointment of special industry committees for Puerto Rico and the Virgin Islands which could recommend the adoption of minimum rates of less than 30 cents per hour. The other bills which were introduced would, if passed, have narrowed the scope of the Act. A large number of exemptions were proposed in these bills. Among them, for example, was one which proposed

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[1] January 3, 1939, to January 3, 1941.

[2] S. 1234.

the exemption of piece-work employees making cigars by hand and another which proposed the exemption of "white collar" employees. There were bills proposing the extension of the "area of production" exemption. One bill provided for a 90-day statute of limitations on employee suits. On the other hand, efforts to extend the coverage of the Act were limited to one bill which provided for the extension of the wage provisions of the Act to employees of the Postal Service.[1]

The Seventy-seventh Congress[2] saw a continuation of these attempts to narrow the scope of the Act by exempting from coverage various groups of workers. All of them were unsuccessful. A few examples may be cited. One bill provided for the exemption of certain cooperatives. Bills were introduced adding exemptions to those in effect for certain fresh fruit and vegetable workers.

With the start of the defense program, the emphasis in the proposed amendments turned to the question of the overtime provisions of the Act on the basis of the alleged assumption that the overtime requirements of the Act hampered the progress of the defense program. In this connection, the Administrator pointed out that the only effect of an abrogation of these provisions would be the removal of unorganized workers in non-war industries from the Act's protection

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[1] 1939 Annual Report of the Wage and Hour Division, p. 160.

[2] January 3, 1941, to January 3, 1943.

since the organized workers in the war industries would continue to receive the overtime benefits under their collective bargaining agreements without resort to legal compulsion.[1]

B. Attempts to Broaden the Scope of the Act

In the summer and fall of 1945 several bills proposing basic amendments to the Act were introduced into both the Senate and the House. The passage of the Act in 1938 took place under conditions far different than those which prevailed in 1945 when the amendments to be discussed below were proposed. The year 1945 was characterized by prosperity, high wages, and a return to the 40-hour week after the long hours characteristic of the war years. Yet, although the economic conditions which had prompted the Act's passage in 1938 had disappeared by 1945, there was, nevertheless, a strong sentiment for the extension of the Act's coverage and an increase in the amount of the basic minimum which it provided.

The chief reason for the pressure to increase the minimum wage lay in the fact that the inflation which accompanied the war had made necessary a minimum wage higher than 40 cents per hour. There was also a feeling in 1945 that the high

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[1]U.S. Department of Labor, Wage and Hour and Public Contracts Divisions, Annual Report for the Fiscal Year Ended June 30, 1942 (New York, 1943), p. 88. Cited hereinafter as 1942 Annual Report of the Wage and Hour and Public Contracts Divisions.

wages of the times were only transitory and that, with the end of the war and the shift of industry from wartime to peacetime pursuits, workers would be subjected to wage cutting and suffer a drastic decline in their purchasing power with a consequent lowering of their planes of living. The cut in working hours and the change from higher-paid to lower-paid jobs contributed to this belief. Briefly, there was a widespread fear on the part of labor, and of industry too, that with the end of the war a period of deflation would ensue and that the establishment of higher wage and hour standards was one way of combating this trend.

Strong administrative support was given to this position. The barrage of administrative pressure for amendment was initiated on September 6, 1945, when President Truman requested Congress to amend the Act so as to increase both coverage and the amount of the legal minimum. Such an increase was necessary, in his opinion, because only in that way could " . . . . the objectives of the Fair Labor Standards Act be realized, the national purchasing power protected, and an economy of full production and abundance preserved and maintained for the American people."[1]

Congressional action followed inthe form of bills

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[1]U.S. Congress, Senate, Committee on Education and Labor, Amendments to the Fair Labor Standards Act of 1938, Senate Report 1012, to accompany S. 1349, 79th Congress, 2nd Session (Washington, 1946), pp. 1-2. Cited hereinafter as Senate Report 1012.

introduced to Congress. The most important of these was Senate Bill S. 1349. This bill provided for the following changes in the Act: The Administrator was empowered to issue wage orders under industry committee procedure to provide for the maintenance of reasonable differentials between wages for interrelated job classifications and the rates for unskilled classifications. Minimum wages were established for unskilled job classifications: 65 cents immediately, 70 cents a year later, and 75 cents after 2 years. The term "wage" was no longer to include the reasonable cost of board and other facilities furnished to members of the crew of a vessel. A five-year statute of limitations on employee suits was provided. Exemptions for seamen, for workers engaged in processing and handling operations, and for workers in the "area of production" in agricultural processing and handling operations were eliminated.

At the hearings on the bill the representatives of the administration, of industry, and of labor took approximately the same positions they had taken in 1937 when the Act was first considered. The administration representatives stressed the need to "strengthen our economy by maintaining national purchasing power."[1] Representatives of industry opposed the

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[1]See testimony of Secretary of Labor Lewis B. Schwellenbach, U.S. Congress, Senate, Committee on Education and Labor, Amendment of the Fair Labor Standards Act, Hearings on S. 1349, 79th Congress, 1st Session (Washington, 1945), pp. 5-24. Cited hereinafter as Hearings on S. 1349. See also the testimony of Clinton P. Anderson, Secretary of Agriculture, ibid., pp. 133-137, then Administrator L. Metcalf Walling, ibid., pp.

bill, most of them on the basis that their particular industries could not pay the costs which would follow its enactment.[1] The representative of southern business felt that the bill would have an adverse effect on small business which characterizes southern industry and would curtail the South's foreign trade.[2] The labor representatives, like the administration representatives, based their arguments on the necessity of maintaining purchasing power.[3]

The reception of the proposal to control wages other than those of unskilled classifications was mixed. The Administrator regarded it as outside the scope of the objective of minimum wage regulation--the elimination of substandard living conditions. He felt that such control was unnecessary since the experience with the Act had not resulted in the elimination of differentials between the legal minimum wage and the wages of skilled workers. Wages in the higher brackets, in his opinion, should be fixed through collective

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233-271, then Secretary of Commerce Henry A. Wallace, ibid., pp. 854-863, and Chester A. Bowles, then OPA Administrator, ibid., pp. 846-853.

[1]See, for example, the testimony of the representatives of the agricultural processing industries, ibid., pp. 137-147, 303-309, 309-318, and 423-457.

[2]Testimony of Tyre Taylor, Southern States Industrial Council, ibid., pp. 502-514.

[3]See testimony of Lewis G. Hines, A.F.L., ibid., pp. 205-208, Solomon Barkin, C.I.O., ibid., pp. 1222-1266, and [illegible] 797-806.

bargaining rather than through legal regulation.[1]

The A.F.L. also felt that the proposal was unwise and unnecessary. It regarded it as "an invasion by the Government of the domain of free and voluntary collective bargaining between labor and management." Its position was that, "detailed regulation of wages above the minimum is not a part of the protective exercise of the Federal powers to safeguard the standards of minimum welfare of the workers and the integrity of the whole economy against unfair competition."[2]

The C.I.O., however, enthusiastically advocated the idea of the regulation of wages above the minimum. The history of the N.R.A. and W.L.B. experience was cited to show that such control was feasible. However, in the opinion of the CI.O. representative, such regulation should not be mandatory for all industries. Furthermore, it should be effected by means of legally enforced key rates in industry on the basis of which the wage structures of various industries would be built by means of collective bargaining.[3]

The bill was favorably reported with the wage provisions amended to provide for a minimum wage of 65 cents for the first two years, 70 cents for the next two years, and 75

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[1]Testimony of L. Metcalf Walling, ibid., pp. 267-278.

[2]Testimony of Lewis G. Hines, ibid., p. 210.

[3]Testimony of Solomon Barkin, ibid., pp. 779-795.

cents thereafter with progress from 65 to 75 cents during these periods by means of industry committees. It contained no provision for the control of above-minimum wages. Coverage was extended to all employees engaged in activities affecting commerce. Exemptions were further restricted. A two-year statute of limitations on employee suits was provided.[1]

The chief obstacle encountered in the Senate was the effort on the part of southern senators to kill the bill by adding amendments which even the staunchest proponents of the bill refused to tolerate. Outstanding among these proposals was an amendment proposed by Senator Russell of Georgia and Senators Maybank and Johnson both of South Carolina which required the inclusion of all labor costs in the computation of parity on major agricultural commodities.[2] Such an amendment would have generated a new round of wage demands with consequent wreckage of the stabilization and price control program.

Nevertheless, on April 5, 1946, the Senate passed the bill including this amendment. There was little doubt in the Senate that the bill would be vetoed. The supporters of the original version of S. 1349 referred to the Senate bill as a "monstrosity" and a "cadaver" and talked about its "decent

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[1] Senate Report 1012.

[2] New York Times, March 15, 1946, p. 1.

burial." Even before the vote was taken Senator Pepper gave the bill up as "dead" and left the capitol for business in his home state. Senator Barkley commented that he had been made responsible for that "from which all others had fled."[1]

Seven bills were introduced into the House. All proposed increases up to 65 cents or 75 cents per hour. Most of them also contained provisions for exemptions, coverage, and a statute of limitations on employee suits similar to those in the Senate committee bill. In June a majority of the House Committee on Labor favorably reported H. R. 4130 providing for a change in the minimum from 50 to 65 cents per hour. In the House, the Rules Committee refused to approve a rule permitting debate on the bill. The House eventually adjourned with no action taken on it.

C. Portal-to-Portal Pay

We turn now to a consideration of the various factors and events which culminated in the passage of the Portal-to-Portal Act of 1947. Ostensibly enacted to solve the problem of what "hours worked" are under the Act, the legislation constitutes an attempt to radically amend the Act by changing certain of its administrative and enforcement provisions. A real understanding of the implications of this legislation can be had only after an examination of the proposals which the Administrator has made in the interests of improving the

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[1]New York Times, April 6, 1946, p. 1.

Act's administrative and enforcement provisions, of the attempt to enact the Gwynne Bill providing for a one-year statute of limitations for employee suits, and of the Portal-to-Portal Act itself and the discussions which preceded its enactment.

Three proposals designed to improve the administration and enforcement of the Act have been made by the Administrator.

Several of the state laws provide that the administrative agency which enforces the minimum wage law has the right to sue directly for restitution of unpaid wages to employees upon assignment of their claims. The Administrator has proposed the addition of such a provision to section 16 (b) of the Act on the basis that the efficiency of enforcement would be increased and the collection of restitution would be facilitated. In addition, in connection with such a provision, he has recommended the amendment of the section to provide that employers who voluntarily pay restitution due their employees should be relieved from the threat of further court action for liquidated damages and attorney fees, except where the employers are involved in wilful and flagrant violations.[1]

The Administrator's second suggestion has been that a reasonable statute of limitation for employee suits be incorporated into the Act. Several states have nullified the Act's provisions by enacting statutes of limitations which provide

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[1]U.S. Department of Labor, Wage and Hour and Public Contracts Divisions, Annual Report for the Fiscal Year Ended June 30, 1944 (New York, 1945), p. 7. Cited hereinafter as 1944 Annual Report of the Wage and Hour and Public Contracts Divisions.

very short periods during which employees may sue for wages due under section 16 (b). Accordingly, employers in those states have a competitive advantage over similar employers in other states.[1]

The third suggestion made by the Administrator is that he be granted power to issue authoritative interpretations of the general provisions of the Act. Prior to 1947 the employer who followed the Administrator's interpretation was not sure that it would stand up in the courts and he might thus be innocently subject to the Act's penalties. For example, an employer who assumed that his employees were exempt on the basis of the Administrator's interpretation of the Act might at a later date have to pay not only the back wages due, but, in addition, liquidated damages and an attorney's fee. Such unfortunate situations would have been eliminated if the Administrator had the power to make the necessary interpretations and issue regulations incident to the Act's provisions, and to provide that employers who follow them be exempt from any civil or criminal liability.[2]

The failure of Congress to amend the Act in line with these proposals has led to a number of problems in enforcement. The sums which employers were compelled to pay because of technical violations or because of adherence to interpretations of the Administrator which were later reversed by

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[1] Loc. cit.

[2] Ibid., pp. 7-8.

the Court grew considerably in size. Employers, therefore, turned to the state legislatures for relief and a number of states passed statutes of limitations. As stated above, these statutes provide for very short periods during which suit can be brought so that the Act in these states has been made ineffective to a considerable degree.

The first real federal attempt to consider these problems was in connection with the Gwynne Bill, H. R. 2788, introduced by the House Judiciary Committee to the 79th Congress, first session. The attempt represented an effort to solve the Act's enforcement problems, not on the basis of the Administrator's suggestions, but by radically limiting the right of the employee to sue under section 16 (b) of the Act. This bill, introduced by Representative John W. Gwynne, had the following provisions:

> . . . . That title 28 of the United States Code, as amended, be further amended by adding a new section to be known as section 793, and to read as follows:
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> SEC. 793. Except as otherwise provided in any action creating a right of action to recover damages, actual or exemplary, no action under the laws of the United States shall be maintained unless the same is commenced within 1 year after such cause of action accrued, unless a shorter time be fixed in any applicable State statute: Provided, however, That public actions to recover money damages may be enforced if brought within two years after the case of action accrued except when the United States is not a real party at interest: Provided further, That the person liable for such damages shall, within the same period, be found within the United States so that proper process thereof may be instituted and served against such person.

Although generally phrased, the bill, as shown by the hearings and subsequent legislative action, was designed to limit the time within which suits under section 16 (b) could be instituted to a period of one year. Hearings were held between June 11 and July 2, 1945. That a statute of limitations was needed was conceded by all who testified but there was wide disagreement as to how long a period should be provided for during which suits could be instituted.

The bill had the backing of industry.[1] The representatives of industry pointed to the hardships to which employers had been subjected as a result of the operation of section 16 (b). They described the injustices arising out of such cases as that of Addison v. Holly Hill Fruit Products, Inc.[2] and Brooklyn Savings Bank v. O'Neil.[3] The N.A.M. felt that

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[1] See, for example, the testimony of Raymond S. Smethurst of the National Association of Manufacturers, Hearings on the Gwynne Bill, pp. 2-32.

[2] 322 U.S. 607 (1944). See pp. 192-193, supra.

[3] 324 U.S. 697 (1945). As a result of the decision of the Supreme Court in Kirschbaum Co. v. Walling the Brooklyn Savings Bank considered that its employees engaged in servicing its buildings were covered and made restitution to them for the extra pay for overtime due them under section 7 of the Act. The employees gave the bank a release of all of their rights under the Act, including the right to liquidated damages. Later the employees sued for liquidated damages and the Court in a 6-3 decision in an opinion by Justice Reed held that the waivers signed by the employees were invalid and that the right of an employee to recover liquidated damages was a right which in substance was a public right essential to the carrying out of the purpose of the Act. The bank was thus unfairly penalized.

the bill was not drastic enough. The period, in the opinion of the association, should be shorter than two years since the Divisions' large inspection staff could adequately handle the violations as rapidly as they arose. In addition, the association suggested that the legislation should be applied retroactively with respect to liabilities already accrued.[1]

Both the representatives of labor and the Administrator conceded that the section 16 (b) provision had operated so as to impose unfair penalties in some instances but they insisted that a short period in which employees could sue for their back wages was not the solution to the problem.

One labor leader summarized the reasons why the bill should not be passed: The proposed period of limitation was unreasonably short and was detrimental to both the rights of employees and the interest of the public in fair labor standards. Under the bill the employee had to choose either his job or his right to sue, but not both, since he was dependent on the employer for his job. The employer was in a better position to know the law than his employees. A short period would tempt the employer to take chances on successfully evading the Act. A short period would endanger the enforcement of the Act since the damages provision is a major deterring influence. The bill provided for limitations of suits for other actions which were not related to the

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[1] Hearings on the Gwynne Bill, p. 32.

problems of wages. And, finally, the bill permitted state statutes of limitations to apply if they were shorter, thus permitting the states to nullify the Act, and further, destroying that uniformity which is necessary if the application of the Act's provisions is not to give some employers a competitive advantage over others.[1] All of the labor representatives suggested a five year period.

The Administrator concurred in this statement. He noted further that if the bill were passed, very few suits could be instituted because negotiations preceding the suit would result in limiting the liability of the employer to much less than a period of one year. A greatly increased inspection staff would be necessary to achieve even token enforcement. Anything less than a three-year statute of limitations, in his opinion, was unreasonable. If a three-year statute of limitations were enacted, if protection were accorded to the employer who complies with the Administrator's interpretations, and if only restitution of unpaid wages were claimed and liquidated damages were waived where the employer had complied with the Administrator's interpretations, then the problem of enforcement would be solved. The employee's rights would be retained, the non-wilful violator would not be penalized, and the employer who committed flagrant violations would receive his just deserts. This was the Administrator's

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[1]Testimony of Frank Donner of the C.I.O., ibid., pp. 115-116.

proposed solution.[1]

The bill reported by the House Judiciary Committee provided not only that all causes of action accruing after enactment of the bill must be started within a period of one year, it provided also that no liability would follow any act done in good faith in accordance with an administrative interpretation or regulation which was subsequently amended, rescinded, or modified.[2]

The House passed the bill in May, 1946, raising the period to two years. The bill was referred to the Senate which passed a substitute bill providing for a three-year period. Congress then adjourned without further consideration of the bill.[3]

The second attempt to weaken the Act's enforcement provisions started in January, 1947, and was successfully completed during that year. The 1947 legislation, passed ostensibly to solve the problems arising in connection with the determination of "hours worked" under the Act, actually was designed, like the Gwynne Bill, to make the enforcement provisions of the Act to a large degree ineffective.

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[1] Hearings on the Gwynne Bill, pp. 144-158.

[2] U.S. Congress, House, Committee on the Judiciary, Limiting the Time for Bringing Certain Actions under the Laws of Congress, House Report 1141 to accompany H.R. 2788, 79th Congress, 1st Session (Washington, 1945).

[3] 1946 Annual Report of the Wage and Hour and Public Contracts Divisions, p. 90.

The Act does not define the words "work" or "workweek." The Act does state that the word "employ" includes "to suffer or permit to work."[1] The question of what work is was, therefore, left to be determined by the employer and the employee, by express or implied agreement, either on the basis of custom or practice or on the basis of collective bargaining until authoritative definitions were promulgated. When the question of what hours worked are under the Act arose, the Administrator referred his interrogators to Interpretative Bulletin No. 13 issued in 1939 and entitled, "Determination of Hours for Which Employees Are Entitled to Compensation under the Fair Labor Standards Act," and to other interpretations which he had made of the term. However, his interpretations were advisory and valid only until the Court decided otherwise or until he himself revised his interpretations. According to Interpretative Bulletin 13 hours worked include:

> . . . . (1) all time during which an employee is required to be on duty or to be on the employer's premises or to be at a prescribed workplace, and (2) all time during which an employee is suffered or permitted to work whether or not permitted to do so.

Such interpretations are given considerable weight by the courts. For example, in Skidmore et al. v. Swift & Company,[2] the Court held:

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[1] Sec. 3 (g).

[2] 323 U.S. 134 (1944).

> We consider that the ruling, interpretations, and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Yet in spite of the weight given such interpretations and rulings the courts have frequently differed with them. An early and important example was the Jewell Ridge Coal Corporation v. Local No. 6167, United Mine Workers of America et al.[1] case in which the Court described an interpretation of the Administrator as ". . . . being legally untenable, lacks the usual respect to be accorded the Administrator's rulings, interpretations and opinions."

The Supreme Court has considered the question of what hours worked are under the Act in three cases.

The first case, Tennessee Coal, Iron & Railroad Company et al. v. Muscoda Local 123 et al.,[2] involved the question of determining what constitutes work or employment in underground iron-ore mines within the meaning of the Act. In essence, what had to be answered was whether time spent by the miners in traveling underground in mines to and from

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[1] 325 U.S. 161 (1945).

[2] 321 U.S. 590 (1944).

the working face[1] constituted hours worked under the Act. In its decision the Court defined work or employment "as meaning physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." The Court went further and defined the part played by the Act in the determination of hours worked and the relation of hours worked to custom or contract:

> But in any event it is immaterial that there may have been a prior custom or contract not to consider certain work within the compass of the workweek or not to compensate employees for certain portions of their work. The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee's time while compensating him for only a part of it. Congress intended, instead to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy like an agreement to pay less than the minimum wage requirements cannot be utilized to deprive employees of their statutory rights.

The second case, Jewell Ridge Coal Corporation v. Local No. 6167, UMW,[2] involved the question of whether the ruling

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[1]The decision contains the following explanatory data:

"The 'working face' is the place in the mine where the miners actually drill and load ore. The 'face to face' basis of compensation, advocated by petitioners, includes only the time spent at the working face. The 'portal to portal' basis, proposed by respondents, includes time spent in traveling between the portal or entrance to the mine and the working face and back again, as well as the time spent at the working face."

[2]325 U.S. 161 (1945).

in the Tennessee Coal Company case, that underground travel in iron-ore mines constituted work, might be applied to bituminous-coal mines. The Court held that underground travel in bituminous coal mines as well as in iron-ore mines were hours worked under the Act. It found "no substantial factual or legal difference" between the two cases.

The third case was that of Anderson et al. v. Mt. Clemens Pottery Company, et al.[1] In 1941 members of the United Pottery Workers (CIO) employed at the Mt. Clemens Pottery sued the company in the Federal District Court at Detroit for wages due them under the Act charging that the company had failed to pay for all of the time they had worked, that they had worked about 56 minutes more per day than they had been credited for by the company, and that all time between the hours punched on the time cards constituted hours worked under the Act.

On June 10, 1946, the Supreme Court issued its decision. It held, first of all, that the burden of proof was not a problem for the employees but for the employers. All the employee had to do was to prove that he had performed the work for which he had been improperly compensated. It was then up to the employer to rebut this assertion by the presentation of accurate records. So far as actual productive work performed, it began and ended at the scheduled

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[1]66 Sup. Ct. 1187 (1946).

hours. But the employees had shown that they had to be on the job some time prior to the scheduled working hours since the employer "required them to punch in, walk to their work benches and perform preliminary duties during the 14 minute periods preceding productive work . . . with the same activities in reverse at the end of the productive work." The Court then stated that: "Since the statutory workweek includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace, the time spent in these activities must be accorded appropriate compensation." The time spent in waiting to punch the time clocks was dismissed but the time spent in walking to work on the employer's premises after the time cards were punched was regarded as working time. Compensation for such walking time was limited, of course, to the time spent in taking the most direct route at an ordinary rate of speed from time clock to work bench. Furthermore, the application of the rule was to be made after more definite findings concerning the walking time in the case. Preliminary activities prior to arriving at their places of work such as putting on overalls, taping arms, and so forth, were also working time in the opinion of the Court. The case was then remanded to the District Court for the determination of the amount of walking time and time given to preliminary work, with the de minimus doctrine to be considered in the calculation of the damages.

On February 8, 1947, the District Court dismissed the case. The Court held that the employees' claims were de minimus since the evidence showed that a total of less than 10 minutes a day was spent by any employee from time clock to workplace in the morning and the reverse at night. The application of the de minimus doctrine should be based on a consideration of the employee's activities (walking to or from work and preliminary activities) in toto rather than separately, according to the Court. Finally, the Court held that the liability for portal-to-portal pay for the time prior to the decision of the Supreme Court was void, for the payment of the sums due would be an unfair penalty against the company which had relied on the interpretations of the Act by the Administrator and the courts. This decision was appealed to the Sixth Circuit Court of Appeals by the employees who later withdrew their appeal.

The Supreme Court decision was followed by a rash of portal-to-portal pay suits with the sums claimed totalling more than five billion dollars. The newspapers disregarded the fact that the sums which would eventually be paid would be far less than this amount and pictured the situation as a body blow to the economy. Bills were promptly introduced to rectify this situation and it is with these bills and the enactment of portal-to-portal legislation with which we are next concerned.

The bills dealt with the problems of portal-to-portal pay but they also embraced a variety of proposals in addition to those dealing with the problem of hours worked. Thus, Senate Bill S. 70, introduced by Senator Wiley, had a provision that employers who prove good faith are not liable for liquidated damages and a provision validating the compromising of the payment of liquidated damages. A substitute bill, introduced by Senator Capehart had a provision that liquidated damages were to be paid only on evidence of "bad faith" on the part of the employer and only at the discretion of the court, validated compromises of adjustments of restitution between employers and employees, provided for a one-year statute of limitations, and had a provision eliminating liability on the part of the employer where there is reliance on an administrative ruling. The provisions of H. R. 584, introduced by Representative Gwynne, were even more drastic. This bill provided for a one-year statute of limitations, compromise provisions, limitations on fees which an employer had to pay to an employee's attorney, and shifted the burden of proof from the employer to the employee.

The arguments pro and con the proposals followed the same pattern as those presented at the hearings on the Gwynne Bill two years before. However, a different attitude prevailed at the hearings in 1947. The representatives of industry dominated the hearings so far as numbers were concerned and their arguments were more lengthy and more respectfully

heard. Those of labor and its friends were coldly received. The questioning of witnesses seemed specifically designed to show that the Act was undermining the structure of our economy and that it should be radically amended.[1]

Industry heartily approved of the bills. But labor and the administration representatives took the position that the bills were unfair to workers and far from solving any administrative and enforcement problems would create additional ones.[2]

On March 10, 1947, the Senate Judiciary Committee issued its report.[3] The Committee concluded that action should be taken by Congress or else employers and employees would be unable to determine without prolonged litigation how much was due in portal-to-portal pay and in many cases would be unable to settle or compromise these claims. Failure of Congress to act would result in a continuation of the suits with resulting congestion in the courts. The uncertainty in industry regarding these claims and their

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[1]See Hearings on S. 70 and U.S. Congress, House, Committee on the Judiciary, Regulating the Recovery of Portal-to-Portal Pay, and for Other Purposes, Hearings before Subcommittee No. 2 on H. R. 584 and H. J. Res. 91, 80th Congress, 1st Session (Washington, 1947).

[2]Loc. cit.

[3]U.S. Congress, Senate, Committee on the Judiciary, Exempting Employers from Liability for Portal-to-Portal Wages in Certain Cases, Senate Report 48, to accompany H. R. 2157, 80th Congress, 1st Session (Washington, 1947).

successful prosecution by employees would result in retarded economic development, unemployment, industrial conflicts, inequalities in competitive conditions, and serious drains on the revenues of government.[1]

The committee, therefore, reported a bill which voided existing claims under the Fair Labor Standards Act, the Walsh-Healey Act, and the Bacon-Davis Act for wages due for activities performed before and after activities payable under a contract. If any claim of this type was not adequately barred by this provision, then there was to be, in that connection, no recovery of liquidated damages, no payment of the employee's attorney fee by the employer, the burden of proof would be on the employee, and compromises of such claims would be valid. In addition, future claims for portal-to-portal activities were banned; representative suits brought by an agent of employees for or on behalf of other employees similarly situated were barred; a two-year statute of limitations was provided; and no liability was to accrue where the employer had complied with an interpretation of the Administrator.[2]

The bill reported by the House Judiciary Committee provided that claims relating to portal-to-portal activities not arising from contract provisions or custom and practice

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[1] Ibid., pp. 41-42.

[2] Ibid., pp. 44-52.

were voided; provided for a one-year statute of limitations; contained a "good faith" provision, a compromise provision, and a provision that the court was to award liquidated damages only if it found the violations unreasonable.[1]

The Conference Report was signed on April 29, 1947. In addition to using some of the features of both bills and omitting others, the managers for the House and the Senate added a new section designed to protect employers from suits arising as a result of the revised "area of production" definitions. The conference version was approved by the Senate by a voice vote and by a vote of 173-27 in the House. The President signed the bill on May 14.

The changes which the legislation made in the Fair Labor Standards Act may be summarized as follows:[2]

(1) All pending claims by employees for wages by employees for activities not covered by contract, custom, or practice at the plant are barred.

(2) Disputes regarding the amounts due employees on claims existing on May 14, 1947, may be compromised if the settlement includes at least 40 cents per hour for straight time and 60 cents per hour for overtime. Liquidated damages

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[1]U.S. Congress, House, Committee on the Judiciary, Regulating the Recovery of Portal-to-Portal Pay, and for Other Purposes, House Report 71, to accompany H. R. 2157, 80th Congress, 1st Session (Washington, 1947), pp. 1-8.

[2]Cf. Bureau of National Affairs, The Portal-to-Portal Act of 1947 (Washington, 1947), pp. 9-10.

for past violations may be waived.

(3) Future suits for wages for activities before or after an employee's "principal activity" are barred unless such activities are paid for under contract, practice, or custom in the plant.

(4) Representative suits, by unions or other representatives of employees are barred. But pending representative suits may be continued if employees give their consent in writing.

(5) Suits on claims accrued on or after May 14, 1947, must be filed within two years of the date of accrual. Suits for actions accrued after May 14, 1947, must be filed within two years of the date of accrual or within a shorter period if a state statute of limitations with a shorter period applies. Where a longer period is permitted by a state law, it applies if the employees file claims within 120 days after May 14, 1947.

(6) Compliance with any administrative written or unwritten ruling will be evidence of "good faith" in case of violations occurring prior to May 14, 1947. After that date written rulings by specified administrative officials will constitute such evidence. Such "good faith" would be a complete defense in employee suits and other wage-hour actions.

(7) The courts may deny liquidated damages in connection with employee suits on demonstration of "good faith" and proof that there were reasonable grounds for the employer to

believe that he was not in violation.

(8) Employers are not liable in any suit involving liabilities arising as a result of the formulation of the new "area of production" regulations.

An examination of the law shows that so many of the phrases and terms used are vague and indefinite that they will give rise to more administrative and enforcement problems than were present before it was passed. Only a few points need be noted in order to reveal the extent to which this law weakens and renders ineffective the Fair Labor Standards Act.

The period of two years for employee suits is far too short. It is unfair to workers who may be sued for their debts over a much longer period. It is unfair to them since other federal statutes provide for much longer periods in which suits may be filed. Furthermore, the employer-employee relation is such that employees will hesitate to sue while employed by a violating employer. And, finally, workers have little hope that there will be a compensating increase in inspection activity to protect them since Congress has cut the Divisions' budget.

The legislation outlaws existing claims for <u>any</u> activities not covered by a contract, custom, or practice in the plant of the employee involved. This provides a huge windfall to employers and a corresponding loss to employees. The latter must write off claims for back wages many of which

have little or nothing to do with the issue of portal-to-portal pay. Furthermore, existing claims in line with custom, practice, or contract in which there is a "bona fide" dispute may be compromised as to the amounts which will be paid. Note, further, that regardless of whether there is a bona fide dispute involved, the employee may waive his rights to liquidated damages in the absence of fraud or duress. How it is possible to insure the absence of duress in the employer-employee situation is not explained.

With regard to future wage claims, Congress has expressed its dissatisfaction with the economic definition of "work" which has been the basis of both the Administrator's interpretations and those of the Supreme Court and now divides work into three parts: (1) activities prior to the employee's "principal activity," (2) the employee's "principal activity," and (3) activities after the "principal activity." Congress has provided that items 1 and 3 need not be paid for unless they are performed in connection with contract, custom, or practice. This backward step from a sound conception of what work is raises many questions as to what is or is not the employee's "principal activity."

The "good faith" provisions are considered in two sections. One section applies to violations prior to May 14, 1947, and the other to those occurring after this date. For those occurring prior to May 14, 1947, reliance on <u>any</u> written or unwritten administrative ruling or practice of <u>any</u>

government agency relieves an employer of liability and punishment. For those occurring after May 14, the reliance must be on a written ruling, and the ruling must be that of a particular administrative official. The important thing to note here is that relief includes not only relief from liability for liquidated damages, but also from the minimum wage and overtime provisions as well. And nothing is said in the law to the effect that the employer must himself comply with administrative rulings and interpretations. It completely protects the employer without any protection for the employee. Furthermore, on what basis can a court decide whether an employer has acted in "good faith" and is a workable legal definition of this phrase possible?

The Act is further weakened by the provision in the 1947 legislation that the courts may waive liquidated damages where the employer shows both "good faith" and that he had reasonable grounds for believing that he was not in violation. The problem of determining what "good faith" is has been mentioned. The determination of what "reasonable grounds" are is similarly a difficult problem.

The ban on representative suits is an attempt to reduce the role of organized labor in the enforcement of the Act. Labor unions have been active in informing workers of their rights under the Act and such utilization as has been made of section 16 (b) has been due largely to their educational efforts. Eliminating the unions from participation in these

suits removes an important influence in the vigorous enforcement of the Act.

Finally, the retroactive provisions of this law might well raise the question of its constitutionality under the Fifth Amendment of the Constitution which provides, among other things, that no person may be deprived of his property without due process of law. The wage-hour back wage claims are property rights of workers and there is considerable legal precedent to bear this out. The voiding of these claims by Congress is, to say the least, questionable legislation.

That there are important segments in the economy that oppose the Act is obvious from an examination of this chapter. Congress during the last three years had ample opportunity to examine the arguments of those who wanted the Act's scope expanded and of those who wanted it restricted. In 1947 Congress chose to weaken the Act by emasculating its enforcement provisions. It did this by reducing the employee suit provisions of the Act to impotency. In addition, it voided the claims of workers to large sums of back wages which were due them and made the possibility of future claims more hazardous. It introduced into the language of the Act a concept of work which is not only opposed to any economic

definition of work but is also contrary to progressive standards of equity in wage payment.

Although organized labor will long feel the effects of this congressional action, it is the unorganized laborer who will feel it most. For with Congress cutting appropriations for inspections, with the Act's employee suit provisions weakened, and with new and complicated versions as to exactly what activities are work which must be paid for, the unorganized employee must now depend more than ever on the honesty and good will of his employer.

Such a radical revision of the Act cannot be explained on the basis that its energetic and impartial enforcement has not been in the best interests of the economy. This will be evident when we examine the economic effects of the Act in the next chapter.

CHAPTER X

ECONOMIC EFFECTS

Before examining the effects of the Fair Labor Standards Act's minimum wage provisions it will be helpful to recall some of the more salient theoretical consequences of minimum wage legislation. The purpose of minimum wage legislation is to raise the wages and increase the purchasing power of workers. This purpose, however, in the opinion of many students, cannot be accomplished by the use of the legal minimum wage without subjecting the economy to some serious hazards: Large numbers of workers may become unemployed; the minimum rates established by law may tend to become the maximum ones; labor organizations may suffer as workers secure the benefits of wage increases without resort to collective action; labor efficiency may decrease in case workers lose their incentive with a guaranteed hourly income.

So far our study has revealed few, if any, harmful effects as the result of minimum wage regulation. We have seen that foreign experience with such regulation has been signally successful. No harmful effects and some benefits have followed state regulation of minimum wages in the

United States.[1]

We turn now to an analysis of the effects of the Fair Labor Standards Act. It is our purpose in this chapter to determine whether the Act has raised the wages of workers and, if so, whether or not such an effect has been accompanied by any of the unhappy consequences which some students of the legal minimum wage have predicted.

A. General Effects

Although the Act has been in effect more than nine years, the evidence as to its economic effects is extremely scanty. The most important questions concerning the Act remain practically unanswered. During the 1937 hearings on the proposed enactment of a minimum wage law there was much discussion as to the possible consequences of minimum wage regulation. Every effort was made in drafting the Act to provide safeguards against the curtailment of employment as a result of the Act's operation. But today we are not certain whether or not the Act did tend to reduce employment nor do we have complete answers to other questions raised by its passage. Today, the questions which the Act has raised remain largely

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[1]For another discussion of the economic effects of state wage controls the reader is referred to Chapter X of Dickinson, Collective Wage Determination, which covers both foreign and American experience up to 1941. It is Dickinson's conclusion that "legal wage-rate minima can be enforced at levels higher than the lowest 10% or so of earned rates before such regulation, and without causing appreciable new unemployment." Ibid., p. 577.

unanswered because its effects cannot be measured due to the inflationary influence of the war. The effects of the war on employment, wages, and prices have submerged and rendered inaccessible to analysis those results which may be attributed primarily to the Act.

There is another problem in connection with the analysis of the economic effects of the Act. The Act is not, of course, purely minimum wage legislation. It is allied with important premium pay provisions. Thus, even if it were possible to determine what the Act's effects actually have been, there would then remain the problem of determining which effects could be ascribed to the minimum wage provisions and which to the premium pay provisions, certainly a very difficult task.

How meager the evidence is was amply demonstrated in 1945 during the hearings held by the House and Senate Labor Committees on the proposed amendments to the Act. It was to be expected that those who advocated or opposed the extension of its provisions would have cited the Act's effects to bolster their arguments. But a careful review of more than 2,300 pages of testimony reveals very little evidence of this sort, practically all of the material being devoted to the effects which the proposed amendments would have on the economy.

Thus the Administrator, in referring to the wage order program, could only "confidently say that the establishment

of a 40-cent minimum wage under the Act did not adversely affect our economy as a whole even though there may have been some marginal producers who had difficulty in adjusting to the wage orders." He doubted that business mortality had increased to a significant degree.[1] He could give no information on the influence of the wages paid under the Act on non-covered workers.[2]

Nor did other witnesses who may have been in a position to know supply any pertinent or useful data in connection with the question of the economic effects of the legislation which they were engaged in condemning or praising. The representative of the National Association of Manufacturers presented several criticisms of the Act and of the proposed amendments but said nothing of its economic effects. The Textile Workers Union of America's representative confined his analysis to the need for and the benefits to be derived from the enactment of the proposed amendments.[3]

Several labor leaders testified to the effect that their industries had not been adversely affected by the Act. The research director of the Amalgamated Clothing Workers of

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[1] Hearings on S. 1349, pp. 263-264.

[2] U.S. Congress, House, Committee on Labor, Proposed Amendments to the Fair Labor Standards Act, Hearings, 79th Cong., 1st Sess. (Washington, 1945), p. 882. Hereinafter cited as 1945 House Hearings on Amendments.

[3] Hearings on S. 1349, pp. 286-302, 779-794, and 1021-1026.

America noted that firms in the men's apparel industry were better able to survive during the biennium of 1933-35 and 1937-39 during which the N.R.A. and the Act were respectively in existence than in other periods when the industry was subject to wide scale wage cutting.[1] The president of the same labor organization testified that so far as the clothing and textile industries were concerned, he had never found an instance in which the imposition of a legal minimum wage had put an employer out of business.[2] Concurring statements were made by representatives of other labor organizations.[3]

Some statistical evidence showing that the country had made considerable gains, despite the Act if not with assistance from it was presented. It showed, at least, that many of the adverse effects of the Act which had been predicted never materialized.

No estimate is available of the total number of workers who have benefited from the minimum wage provisions of the Act nor of the extent of such benefits. However, the Divisions have estimated that about 2,700,000 workers were being paid less than the recommended minimum wage on the dates of the various industry committee meetings. Since this figure involves recommendations prior to arriving at the 40-cent

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[1] Ibid., p. 1361.

[2] Ibid., p. 798.

[3] See testimony of representative of the International Fur and Leather Workers Union, Hearings on S. 1349, pp. 1078-1079, and of the International Ladies Garment Workers Union, 1945 House Hearings on Amendments, p. 378.

recommendations, another figure, the number of workers who were paid less than 40 cents at the time of the 40-cent recommendations is sometimes used. This figure totals 1,600,000.[1]

Nor is any information available on the indirect effects of the minimum wage provisions. The range of estimates as to the indirect effects vary from the claims of those who maintain that the minimum wage results in very few increases to those receiving more than the minimum, to the estimates of those who argue that the wages of most workers paid more than the minimum are increased by the same amount as that received by workers below the minimum.[2]

The extent of the direct effects of the wage orders varied with the different industries. As shown in Table 6 the proportion of workers directly affected by the industry committee recommendations ranged from 1 percent of the estimated employment to 68 percent of this employment. In at least half of the wage orders 20 percent of the workers were affected. Table 6 also shows the estimated percentage increase in the wage bill for the different industries.[3]

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[1]Harry Weiss, "Minimum Wage Fixing in the United States: The Working of the Industry Committees," International Labour Review, LI (January, 1945), 45-46.

[2]Loc. cit.

[3]Loc. cit.

TABLE 6 EFFECTS OF INDUSTRY

Industry committee	Committee No.	Minimum wage rate per hour recommended	Estimated number of employees covered	Estimated percentage of employees directly affected	Estimated percentage direct increase in wage bill[1]	Effective date of wage order
		cents				
Textiles	1	32½	668,000	26	4.0	24 Oct. 1939
"	25	37½	661,000	45	3.1-5.0	30 June 1941
"	39	40	700,000	21	—	20 Apr. 1942
Woollen	1A	36	159,000	8	0.6	17 June 1940
"	36	40	198,000	4	—	24 Nov. 1941
Apparel[2]	2	32½, 35, 37½, 40[3]	720,000	25	0.1-14.1[3]	15 July 1940
Single pants, shirts and allied garments	20	40	146,000	68	2.3-8.8	29 Sept. 1941
Women's apparel	27	40	256,000	25	1.7-5.9	29 Sept. 1941
Miscellaneous apparel	31	40	21,200	34	2.7	15 Dec. 1941
Gloves and mittens	40	40	38,000	42	1.6-8.5	21 Sept. 1942
Handkerchiefs	46	40	5,400	28	2.0	15 Feb. 1943
Hosiery—full-fashioned	3	40	85,000	19	2.1	18 Sept. 1939
Seamless	3	32½	61,000	49	7.3	18 Sept. 1939
"	21	36	63,300	44	2.7	15 Sept. 1941
"	21[3]	40	65,000	23	4.7	15 Feb. 1943
Hat (except straw and harvest)	4	40	21,500	21	1.4-2.7	1 July 1940
Straw and harvest hats[4]	4	35	3,500	32	2.5-3.5	1 July 1940
Millinery	5	40	20,800	16	1.3	15 Jan. 1940
Shoe manufacturing and allied industries	6	35	234,000	26	3.0	29 Apr. 1940
Shoe manufacturing and allied industries	35	40	228,000	39	3.1	3 Nov. 1941
Knitted outerwear	7	35	26,000	33	2.9	1 July 1940
" "	32	40	23,500	25	2.0	20 Apr. 1942
Knitted underwear and commercial knitting	8	33⅓	62,000	28	1.8	6 May 1940
Knitted and men's woven underwear and commercial knitting	28	40	68,000	22	5.9	24 Nov. 1941
Railroad carriers	9	33, 36	1,067,000	6	[5]-2.5	1 Mar. 1941
" "	44	40	1,300,000	4	—	31 Aug. 1942
Leather	10	40	48,900	6	0.5	16 Sept. 1940
Pulp and primary paper	11	40	129,000	7	0.5	16 Sept. 1940
Carpet and rug — wool branch	12	40	30,000	3	0.2	17 Mar. 1941
Other than wool branch[5]	12	35	1,000	9	2.3	17 Mar. 1941
Luggage and leather goods	13	35	17,000	28	2.4	6 Jan. 1941
Luggage, leather goods and women's handbags	41	40	32,000	38	2.8	27 July 1942
Converted paper products	14	36, 38, 40	200,000	16	0.1-2.7	30 June 1941
" " "	48	40	70,000	7	0.7-3.6	15 Feb. 1943
Embroideries	15	37½	15,200	29	2.4	27 Jan. 1941
"	45	40	20,000	20	1.2	20 Sept. 1943
Portable lamp and shade	16	40	10,300	44	6.3	1 July 1941

Industry committee	Committee No.	Minimum wage rate per hour recommended	Estimated number of employees covered
		cents	
Jewelry manufacturing	17[7], 26	40	35,000
Enamelled utensil	18	40	6,100
Drug, medicine and toilet preparations	19	40	44,600
Rubber products	22	40	131,500
Gray iron jobbing foundry	23	40	100,000
Clay products	24	34	39,000
Stone, clay and glass and allied industries	59	40	500,000
Wood furniture manufacturing	29	40	121,000
Lumber and timber products	30	35	384,500
Logging, lumber and timber and related products	64	40	500,000
Passenger motor carrier	33	40	36,000
Property motor carrier	34	40	600,000
Cigar-cigar manufacturing	37	40	51,000
Leaf processing[8]	37	35	9,000
Tobacco	38	40	90,000
Grain products	42	40	64,000
Button and buckle manufacturing	43	40	12,500
Candy and related products	47	40	73,000
Printing and publishing and allied graphic arts	49	40	550,000
Sugar and related products	50	40	65,000
Cooking and heating appliance manufacturing	51	40	25,000
Pens and pencils manufacturing	52	40	12,000
Metal, plastics, machinery, instrument, and allied industries	53	40	7,500,000
Mattress, bedding and related products	54	40	20,000
Miscellaneous textile, leather, fur, straw and related products	55	40	120,000

S OF INDUSTRY COMMITTEE ACTION

Minimum wage rate per hour recommended	Estimated number of employees covered	Estimated percentage of employees directly affected	Estimated percentage direct increase in wage bill[1]	Effective date of wage order
cents				
40	35,000	33	3.9	3 Nov. 1941
40	6,100	19	1.5	21 Apr. 1941
40	44,600	21	2.0	7 July 1941
40	131,500	8	0.6	28 July 1941
40	100,000	5	0.5	3 Nov. 1941
34	39,000	18	—	1 Sept. 1941
40	500,000	4	—	27 Dec. 1943
40	121,000	36	5.5	3 Nov. 1941
35	384,500	44	4.6	3 Nov. 1941
40	500,000	17	—	7 Feb. 1944
40	36,000	11	1.1	5 Jan. 1942
40	600,000	12	1.2	16 Mar. 1942
40	51,000	42	6.5	10 Aug. 1942
35	9,000	42	4.2	10 Aug. 1942
40	90,000	50	—	10 Aug. 1942
40	64,000	31	4.3	1 Mar. 1943
40	12,500	40	3.9	19 Oct. 1942
40	73,000	29	3.1	29 Mar. 1943
40	550,000	8	0.9	14 June 1943
40	65,000	23	3.7	21 June 1943
40	25,000	12	—	12 Apr. 1943
40	12,000	18	1.7	27 Dec. 1943
40	7,500,000	1	—	13 Sept. 1943
40	20,000	7	0.5	20 Sept. 1943
40	120,000	8	—	20 Sept. 1943

Industry committee	Committee No.	Minimum wage rate per hour recommended	Estimated number of employees covered	Estimated percentage of employees directly affected	Estimated percentage direct increase in wage bill[1]	Effective date of wage order
		cents				
Canned fruits and vegetables and related products	56	40	400,000	28	3.3	18 Oct. 1943
Cottonseed and peanut crushing	57	40	28,000	57	9.6	16 Aug. 1943
Vegetable fats and oils	58	40	17,000	4	0.2	16 Aug. 1943
Chemical petroleum and coal products and allied manufacturing industries	60	40	875,000	3	—	7 Feb. 1944
Meat, poultry and dairy products	61	40	450,000	11	—	20 Mar. 1944
Fruit and vegetable packing and farm products assembling industries	62	40	150,000	7	—	22 May 1944
Wholesaling, warehousing and other distribution industries	63	40	900,000	6	—	7 Feb. 1944
Bakery, beverage and miscellaneous food industries	65	40	300,000	5	—	20 Mar. 1944
Metal ore, coal, petroleum and natural gas extraction industries	66	40	750,000	1	—	20 Mar. 1944
Construction	67	40	200,000	3	—	7 Feb. 1944
Finance, insurance, real estate, motion picture and miscellaneous industries	68	40	1,250,000	5	—	17 July 1944
Communication utilities and miscellaneous transportation industries	69	40	900,000	6	—	17 July 1944

Source: Estimates prepared by the Economics Branch of the Wage and Hour and Public Contracts Divisions on the basis of data available at the time of the committee meeting.

The sign * signifies: "less than 0.05 per cent."; the sign — signifies: "figure not available".

[1] Wherever two figures are given, they constitute a range representing the classification with the lowest and the one with the highest cost increase.
[2] Committee No. 2 made separate recommendations for 28 branches, each branch receiving one of the four rates specified in the table. The wage bill increases represent a range for these 28 branches. Those branches for which recommendations lower than 40 cents were made by committee No. 2 were subsequently covered by one of the five committees listed immediately below apparel committee No. 2, except for men's and boys' woven underwear, which was covered by the knitted and men's woven underwear and commercial knitting wage order (No. 28), and women's handbags, which were included under the luggage, leather goods, and women's handbags order (No. 41).
[3] Industry committee No. 21 was reconvened.
[4] Straw hats were subsequently covered under the miscellaneous textile, leather, fur, straw and related products wage order (No. 55).
[5] The "other than wool" branch was subsequently covered under the 40-cent textile wage order (No. 39).
[6] Includes the wall paper branch not covered by the original industry committee.
[7] The recommendations of industry committee No. 17 were rejected by the Administrator.
[8] The leaf processing branch was subsequently covered under the fruit and vegetable packing and farm products assembling industries wage order (No. 62).

Cited in Weiss, op. cit., pp. 46-47.

Fortunately, the information which is available as to the economic effects of the Act is not limited to what was presented at the 1945 hearings. There are available several case studies of the effects of wage orders on particular industries made before the influence of inflation obscured them.

Three of the most important of these analyses have been chosen for the purpose of illustrating the Act's effects. They provide us with very limited conclusions for two reasons. The influence of the Act cannot be isolated readily from all of the factors which operate in the economy. And even if such isolation were possible, the conclusions drawn are based on extremely small samples. Nevertheless, in the absence of more fruitful sources, they merit some study.

One of the first important studies of the economic effects of the Act was one made by the Wage and Hour Division, the purpose of which was to determine, "What was the effect on employment in low-wage seamless hosiery mills between October, 1938, and September, 1939, of the 25-cent minimum wage that became effective on October 24, 1938?"[1]

For the purpose of discussion, the low-wage plants which were studied were divided into three groups depending on the average wage paid prior to October 24, 1938:

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[1]A. F. Hinrichs, "Effects of the 25-cent Minimum Wage on Employment in the Seamless Hosiery Industry," Journal of the American Statistical Association, XXXV (March, 1940), 13-23.

Group I -- less than 25 cents per hour
Group II -- 25 cents or more but less than 27.5 cents
Group III-- 29 cents or more but less than 32.5 cents

The findings in this study may be summarized as follows:

Of the 97 plants that reported to the Bureau of Labor Statistics in October, 1938, not one went out of business during the first year of the Act although a rather sharp business recession occurred in 1938. The fact that one plant did cease operations during July to September, 1939, could hardly be considered a fatality since it is not unusual for failures to occur in this industry in the normal course of a year. Thus, the first conclusion arrived at by the investigators was that the 25-cent minimum did not create stranded communities in the centers of which stood closed mills.

Average hourly earnings for the industry increased during the period. These increases were largely concentrated in Groups I and II. Furthermore, the increases in Groups I and II were considerably in excess of those which were made necessary by the requirements of the Act, whereas in Group III, the increases were only slightly more than the amounts which the Act made necessary.

One of the most important changes resulting from the Act was the narrowing of wage differentials between plants. Whereas prior to the effective date of the Act, Group I plants had wages which averaged 4 cents per hour under Group II plants, in 1939 they averaged 2.5 cents under those in Group II. The differential between the average wage for

Group II and that of Group III decreased from 5.5 cents in 1938 to 1 cent in 1939. In addition, the differential between Group III and the higher wage plants in the industry also declined.

For the 76 plants which reported at the end of the period the average number of man-hours worked increased 15.7 percent in the first nine months of 1939 as compared to the year 1938. Group I mills experienced a decrease of 12 percent in man-hours worked during the period. Employment increased in Group II plants, but not as much as in Group III plants, and the increase in Group III was less than the increase for the industry as a whole.

These shifts in employment were not essentially regional shifts. Although in 1938 there were no plants with average hourly earnings of less than 30 cents an hour in the North whereas of the 97 plants surveyed, there were 27 such plants in the South, still the same survey showed 18 southern plants and only 7 northern plants which had averages from 30 to 35 cents an hour. Finally, and most important, there were 25 northern and 20 southern plants that averaged 35 cents an hour or more. These were the plants which gained the most business as a result of the introduction of the minimum wage.

Some light was thrown on these statistics by a field investigation designed to supplement the statistical analysis. It showed that the mills paying the industry average hourly rate of 35.1 cents or more were unaffected by the 25-cent

wage provision of the Act. Those paying between 29 cents and the industry average of 35.1 cents had to make comparatively few adjustments. Piece rates were not changed. Occasional make-up payments were necessary to bring workers up to the 25-cent minimums. The number of workers discharged for failing to earn the minimum was small. More far-reaching adjustments were necessary in all of the Group I plants and some of the Group II plants in which there were a considerable number of wage increases. Supplementary make-up pay was found necessary to achieve the minimum in some cases. There were some discharges but these were quite few. It was found that the decline in man-hours worked in Group I plants was due, in some instances, to a falling off of business done. In others, the decline was due to technological changes. A large number of plants before the Act had paid low wages because they had been using certain obsolete hand transfer machines. Faced with the necessity of paying a 25-cent minimum, many of these firms had converted to automatic machines. This resulted in a decrease in employment and in man-hours worked, but it did not reflect a decrease in the volume of business done. In addition to changing machinery, some firms turned to the manufacture of a different product. These firms, at comparatively little cost, adapted their obsolete hand transfer machines to the automatic production of anklets. They were thus able to maintain their production although man-hours worked declined.

The study can be summarized in a few words as follows: The impact of the 25-cent minimum on this industry caused difficulties for about 10 percent of its firms, namely those averaging less than 25 cents an hour before the Act. These firms had difficulty in meeting the minimum. This was also true, to a lesser extent, for the firms averaging less than 30 cents per hour before the Act's effective date. In some cases this resulted in an absolute loss of business, but in no case did operations cease permanently. In other cases, labor costs were reduced by technological improvements so that the 25-cent minimum could be met. None of the inefficient plants were forced out of business.

Research into the question of the effects of minimum wage regulation in the seamless hosiery industry continued and in 1941 the results of another investigation were published.[1] This study covered not only the effects of the 25-cent minimum effective on October 24, 1938, but also subjected to careful analysis the effects of the 32½-cent minimum made effective by wage order on September 18, 1939. The period analyzed extended from September, 1938, to September, 1940.

The 97 plants which had been studied in 1938 were included in a larger sample totalling 237 mills which were

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[1]H. M. Douty, "Minimum Wage Regulation in the Seamless Hosiery Industry," Southern Economic Journal, VIII (October, 1941), 176-190.

studied in 1940. Of the 97 plants studied in 1938, 6 were no longer in business in 1940. The Bureau of Labor Statistics tabulated the data in the 1940 survey for two groups: (1) for the 91 plants which were covered in 1938 and were still in business in 1940 and (2) for the 237 mills surveyed in 1940.

The findings of this study may be summarized as follows:

Wages were raised to higher levels by the legislation. The increase was much greater in the South than in the North so that regional differences were narrowed from an average of 8.1 cents in 1938 to 4.1 cents in 1940. Southern average wages as a percentage of northern average wages rose from 80.3 percent in 1938 to 90.7 percent in 1940.

Although almost half of the workers had been earning less than 32½ cents per hour in 1938, practically all with the exception of learners and handicapped workers were earning this minimum or more in 1940. Furthermore, the workers were heavily concentrated at or near the minimum in 1940, 32 percent of them being located in the wage interval of 32.5 cents and under 35.0 cents. Yet the wage order also affected workers earning more than the minimum. The study also showed that the wide variation between the wage levels in different plants which was prevalent in 1938 and which had been narrowed after the imposition of the 25-cent minimum, was narrowed still more by the 32½-cent wage order.

The number of workers employed in the 91 plants surveyed both in 1938 and 1940 declined from 17,868 to 17,346 during

the period, a decline of 3.9 percent. This decrease in employment was concentrated largely in the plants which in 1938 were paying less than the average wage for the industry. In 1938 most of the relatively low-wage plants were found in the South and it is among these plants that decreases in employment occurred. That the southern decline in employment was due to the presence of the low-wage plants in that region is evident from the fact that the plants in the South which paid more than average wages in 1938 experienced an increase in employment during the period under consideration.

Plant mortality was not exceptional during the period. Of the 97 plants surveyed in 1938, six employing 402 workers were no longer in business by 1940. On this basis 6.1 percent of the plants surveyed employing 2.2 percent of the workers were fatalities, representing an annual mortality rate of 3 percent. This might be compared to a mortality rate of 5 percent during the period between 1937 and 1938.

To offset the increased costs, the low-wage plants turned to the improvement of managerial efficiency. But the major means of reducing costs lay in increasing and improving mechanization. The trend toward the introduction of automatic machines and the conversion of machines operated by hand to automatic operation was substantially accelerated by the Act's wage standards, an acceleration which was effected at the expense of some displacement of labor.

A third study, also by Douty, published in 1942 analyzed

the effects of wage orders establishing legal minimum wages of 32½ cents per hour in four low-wage industries: seamless hosiery, cotton textiles, work clothing, and dress shirts.[1]

In 1939 these four industries employed about 600,000 wage earners of whom 67 percent were in the South. The firms which make up these industries are small or medium-sized and sharply competitive. There are more women than men in all of them except in the cotton textiles where only 38 percent of the workers are women.

Wage rates in these industries were relatively very low: Average hourly earnings in the cotton textile industry were 36.9 cents in August, 1938; 36.9 cents in the dress shirt industry, and 35.5 cents in the work clothing industry in the spring of 1939. Just before the Act took effect, more than a third of the textile workers earned less than 32½ cents per hour. In the spring of 1939 when the legal minimum was 25 cents per hour, 55 percent of the work clothing and 43 percent of the dress shirt workers earned less than 32½ cents per hour.

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[1]H. M. Douty, "Some Effects of Wage Orders Under the Fair Labor Standards Act," American Labor Legislation Review, XXXII (December, 1942), 171-175. The material in this section is a summary of this article, except that it does not cover the material contained therein on the seamless hosiery industry since that industry has been covered above. Wage orders establishing a 32½-cent minimum rate became effective on October 24, 1939, in the cotton textiles industry, and on July 15, 1940, for work clothing and dress shirts.

The establishment of the 32½-cent minimum resulted in a definite concentration of workers at or near the legal minimum. In September, 1940, about 40 percent of the workers in cotton textiles earned between 32½ and 35 cents per hour. About 37 percent and 29 percent of the workers in work clothing and dress shirts, respectively, were in this group in the spring of 1941. A few workers were employed at sub-minimum rates under learner or handicapped worker certificates.

The wage orders also had an indirect effect--workers earning wages in excess of the minimum also receiving wage increases. However, occupational differentials were not maintained. The conclusion may be drawn from the data that a minimum wage does not result in a general increase within the first year or so, at least, but rather is followed by individual adjustments of wages above the minimum.

The impact of the wage orders in the South was greater than in the North. In two of the industries, regional wage differentials were narrowed. In the dress shirt industry, southern wages which were 80 percent as great as northern wages in the spring of 1939, rose to 89 percent in the spring of 1941. This percentage rose from 73 percent to 81.6 percent in the work clothing industry between the spring of 1939 and the spring of 1941. However, the differential between northern and southern wages in the cotton textile industry was not affected by the wage order, probably because of the

influence of union activity which raised northern wages after the effective date of the wage order. It should be noted that a uniform legal minimum wage will reduce regional differences in an industry, but it will not eliminate them. The wage structure of an industry is more affected by labor market conditions than by a legal minimum wage.

The uniform minimum wage tended also to reduce differences between plant wage levels. For example, in the cotton textile industry, plants were found in 1938 which paid average wages of less than 30 cents per hour, while competitors were paying average wages of 45 cents or more per hour. Such inequalities tended to be reduced.

Finally, labor efficiency was increased. The problem of plant lighting received more attention. Vocational schools were started. Attempts were made to adjust workers who were unable to earn the legal minimum to new jobs. Medical examinations prior to employment became common.

Technological changes designed to increase production were instituted. In cotton textiles the improvements were a continuation of a trend in existence before the impact of the wage order, the order acting as a stimulant to such improvement.

There was no evidence that the general level of employment was materially affected by the introduction of the wage orders.

B. Effects on the South[1]

The South was obviously more affected by the minimum wage provisions of the Act than the North. This conclusion stems from the fact that southern industries utilize large amounts of unskilled labor.[2] This heavy concentration of unskilled labor is reflected in the fact that compared to the rest of the nation the value of the southern output per worker was 21 percent lower in 1937. A Bureau of Labor Statistics survey showed that the proportion of employees earning less than the minimum was greater in the South than in the rest of the country. In the cotton seed crushing industry 55 percent of the workers received less than 25 cents per hour prior to the Act's effective date. Prior to October 24, 1939, when the 30-cent minimum became effective, the South

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[1]The definition of "South" varies with different writers. As used in "Labor in the South," Serial No. R. 1855 of the U.S. Bureau of Labor Statistics (reprinted from the Monthly Labor Review (October, 1946), hereinafter cited as Labor in the South, it includes 13 states: the Southeast--Virginia, North Carolina, South Carolina, Georgia, Florida, Kentucky, Tennessee, Alabama, and Mississippi; and the Southwest--Arkansas, Louisiana, Oklahoma, and Texas. As used by John V. Van Sickle, Planning for the South (Nashville, 1943), Oklahoma and Texas are excluded from these 13 states. See p. 38.

[2]The percentage of low-skilled labor in the South's total labor supply is larger than in the United States as a whole. Unskilled workers, especially Negroes, find it difficult to become skilled, particularly in the early stages of industrialization. Cf. Viner, "The Role of Costs in a System of Economic Liberalism," Wage Determination and the Economics of Liberalism, U.S. Chamber of Commerce (Washington, 1947), p. 24.

led the nation in the proportion of workers getting less than 30 cents per hour. Of 690,000 workers getting less than 30 cents per hour in the spring of 1939, 54 percent were in the South. Obviously then, the South was faced by a serious problem when the Act was passed. The adjustments which it had to make were more far-reaching and drastic than those which were faced by the rest of the country.[1]

The effects on the seamless hosiery industry and three other industries have been described in detail above. Of interest at this point is the story of what happened in two typically southern industries: cotton seed and lumber.

As a result of the minimum wage provisions of the Act there was an increase in average earnings in the cotton seed industry of 43 percent in the Southeast, 36 percent in the Valley States, and 17 percent in the Southwest between 1937-38 and 1939-40. The increase was not accompanied by a comparable increase in costs. Employment declined 19 percent in the two years after the Act became effective, however, especially during the crushing season in the cotton seed oil mills, because of the installation of labor-saving machinery, increased plant efficiency, and other factors leading to productivity. Gross wages increased 6 percent. In some cases unit labor costs declined.[2]

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[1]John F. Moloney, "Some Effects of the Federal Fair Labor Standards Act upon Southern Industry," Southern Economic Journal, IX (July, 1942), 16-18.

[2]Ibid., pp. 19-20.

The southern lumber industry was not able to offset the increased costs by mechanization as easily as could the northern lumber industry. However, price increases and increased production absorbed the increased wage cost. Some attempt was made by a few of the lumber employers to avoid the Act's requirements by limiting their business to intra-state activities.[1]

In these two industries the Act affected a large number of employees, wage differentials within and among plants were reduced, better management practices were instituted, and labor saving devices were installed. All of this was accomplished at the expense of some unemployment. The reduction of employment caused by the Act was, to some extent, offset by a rising volume of production and the increase in demand and prices as the war emergency developed. The long run effects, however, will only become obvious in the downswing of the business cycle.[2]

The relationships of the Act with the South merit further careful exploration at this point for a number of reasons. Much of the opposition to the enactment of the Act came from southern industrialists and southern members of Congress. These groups also strongly resisted the attempts on the part of the proponents of regulation to extend the

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[1] Ibid., p. 21.

[2] Ibid., p. 22.

Act's coverage and to increase the amount of the legal minimum. The reasons for the vigorous opposition of the South can be best seen in the light of the peculiar nature of its economy.

The South has an abundant supply of natural resources. It has relatively large forest and pasture areas, mineral areas, and excellent sources of water power. Its minerals are of various kinds, the most important of which are iron, coal, and limestone. These three minerals are found in Alabama in such quantities as to make Birmingham potentially one of the world's great iron and steel producing centers. The South's production of minerals between 1900 and 1937 increased at a rate two and one-half as great as that of the nation as a whole.[1]

The land of the South while not of the best in the country, is not, on the other hand, of the worst. There are smaller proportions of good land in the Southwest, the Northwest, and the Northeast than in the South, but there are relatively more people depending on this land for their living in the South relative to these other areas. The extremely low productivity of the southern farm population is due to their excessive numbers in relation to the tillable land. This pressure on the part of the population on southern land has led to faulty land use practices causing

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[1]Van Sickle, op. cit., pp. 45-46.

extensive soil erosion. This loss of good soil has, in turn, increased the pressure of the population on the soil which remains. There is thus a vicious circle of faulty land use, loss of soil, and increased unscientific pressure of the population on the good land which remains.[1]

The income of the South relative to that of the rest of the country is very low. This is explained, in part, by the fact that agriculture is dominant in the southern economy with manufacturing taking a subordinate position. Agriculture in the South is not as productive as it is in other areas of the country. Farms are small, capital equipment is largely lacking or obsolescent, and labor productivity is lower in general. Furthermore, southern manufacturing activity is also on a less prosperous level.[2]

Southern wages, like most other southern incomes, are low. If the regions are ranked on the basis of the straight-time hourly earnings of all workers we find that the Southeast closely followed by the Southwest has the dubious distinction of paying the lowest wage rates in the country. Not only are average hourly rates lowest for the Southeast, but, in addition, the level of wages for all workers in the Southeast, skilled, semiskilled, and unskilled, is lower than that for workers of similar skill for all other regions.[3]

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[1] Ibid., pp. 46-52.

[2] Labor in the South, pp. 15-16.

[3] Ibid., pp. 35-42.

That the relatively lower wage paid southern labor may be accounted for by its lower productivity has been disputed by labor leaders. Their position is given some support as the result of a recent investigation into this question. A number of firms having plants both in the North and the South were asked whether they were getting as much per hour out of their labor in the South as in the North. Their replies were to the effect that southern labor in the firms studied was as efficient as northern labor. They showed that 23 out of the 41 interregional concerns replying regarded the efficiency of their southern plants to be equal to that of their northern plants and four regarded their southern plants as superior. A dozen engineering firms which did business both in the North and the South stated that the relative effectiveness of labor in the North and the South, under comparable conditions, was the same. The investigator concluded that: "Differences in labor efficiency and productivity apparently are not a fundamental factor in regional differentials in wage rates. Such wage differentials must, for the most part, be explained on other grounds."[1]

Differences in the cost of living between different geographical areas appear to be but slight. This statement is substantiated by a 1938 survey made to determine what differences of cost, if any, existed between northern and southern

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[1]Richard A. Lester, "Effectiveness of Factory Labor: South-North Comparisons," The Journal of Political Economy, LIV (February, 1946), 60-75.

cities for about the same standards of living. The survey was not a comparison of money expenditures of families living in different places since the differences in the expenditures of families living in different regions are not differences in the cost of living but rather are differences in standards of living. The objective of the survey, rather was to determine the costs required to maintain the same standard of living in both regions compared, the North and the South.[1]

It was found that the difference in the cost of a given standard of living in five small northern and southern cities was small, being 3.2 percent lower in the southern than in the northern cities. It is interesting to note that the city with the lowest cost of living was a northern city and that the difference between all of the northern cities as a group and all of the southern cities as a group is less than the differences between some of the cities in the same region.[2]

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[1]U.S. Department of Labor, Bureau of Labor Statistics, "Differences in Living Costs in Northern and Southern Cities," reprinted from the Monthly Labor Review (July, 1939), Serial No. R. 963, pp. 1-2.

[2]Ibid., pp. 2-3. This conclusion is confirmed by later studies of the southern economy. Thus, a 1947 congressional investigation noted that "living costs do not vary widely among different parts of the country." U.S. Congress, House, Committee on Agriculture, "Project VII, Industrialization and the South," reprinted from Hearings on Study of Agriculture and Economic Problems of the Cotton Belt, 80th Cong., 1st Sess. (Washington, 1947), p. 59.

One of the factors which keeps southern industrial activity at a low level is its freight rate structure. Freight rates do not favor southern industrial expansion. Low rates are provided for southern raw materials in accordance with the policy of "charging what the traffic will bear." This tends to perpetuate submarginal areas. If there were a gradual reduction in the spread between southern class and commodity rates, the industrialization of the South would be accelerated.

In addition, the South suffers from inter-territorial rate discrimination. The nature of the discrimination is best expressed by the following question: "Should commodities shipped into Eastern territory from Southern territory pay more, mile for mile, than similar commodities shipped between points entirely within Eastern territory?" Numerous examples of such discrimination may be cited. This situation is possible because the rates within the South are relatively high on processed or manufactured goods and relatively low on basic commodities with the reverse being true in the North and the East. Goods which move between territories are assigned rates which are somewhere between the rates of the territory of origin and territory of destination. This favors northern processors and southern producers of raw materials. It also militates against the rapid expansion of southern industrialization.[1]

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[1]Van Sickle, op. cit., pp. 175-177.

An approach to the solution of discriminatory freight rates was opened with the decision on May 12, 1947, by the Supreme Court on the question of freight rate differentials. As a result of complaints by southern industrialists to the effect that the freight rates were discriminatory against the South, a series of investigations were ordered by the Interstate Commerce Commission. On May 19, 1945, the Commission ordered northeastern class rates raised by 10 percent and southern class rates lowered by an equal amount. This ruling was supported by the Supreme Court by a vote of 7 to 2 with Justices Frankfurter and Jackson dissenting.[1]

Because of its economic problems, the majority opinion in the South has always opposed the enactment of minimum wage legislation, especially on a national basis, and the extension of wage control throughout its borders. Sometimes this opposition has sprung from a long established fear of control by the federal government or by northerners. Some of this opposition has its origin in a resentment against any control whatsoever regardless of its source. This attitude expresses itself not only in opposition to federal regulation but also to state protective labor legislation. In addition, there is the enlightened opposition which welcomes regulation as a possible solution to a number of southern problems but wants such regulation to be geared to the special problems of the

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[1] New York v. United States, 91 U.S. Sup. Ct. Law. ed. Advance Opinions, 1083.

South. This last group is opposed to the Fair Labor Standards Act because it is a law which in practice applies uniform requirements to the country as a whole regardless of the ability of the different sections to comply with them. All of these groups strongly suspect that the law was passed at the instigation of northerners who, fearing the growing industrialization of the South, turned to the Act as a means of stifling this increasingly serious source of competition.[1] One southern opponent of the Act has quoted Professor Jacob Viner to the effect that outside efforts at laying down minimum standards of wages and hours are not always purely altruistic, and that:

> . . . it is often doubtful, that minimum requirements with respect to such matters will serve to raise rather than to lower the economic productivity of the area to which such standards are applied. In fact, proposals for their application, when made from outside the area, at times have the appearance at least of having as their real objective the reduction of the competitive power of such areas insofar as it results from low wages and poor working conditions. The authorities in the areas with this in mind will tend in such cases either to refuse in general to accept the standards or to demand nullifying special provisions for their areas, or to refrain from enforcing them, or they may unwisely try to enforce them too quickly or too rigorously, with unfortunate results for the people on whose behalf they were supposedly introduced.[2]

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[1] Walter E. Boles, Jr., "Some Aspects of the Fair Labor Standards Act," Southern Economic Journal, VI (April, 1940), 498-500. See also the testimony of John E. Edgerton, President, Southern States Industrial Council, 1937 Joint Hearings, pp. 760-768.

[2] 1945 House Hearings on Amendments, pp. 342-343.

At least one outstanding economist has opposed the Act because, in his opinion, it violates certain basic economic principles.[1]

It is his opinion, that the Act fails to take into consideration the fact that in any society there are always some individuals whose productive capacity is below the minimum standard necessary for health and efficiency and to attempt to legislate a minimum wage which will make mandatory wage rates which are above what they produce will cause unemployment. Nor will the Act, he argues, increase purchasing power, for it causes unemployment with the unemployed entering the occupations not covered by the legislation, thereby lowering wages there. This results in a decrease in purchasing power. But, most important of all, the Act disregards the economic function of geographical wage differences. Such differentials are caused by differences in natural resources, population, supply of capital, and quantity and quality of business leadership. Geographical wage differences cause movements in capital and labor which tend to equalize wages and eliminate differences in standards of living. Low wage rates attract outside capital, induce excess population to leave the low-wage areas. The well-being

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[1]John V. Van Sickle, "Geographical Aspects of a Minimum Wage," Harvard Business Review, XXIV (Spring, 1946), 277-294. See also his testimony in the 1945 House Hearings on Amendments, pp. 334-343, and his dissenting statement on wages and wage policy, Project VII, Industrialization and the South, pp. 138-145.

of the country as a whole is raised. The elimination of these differences by legislative fiat immobilizes these economic movements of capital and labor.[1]

Yet Van Sickle does not oppose the principle of any legal minimum wage. What he opposes is the principle of a uniform minimum wage. He proposes amendment of the Act to provide for "variable wage minima by regions and by size of community within regions."[2]

However, not all southern spokesmen concur in Van Sickle's views regarding the Act. There are some who believe in a high uniform minimum wage.[3]

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[1]Testimony of John V. Van Sickle, 1945 House Hearings on Amendments, pp. 335-338.

[2]The procedure should be somewhat as follows: The states should be ranked according to per capita income. Those at the bottom of the list will be found to be the agricultural states. The states should then be grouped by area according to economic structure and broken down by size of community starting with rural communities of less than 5,000 population and on up through the large urban centers. The Bureau of Labor Statistics would then determine the wages paid by covered industries for each size-group within the different regions. The minimum would then be set as the highest wage paid in the lowest quartile of wages in each group. This would be the legal minimum wage. Ibid., p. 340.

[3]Clark Foreman, president of the Southern Conference for Human Welfare, a pro-union and Negro-advancement organization, advocates a 65-cent uniform minimum wage as a means of bettering southern conditions. He bases his argument on the theory that higher wages would result in increased purchasing power for southern agricultural and industrial products. Hearings on S. 1349, pp. 597-604.

Frank Graham, president of the University of North Carolina and a member of the State Committee of the Southern Conference for Human Welfare, has expressed a similar opinion. Ibid., pp. 604-612.

C. Implications of an Increase in the Legal Minimum Wage

The minimum wage provided by the Fair Labor Standards Act is 40 cents per hour. In view of the many changes which have occurred in the economy since 1938 consideration is being given by Congress to the advisability of increasing the minimum to 65 or 75 cents per hour.

In 1938 a basic reason for enacting a legal minimum wage was to increase the purchasing power of the nation. In 1948 demand is effective at a high level. Yet cogent reasons are presently being cited, not only for the retention of a legal minimum but for a substantial increase in the amount of the minimum.

On the basis of the Act's coverage in July, 1947, approximately 904,000 workers would receive increases as the result of the enactment of a 65-cent minimum and about 1,830,000 if a 75-cent minimum were enacted.

Yet a higher minimum wage would not entirely solve the problem of adequate living standards for those enjoying coverage. It is only an approach to a solution. Nevertheless, representatives of labor unions and government argue for the higher legal minimum wage as though by this device alone the problem of poverty can be solved. They cite a variety of budgets and then point to the wage rates which are necessary to pay the cost of such budgets, assuming that little if any unemployment or underemployment would be produced. They regard this as the "scientific approach" to the

problem of legal minimum wage determination.

The use of budgets in the determination of minimum wage policy is not new in the United States. The minimum wage laws of 26 states require that "minimum wages shall equal the amount necessary to provide the cost of proper living, or that the cost of adequate maintenance shall be taken into account in setting wages."[1] A number of different budgets have been prepared or utilized for this purpose. These indicate that in 1945 a minimum wage from 60 to 80 cents per hour, based on a 2,000-hour year, was necessary to provide for the cost of living of unskilled workers. They are outlined in Table 7 below.[2]

By 1947 the price inflation had outmoded the budget which had been regarded as appropriate in 1945. A Bureau of Labor Statistics study shows that in June, 1947, in most large cities, between $2,800 and $3,000 was required to support a family of four people. To this there had to be added about $300 to cover taxes and insurance.[3] To earn an

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[1] U.S. Department of Labor, Women's Bureau, State Minimum Wage Budgets for Women Workers Living Alone (Washington, 1942), p. 1. Cited in U.S. Department of Labor, Wage and Hour and Public Contracts Divisions, Summary of Statistical Materials Bearing on Proposals for Revising the Minimum Wage Provisions of the Fair Labor Standards Act (New York, 1945), p. 12. A recent study of minimum wages using the budgetary approach is that of Francis Leo Burns, The Needs Factor in Wage Determination, unpublished Ph. D. thesis, University of Michigan, 1946.

[2] Summary of Statistical Materials Bearing on Proposals for Revising the Minimum Wage Provisions of the Fair Labor Standards Act, p. 12.

[3] A. Ford Hinrichs, "The Budget in Perspective," Monthly Labor Review, LXVI (February, 1948), 131-132.

TABLE 7

COSTS OF VARIOUS BUDGETS

Budget	Date	Annual Cost	Hourly wage rate necessary to cover cost of budget (cents)
I. W.P.A. emergency-level budget for 4-person family:			
A. New England and South Atlantic States	March 1935	$1020.97 1/	51
B. Five Textile Communities	Jan-Feb. 1944	1400.38	70
C. Same as B but including social security and withholding taxes and union dues	Jan-Feb. 1944	1454.74	73
II. W.P.A. maintenance-level budget for 4-person family:			
A. Mobile, Alabama	March 1935	1129.81	56
New York, N.Y.	March 1935	1375.13	69
Average, 59 cities	March 1935	1260.63	63
B. Lowest -- Mobile, Alabama	June 1943	1496.50	75
Highest -- New York, N.Y.	June 1943	1816.12	91
III. A. Budget for single women in New York (excluding taxes and War bond purchases)			
1) Living as members of a family			
a) New York City	Sept. 1944	1244.06	62
b) Outside New York City	Sept. 1944	1251.84	63

TABLE 7 - Continued

Budget	Date	Annual Cost	Hourly wage rate necessary to cover cost of budget (cents)
2) Living alone (10 percent added to above figures)			
a) New York City	Sept. 1944	1368.46	68
b) Outside New York City	Sept. 1944	1377.02	69
B. Heller Committee budget for a single woman living alone, San Francisco, (including taxes but no bond purchases)	March 1944	1469.20	74
IV. Heller Committee budget for a 4-person skilled workers family: California	March 1944	2964.13	1.48

1/ This figure, about $120 higher than the W.P.A. published figures, was obtained by substituting the Bureau of Agricultural Economics low-cost food budget for that of W. P. A. This adjustment was computed by the Textile Workers Organizing Committee, on the basis of B.L.S. figures.

Source: U. S. Department of Labor, Wage and Hour and Public Contracts Divisions, Summary of Statistical Materials Bearing on Proposals for Revising the Minimum Wage Provisions of the Fair Labor Standards Act, p. 23.

annual income of $2,800 plus $300 for taxes and insurance a worker has to earn $1.55 per hour, forty hours per week, 50 weeks per year. Such a budget covers the cost of a rented dwelling of five rooms; a household with the usual home-furnishings and mechanical aids; a food budget which provides a diet recommended by the Food and Nutrition Board of the National Research Council; adequate clothing; the cost of local transportation with an occasional out-of-town trip; and the cost of recreation, education, personal care, tobacco, and communications on a very modest scale.[1]

Nevertheless, the argument of basing a legal minimum wage on budgets is largely fallacious, although, of course, such calculations are useful in that they show the wide disparity between what some families receive in the way of income and how much they need to spend to cover their basic needs. The reasons for the inadequacy of budgets in the determination of minimum wages have been detailed by various writers.[2]

The legal minimum wage policy should be regarded as supplementary to a comprehensive social security system, not as a substitute for one. The application of legal minimum

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[1]Lester S. Kellogg and Dorothy S. Brady, "The City Worker's Family Budget," Monthly Labor Review, LXVI (February, 1948), 133-134.

[2]See, e.g., Z. C. Dickinson, Collective Wage Determination, pp. 476-477, and Sumner H. Slichter, Basic Criteria Used in Wage Negotiations, pp. 10-14.

wages on the basis of the suggested budgets would result in large scale unemployment or inflation or both, in the first place. Secondly, total national income is not great enough to support the payment of the cost of the Heller Committee budget, for example, to each man or woman who is employed. Such a budget would have cost 215 billion dollars annually in December, 1946. But the amount of consumers goods and services available at that time on an annual basis was only 136 billion dollars. Furthermore, these budgets are based on four-person families, but the average family is less than this in size. Many workers have no dependents whatever, others have many more than three. Many families have more than one member of the family in the work force. Some workers are employed only on a part-time basis.[1]

The most controversial issue raised by the proposal to increase legal minimum wages is the question of whether industry generally and specific industries in particular can pay a higher minimum wage. There seems little doubt that industry can now shoulder the burden of a higher minimum wage. The case for the higher minimum wage is supported, first, by the inflation of prices and wages which has occurred since the Act was passed in 1938; and also by abundant evidence of the nation's increasing productivity. The productivity of labor in manufacturing industries has shown an

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[1] *Loc. cit.*

upward trend over a number of decades. The most rapid increase occurred during the post World War I years, 1919 to 1923. The steep rise in productivity during the years following 1919 was due to a rapid increase in machine tool production which had been delayed by the war. As a result, the increase in output per man-hour between 1919 and 1922 was about 10 percent per year as compared to a total increase of about 43 percent in average output per man-hour between 1921 and 1929.

Increased productivity has not been limited to manufacturing industry alone since 1919. The productivity of the mining industries doubled during the 20 years between 1919 and 1939. In the railroad industry productivity increased about 3 percent per year between 1919 and 1939 with a 50 percent increase between 1939 and 1944.[1]

As was the case during World War I there was no increase in the productivity of 24 non-munitions industries producing nondurable consumer goods between 1941 and 1944. And, as was the case following World War I, a spurt in the productivity of these industries may be expected in the years following World War II. As a result of the invention of new methods, techniques, and materials during the war it is to be expected that the production of peacetime goods will be under conditions of sharply accelerated productivity. Improved production technology has been accompanied by the replacement

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[1] Senate Report 1012, Part 2, pp. 43-44.

of immature and aged workers by veterans and others who can make more substantial contributions to production. In addition, the replacement of the long workweek by a 40-hour week will result in an increase in output per man-hour of work. General, though moderate, increases in productivity in manufacturing industries were recorded in 1944 and continued through 1945 and the first half of 1946.[1]

It should be noted that what is being advocated is a general increase in the minimum wage based on a general increase in productivity. A part of the increased productivity of the economy is due to the greater skill of the American worker. He should be compensated accordingly.

But increases in wages considerably out of line with increases in productivity are of questionable wisdom, to say the least. Such proposals as that of Senator Thomas which seek to enact an immediately effective minimum wage of 75 cents per hour to be applied to a widely expanded coverage[2] should be considered with great care. Even assuming that prices and costs remain at their present levels, large numbers of employees would probably be thrown into unemployment. Employers able to pay such a minimum now would be

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[1]U.S. Bureau of Labor Statistics, "Productivity Changes Since 1939," Serial No. R. 1854, reprinted from the Monthly Labor Review (December, 1946), p. 9.

[2]U.S. Congress, Senate, Senate Bill 2062, 80th Cong., 2d Sess., January 26, 1948.

unable to pay it if a deflation of costs and prices were to ensue. In arguing for the 75-cent minimum, the representatives of organized labor and the federal government assume that the present level of costs and prices will be continued although, of course, they have no basis for such an assumption. Thus, the bill mentioned above has no provisions that in the event of a decline in the cost of living, a downward adjustment in the minimum should be effected. Nor does the bill provide that, in the event that experience demonstrates that the 75-cent minimum is too high, even at the present level of costs and prices, the minimum might be adjusted downward. There is no doubt that in view of the present price level a 75-cent hourly wage is niggardly, but its incorporation into a minimum wage law would in all probability be followed by no wage at all for large numbers of workers.

Finally, in considering an increase in the amount of the minimum wage, the peculiar problems of the South must be borne in mind. Although living costs may be only slightly lower in the South and although under <u>comparable conditions</u> the productivity of southern labor is probably equal to that of northern labor, the southern economy is so different from the North that a wage differential must be provided if southern progress is not to be retarded. Conditions in the South are not comparable to those of the North. The South lacks capital equipment, certain labor and managerial skills,

and industrial jobs. She is handicapped by discrimination in freight rates. The imposition of a uniform national minimum wage on her economy would mean that there would be an unduly low incentive to move industries into the South where they are so vitally needed. A differential in her favor would operate so as to bring industry in, move excess labor out with a transfer of employment from low-paid agricultural work to higher-paid industrial work. Thus wages between the two regions would be equalized. Levels of living in the South would rise. Differentials would gradually be eliminated by the automatic operation of economic forces.[1]

Very little evidence is available as to the effects of the Act on the economy and what evidence there is has been obscured by the inflation of the war. Yet there is a sufficient amount so that some tentative conclusions can be drawn.

There is no proof that the Act has adversely affected the economy. As a result no one has very seriously suggested its repeal although, of course, its improvement by amendment has been discussed.

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[1] See discussion of the function of geographical wage differentials in Z. C. Dickinson, Collective Wage Determination, pp. 558-560; Sumner H. Slichter, Basic Criteria Used in Wage Negotiations, pp. 36-40, and on pp. 311-312, supra.

On the other hand there is some evidence to the effect that the Act has been beneficial. This is the opinion of the Administrator of the Act, of leaders of organized labor, and of most students of the Act.

Our examination of specific case studies of the effects of wage orders substantiates this position. From these we can draw the following conclusions:

(1) The wages of workers--covered and non-covered--have been increased as a result of the Act. The wage orders caused concentrations of workers at or near the minimum. However, there is no evidence that the minimum wages became maximum wages to any substantial extent. Regional and interplant differentials were reduced but not eliminated. Reductions in interplant differentials were due to non-proportional increases in above-minimum wages.

(2) Employment was not generally reduced as a result of the wage orders. There was a transfer of employment from relatively low-wage to relatively high-wage industries. This meant a loss of employment to southern industry for it was there that the low-wage plants were predominant. Southern plants, however, which paid more than average rates in 1938, gained in employment just as much as did northern ones.

(3) The wage orders caused improvements in efficiency, improvements which were followed by some displacement of labor. Employment techniques generally were improved. Technological improvements received some impetus from wage orders but they

were not initiated by them, for such improvements were in effect prior to 1938. As a result of these changes, there was some disemployment of labor.

Our examination of the economy of the South has shown it to be one far less prosperous than that of the North for a number of reasons. Although the Act had some adverse effects on southern employment, the southern economy as a whole was not substantially harmed by it. The failure to substantially retard southern industry was probably due to the fact that the inflationary effects of the war were felt within two years after the Act's enactment. Had the Act been applied to the South over a longer period of time, the effects would probably have been such as to retard southern progress.

The success of the Act may be gauged by the absence of any criticism of such important subjects as the effects on substandard workers and on the growth of labor organizations. The Divisions' handling of the problem of learners, apprentices, and handicapped workers has been such that it has aroused practically no criticism or discussion. If any such workers became unemployed because of the Act, the facts have not come to light. The argument that the Act would adversely affect the growth of labor organizations is no longer considered worthy of discussion in view of the considerable increase in the number and proportion of workers covered by collective bargaining agreements since 1938.

The experience with the Act has been such as to warrant the expansion of its provisions. The times and conditions

are propitious for such a step. The fact is that America has everything to gain in extending the benefits of a higher legal minimum wage to its poorest paid workers. But such extension must be reasonable in its scope and should be made cautiously and with circumspection. Care must be taken to see to it that any increase in the minimum wage is based on productivity which has been achieved in the economy or which may be achieved in the very near future. Finally, provision should be made, in connection with an increase in the amount of the minimum wage, in the event that we find we have erred in favor of too high a minimum, that we can readily adjust it downward.

CHAPTER XI

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

A. Summary

The dominant theory of wage determination in modern times is marginal productivity theory, a theory which holds that under competitive conditions the wage paid must equal the value of the marginal product of the worker. But this theory constitutes not a rule but a tendency, a tendency which holds true in the long run. In the short run a number of factors operate which may make the wage differ considerably from the value of the marginal product of the laborer. But even if the wage paid equalled the value of the marginal product, there still would be a wage problem, for the wage, though the equivalent of the value of the marginal product, may be so low as to be insufficient for the support of the laborer. When the wage is low, whether it is low because the worker does not get his marginal productivity wage, or because his productivity is low, there follow those unfortunate effects whose evils are only too well known: malnutrition, inadequate schooling, slums, and the other attributes of poverty.

If, then, we are going to avoid these effects by setting a minimum which must be paid for labor, the question necessarily follows: On what basis shall it be determined? Two principal standards of wage determination have been described: the "fair wage," and the "living wage," both more or less qualified by "what the industry can bear." We have noted that a wage may be based on one or both of these principles in combination. Furthermore, regardless of the basis of minimum wage determination, there are two approaches whereby the minimum wage is now increasingly sought: by collective bargaining activity and by legal enactment.

We have weighed the merits of collective bargaining in minimum wage determination and have found them most valuable. Labor organizations have played an important role in the raising of wage standards. Their influence has also tended in the direction of greater productivity and efficiency and has, in general, not adversely affected employment. Yet, because of the limited effectiveness of collective bargaining alone, a broad area remains in which the legal minimum wage can be of real service to workers, employers, and society.

The method of the legal minimum wage is to prescribe a rate of pay which must be paid by the employer for the type of work to which it is applicable. The chief theoretical advantages which accrue from the use of the legal minimum wage have been detailed above: the elimination of sweatshop labor and the raising of competitive standards. Nor have

the hazards involved been neglected: possible unemployment of marginal workers, the failure of marginal employers, and the possibility of properly established wage differentials being reduced or eliminated. Other difficulties such as those arising from the varying sizes of family units have been noted.

The legal minimum wage may be determined by its inclusion in the statute itself, by means of arbitration courts, or by wage boards. The scope of its application varies with the philosophy which is prevalent in the economy and the objective of regulation.

The progress of legal wage regulation from mediaeval to modern times was over a rocky road indeed. We have touched upon its history from the time of the first Statute of Laborers in the fourteenth century to the passage of the Fair Labor Standards Act in 1938. We have noted the resistance of employers to legal minimum wages and the reluctance of government to enact them. We have observed the slow, tortuous growth of the legal minimum wage, first in Australasia, then in England, in Canada, and finally in the states of the Union, reaching its climax in the minimum wage provisions of the national Act of 1938.

Problems were met in the carrying out of the provisions of legal minimum wages in all of these countries: there were jurisdictional conflicts in Australia; there was the question of compromise in the application of principles of minimum

wage determination in Great Britain; there was the failure on the part of the states to fix minimum wages which were reasonably high, and other difficulties. Nevertheless, the scope of application of regulation was greatly widened in Australasia, Great Britain, and Canada, such regulation being extended to men as well as women and to skilled as well as to unskilled labor. Notable, too, is the fact that students who have studied the legal minimum wage in these countries and in the American states seem nearly unanimous in the conclusion that it was of great benefit, with almost no adverse effects making any substantial appearance.

Leaving our examination of foreign experience, we turned our attention to the Fair Labor Standards Act of 1938. This legislation is a "package" embodying not only minimum wage provisions, but premium pay and child labor provisions as well. Our review of the Act has been concentrated strictly on the minimum wage provisions, omitting any consideration of the other provisions of the Act.

The passage of the Fair Labor Standards Act, a few years after the somewhat similar N.R.A. controls were overthrown, was resisted by employers who regarded it as an unnecessary encroachment on their rights to determine wages and as a harmful interference with the orderly operation of the forces which determine wages. It was also opposed by southern industrialists and statesmen who regarded its passage as an attempt to throttle the growing industrialization of the

South. These pointed in vain to the disadvantages under which the South was laboring: its inadequate capital and equipment and the handicap of discriminatory freight rates. Their plea for a differential, such as was provided for in about half of the N.R.A. codes, was disregarded in the final enactment, although transportation, living, and production costs were to be considered in wage orders.

The Act successfully cleared all constitutional hurdles. The prohibition of the shipment of goods not produced under the standards prescribed in the Act was held to be a valid exercise of the federal commerce power. The power of Congress to regulate interstate commerce was held to extend also to the production of goods for interstate commerce. The delegation of authority to the industry committees to fix wages was regarded as proper. In addition, the Court held the wage and hour provisions of the Act as not in violation of the freedom of contract provisions of the Fifth Amendment.

The liberal attitude of the Court regarding constitutionality was extended to the allied problem of coverage. Coverage was broadened to cover a wide variety of workers in that all workers who are necessary to the production of goods for commerce were regarded as covered. Exemptions were construed narrowly. Nevertheless, the Act's coverage could still be extended to about 10 million additional persons if Congress were to enact the necessary legislation. Such extension would affect the South most seriously since it is in that

region that we find the greatest number of low-paid workers.

Administration and enforcement have benefited by the influence of strong, liberal, and efficient administrators. Under their direction the industry committee method was fashioned into a scientific tool for wage determination, although opinion as to the adequacy of this tool is divided. The handling of the payment of subminimum rates was approached with careful precision, decisions being made on the basis of facts, with the aim in view of insuring the employment of all persons who are unable to earn the legally applicable minimum. Fact-finding and public hearings also characterized the determination of what deductions were proper under the Act. Unfortunately, no amount of scientific investigation or careful probing was able to solve the problem of an adequate definition of the "area of production." This remains one of the Act's most difficult administrative problems. Much more successful was the administrative handling of the problem of industrial homework. This ancient blight was eliminated to a large extent by prohibiting or restricting it in connection with wage orders. The handling of the tipping problem in connection with redcaps was unsolved because of the fact that the Act makes no provisions for the payment of tips as wages. Its solution lies in the hands of Congress which can amend the Act so as to exclude tips from the definition of wages.

The enforcement of the Act has been characterized by the informal disposition of minor, non-wilful violations.

In addition, the Divisions' enforcement efforts have been supplemented by the cooperative efforts of industrial and labor groups. For serious and deliberate violations, the Act provides ample punitive measures designed to reduce their incidence. Enforcement has suffered to the extent that co-operation between the Divisions and state agencies administering minimum wage laws has been inadequate. But more important still in reducing the effectiveness of enforcement has been the failure of Congress to provide sufficient funds for adequate staffing of the Divisions.

Attempts to improve the Act by amendment have been generally unsuccessful. From all the bills introduced into Congress there have emerged only two changes in the Act: the provision for the exemption of telephone operators in small telephone exchanges, and the Portal-to-Portal Act of 1947. The latter, passed ostensibly to relieve employers from the obligation of paying for certain activities of employees which were not compensable before the Act, except as the result of contract or established custom or practice, incorporates a number of amendments which seriously limit the effectiveness of not only the Fair Labor Standards Act but the Walsh-Healey and Bacon-Davis Acts in addition. It partly emasculates the Fair Labor Standards Act by outlawing future claims for time spent in traveling to and from the place of work and for activities which are preliminary and postliminary to the activities of the regular workday unless they are paid

for in connection with contract, custom, or practice; bans suits by unions as representatives of workers who sue for unpaid back wages; establishes a two-year statute of limitations for suits for back wages; excuses employers from liability for unpaid wages if they can show reliance in good faith on administrative interpretations and regulations; and permits the courts to compromise claims for liquidated damages--changes which cannot be justified on the basis of either equity or administrative necessity.

B. Conclusions

1. The history and growth of minimum wage regulation by government point to the expansion of such control with the further growth of the economy and with the continued acceptance of a philosophy of government intervention in areas where private enterprise fails to function in the best interests of the economy.

With the passage of the years since the rise of the industrial revolution, government has increasingly intervened to insure the receipt by workers of a wage which would enable them to purchase those essentials which are necessary for living. As countries have matured they have increasingly felt the need for such governmental intervention and have employed it. There is no indication that any of the countries which have enacted minimum wage laws are considering or have ever seriously considered abolishing them. On the contrary, they want to expand them because they feel that they help

protect the underpaid, provide for more equitable wage payment relationships, and impart a desirable stability to their wage structures.

In the United States the growth of legal minimum wage regulation among the states has not been rapid but it has been steady. The number of states having such regulation totalled thirty in 1947. The number of industries subject to regulation is steadily increasing. Four states, Puerto Rico, and Hawaii furnish protection to men as well as women and children. We can look forward optimistically in the direction of state regulation of minimum wages.

The federal government of the United States has also entered the field of wage regulation by insuring the payment of "prevailing" wages in connection with public contracts and of minimum wages in connection with private employment. Let no one mistake the current trend against the movement as indicative of a reversal of the tide. The legal minimum wage movement is experiencing only a slight ebb. A few years hence will probably see the resurgence of even broader and more effective minimum wage control.

The need for the legal regulation of minimum wages increases with the increasing maturity of society. The spirit of complete and unbridled free enterprise was appropriate for the simple, primitive economy of pioneer days. It is inappropriate in the complex American civilization of today with its monopolies, rigidities, and other factors which militate

against optimum conditions of production, consumption, and distribution.

2. The Fair Labor Standards Act is structurally deficient and its deficiencies are due to the fact that legal, administrative, and political considerations rather than economic ones were dominant at the time of enactment.

The original bill which was considered by the joint Senate and House labor committees was a far better instrument of regulation in some ways than the one which was finally enacted. However, it was radically changed because it was imperative that the Act successfully negotiate the hurdle of constitutionality. Accordingly, Congress did not avail itself of the full powers of the commerce clause and there were other changes in the interests of constitutionality which weakened the Act. In the second place, there was the desire on the part of large segments of industry and agriculture for exemption from the Act's provisions. An example of the incongruous results of illogical exemption is that of the exemption of the extremely low-paid hired farm laborer while the comparatively highly paid automobile worker who has no need of minimum wage coverage enjoys such protection. In the third place, there was the fear that it would be difficult to administer the Act for certain groups such as the farmers, fishermen, and seamen, for example. The experience of state minimum wage legislation in connection with these occupations furnished no guide and it was felt wise to proceed very cautiously in

this direction. Finally, there was the fear of placing too much power in the hands of an administrator of a federal agency. The result was the establishment of an agency headed by an administrator who lacked powers which were essential to the proper functioning of his office. The most unfortunate aspect about all this is that had Congress not effected all these changes in the original bill, the Act would, in all probability, have been declared constitutional and would have been successfully administered.

Other defects which may not be ascribed to these causes have become obvious. The absence of a statute of limitations on employee suits created many difficulties. The Act contained no provision that the amount of the minimum be reconsidered at intervals to provide for adjustments in line with price changes. The insertion of the "area of production" exemption was an error which still causes the greatest amount of administrative difficulty. And there are other defects. Yet, until 1947 no basic change was made in the law. Those who favored regulation and who would have liked to have the law perfected hesitated to provide Congress with an opportunity to revamp the Act for fear that during the course of amendment it would be destroyed. Their fears were not without justification. The enactment of portal-to-portal legislation in 1947 seriously has weakened the Act.

Finally, in closing our discussion of the Act's structural deficiencies, we should like to consider briefly the question

of whether the combination of the minimum wage provisions with those providing for premium pay and the control of child labor have detracted from the value of the Act as a device for improving labor standards. It is our belief that the control of minimum wages should be combined with these other provisions and that the integration of the control of wage, hour, and child labor standards in one law results in the more efficient regulation of labor conditions. The fact that such integration is not always found in other minimum wage laws does not mean that it should be dispensed with in the case of the Act.

3. In spite of the Act's defects it has been of great value because of its intelligent administration and enforcement and because of the support of the Administrators' liberal interpretations by the Supreme Court.

There is every reason to believe that the Administrators of the Act have sincerely endeavored to carry out its provisions so that substandard conditions of labor would be reduced, so far as possible, if not eliminated. In spite of the limitations of the Act and the opposition they encountered, the Administrators so interpreted the Act and their task in connection with it that workers have received real protection in wage and hour standards. Nevertheless, the funds made available for enforcement have been continually curtailed until at the present time only token enforcement and inspection is possible. The recommendations which the Administrator

has made, the carrying out of which would have enabled him to achieve better inspection results, were ignored by Congress and, instead of passing helpful legislation, the portal-to-portal legislation was enacted with the result that the already difficult task of enforcement is more complicated than ever.

The Supreme Court, liberalized by changes in its personnel during the New Deal period, has gone as far as it can in liberally interpreting the Act's provisions. Like the Administrator, the Court has approached the questions presented to it from an economic as well as a legal point of view. Much of the Act's success may be ascribed to this progressive attitude on the part of the Court. The Court's opinions in connection with the Act contain pronouncements of the most democratic and liberal nature, statements which are far in advance of its times.

4. The economic effects of the Act are difficult to determine because of the inflationary effects of the war but so far as they can be determined they have been beneficial to the economy.

The summary of the evidence is to the effect that the Act resulted in an increase in the real income of thousands of workers. Furthermore, the raising of wages by the Act did not result in a substantial amount of unemployment of workers. On the contrary, most of the marginal firms offset their increased labor costs by improvements in management and

technology with benefits resulting to all sectors of society. In some cases they were able to raise their prices because of the increased effective demand during the period of the Act's operation. No evidence of serious injury to southern industry has been presented, although some unemployment followed the law's enactment. Southern industrial workers received comparatively large increases in wages yet the industrialization of the South proceeded apace.

However, our judgment of the Act's effects must be made with great caution. The evidence on which these statements are based is quite insubstantial and, in addition, is obscured by the changes wrought in the economy by the war. Consideration must be given, too, to the fact that the increase in the minimum wage from the very low requirement of 25 cents per hour to the comparatively low requirement of 40 cents per hour was made very gradually over a period of years by means of industry committees which controlled the increase with a watchful eye on the economic consequences on each industry. In addition, it should be noted that the increase in the minimum wage to its present level was effected during a period of growing economic activity. All wages rose--not only those legally controlled. A longer period of operation will be necessary before valid conclusions may be drawn concerning the economic effects of the Act. For the answers we must look to the postwar years when the effects of the Act during periods of economic decline and depression will be evident.

5. The achievement and maintenance of adequate minimum wage standards is dependent on more than effective minimum wage legislation. The minimum wage must be made a part of a positive program for the achievement of a smoothly operating economy unmarred by unhealthy inflationary and deflationary spirals with a high level of national income, equitably distributed among all elements of the population.

The Act alone cannot solve the problems of the underpaid and overworked. Even a perfectly operating minimum wage law is of little value in periods of unemployment when there are no jobs available. More than merely the guarantee of a minimum hourly rate of pay is necessary to protect living standards. Other approaches must be used.

Since we cannot hope to meet all of the family's needs through the legal minimum wage, we must turn to other methods devised to supplement the family income. One early method was the family allowance and this has been notably successful in Australia and England. However, the problem of poverty can be dealt with more adequately by means of an extensive system of social security. Social security in the forms in which it has been adopted in this country becomes more equitable and palatable than the cruder forms of protection such as family allowances. It is in an expanded social security system that we may make our greatest progress in the elimination of poverty.

A departure from the older legal minimum wage is the

guaranteed wage plan. In contrast to the mere guaranteed hourly wage, a guaranteed wage plan assures the worker of a definite minimum of wages or employment covering a stipulated length of time. Such a plan in combination with unemployment insurance acts as a stabilizing influence on employment and income, minimizes the effects of seasonal and other short-term employment, regularizes the demand for consumer goods, and helps offset the effects of cyclical swings. It also helps achieve more harmonious industrial relations.

Another approach to the solution of the problem of substandard incomes would be through the elimination of unemployment. Thoughtful employers can help in this connection by minimizing or alleviating the effects of casual and technological unemployment. But cyclical unemployment is beyond the control of individual employers and industry as a whole has not demonstrated any success in coping with this major problem. It is not necessary in a discussion of this sort to go deeply into this problem. We need only to mention such approaches as the original full employment bill.

Legislation should be enacted providing especially for the development of certain retarded areas in the United States which, although they have great potentialities, have so far been neglected by industry because of the great risks and capital requirements involved in their development. A host of self-liquidating projects spread throughout the South and other areas in the country in need of assistance in development

would do much to raise living standards in these areas.

These are only a few of the possibilities which are available for a positively planned program for full employment and a high plane of living for all. Some of these approaches are in areas which will not interfere with private enterprise but rather will encourage it. Others will mark the intervention of government in areas where private enterprise has failed. The possibilities for good which are inherent in the directing and planning powers of government have only been tapped as yet. They can be exploited still further with little or no danger of totalitarianism.

C. Recommendations

Our examination of the Act has revealed its many defects. Much could be done to improve it by legislative amendment. The following suggestions, if adopted, would make the Act a notable piece of legislation in the field of wage control.

1. The minimum wage should be increased to 65 cents per hour, progression to that rate to be achieved within a period of four years by industry committees which could authorize regional differentials and the lowering in addition to the raising of the minimum.

Such an increase is necessary in order to achieve the aims of Congress when it originally passed the Act. The minimum wage must now be increased in order to eliminate from

the channels of commerce goods which are detrimental to the health and welfare of the nation.

The question then arises, what should be the amount of the increased minimum wage? Certainly, in view of the greatly increased cost of living some increase is indicated in the wage floor. On the basis of the Bureau of Labor Statistics consumer price index it cost a worker 67 percent more to maintain his family in December, 1947, than in the pre-war years of 1935-1939. An increase to 65 cents per hour would make up for this cost-of-living rise. Furthermore, it might be justified on the basis of the nation's increased productivity since the Act was enacted in 1938 and on the basis of the expected rise in productivity during the next few years and perhaps most convincingly by the extent of the rise of the general wage level above its position in 1938.

It is not assumed, of course, that a 65-cent minimum wage would solve all of the budget problems of the workers. Such a minimum, for example, is far less than the minimum necessary for the W.P.A. maintenance level budget for a four-person family in New York City as repriced by the Textile Workers Union of America, or for the City Workers budget recently issued by the U.S. Bureau of Labor Statistics. It will not solve the problem of poverty. But it will serve, as a part of a general program of higher labor standards, to play an effective part in the achievement of such standards.

If a differential is permitted in favor of a lower wage

floor in the South, that area's labor standards could be raised, though not as rapidly or as high as those of the rest of the country. The nature of the southern economy makes imperative a differential favoring the South in any consideration of legal minimum wages. The proposal to increase the minimum wage to 65 cents per hour over a period of four years deserves support, however, even for the South, for reasons suggested above.

Furthermore, it is suggested that there be incorporated a provision enabling the industry committees to lower the minimum if it is found that it has been raised too high on the basis of present or future prices and costs. Thus the element of risk involved in the establishment of a higher minimum wage is considerably lessened.

The risk can be diminished still further by the application of some of the lessons which we have learned from the operation of industry committees in the past. Appropriations for their establishment and operation should be generous. Only persons of the very highest caliber should be encouraged to serve on these committees and they should be persons who are best able to judge what particular minimum wage rate would be best for a particular industry at a particular time.

Finally, it should be realized that even the most skilled committee will have to do some guessing as to what the minimum rate should be and even the best guesses would have to be tempered by political considerations. Hence, it should be

obvious that a student making a study of the minimum wage is hardly in a position to digest and evaluate all of the problems involved sufficiently so as to be able to determine exactly what the minimum wage should be in cents per hour. He can only make the best approximation possible under the circumstances.

2. Coverage should be expanded by extending it to all employees employed in connection with an enterprise whose activities affect commerce and should be further expanded by the narrowing or elimination of some of the existing exemptions in the Act.

Coverage under the Act is determined on the basis of the work of the individual employee. This creates several problems for both the employer and the Divisions in their enforcement activities. It means that some of the employees of a particular employer receive the benefits of the Act while others do not. Furthermore, these non-covered employees may be engaged in activities which affect interstate commerce even though the products of their activities never leave the state in which they are produced. Another difficulty which arises from the fact that coverage is based on the activities of individual employees is that an employee may be covered one week and not the next, even though he may be doing the same type of work both weeks. The solution of these problems lies in making the wage and hour provisions of the Act applicable to all employment in industries which

substantially affect interstate commerce. Such a proposal was present in the original wage and hour bill which was presented to Congress in 1937. If it were presently enacted it would increase the coverage of the Act by about 1,150,000 workers. Employers would benefit by the elimination of a certain amount of unfair competition from the channels of commerce. In addition, the amendment would eliminate a major defect in present coverage. Under the Act "produced" is defined to include any occupation necessary to the production of goods for commerce. But employees who are engaged in producing goods or providing services which are necessary to commerce are not covered. Thus, for example, maintenance workers servicing buildings whose tenants are engaged in commerce, but not the production of goods for commerce, are not now covered. Such workers would be covered under the proposed amendment.

Such an extension of coverage would be in line with the power of Congress under the commerce clause. In at least two cases the Supreme Court has noted that Congress has not gone to the limits of its power to regulate commerce and has pointed to the National Labor Relations Act as an example of how far Congress can go in the regulation of activities affecting commerce. The courts have repeatedly shown that there are many activities which affect commerce but which do not constitute commerce or the production of goods for commerce.

Amending the Fair Labor Standards Act to cover activities

which affect commerce will bring under the coverage of the Act more than a million employees in manufacturing, construction, wholesale trade, and the transportation industries. The additional coverage in the fields of manufacturing and transportation are insignificant but the gains in coverage in the construction industry and wholesale trade would be large. It would double the number of covered workers in the construction industry but the effect on labor costs of this increased coverage would be minor since the construction industry is highly organized and the wages paid are considerably in excess of the present minimum or any that is contemplated. Although the number of covered workers in wholesale trade who would be increased would be about 10 percent of the number now covered, it would be an important gain for there are large numbers of workers in the industry who earn less than the present minimum of 40 cents per hour.

The present exemption for retail and service establishments should be sharply curtailed. The Act should be amended to insure the exemption of only small establishments. It should provide that only employees in retail or service establishments of employers with not over four such establishments and with total annual sales of not over $500,000 would be entitled to the exemption. In addition, the provision of the Act which exempts employees engaged in a local retailing capacity should be abolished. Thus, the large chain and department stores whose activities are frequently nation-wide

in their scope would be brought under the cover of the Act. Such an amendment would add more than 2,000,000 workers to the coverage of the Act. These workers are low-paid workers, large numbers of whom get less than 40 cents per hour. They are employed by firms which are making large profits, firms which can pay the present legal minimum of 40 cents per hour and the higher proposed minimum of 65 cents per hour. Not only can employers pay the increased costs involved, there is, in addition, no administrative difficulty in the handling of the increased coverage.

The section 13 (a) (10) "area of production" exemption should be eliminated. The administrative difficulties which this exemption has caused have been detailed. Its elimination should cause no hardship on employers many of whom are paying more than the minimum which the Act requires. Similarly, no valid reasons exist for the exemption of seamen and workers engaged in the processing and wholesaling of fish. Coverage of these workers is administratively feasible and most of them already are paid more than the present minimum.

The benefits of the minimum wage provisions of the Act should be extended to employees working in industrialized agriculture. This type of agriculture is characterized by large scale farms which have many of the characteristics of factory production. Corporate or absentee ownership predominates. Supervision is in the hands of foremen or managers. The employer-employee relationship has none of the traditional,

friendly, intimate relationship which is typical of the small farmer and his hired man.

The workers in commercialized farming are among the lowest paid workers in the economy. They have none of the benefits of labor and social legislation which have been extended to most of the other workers in the country. They are largely unorganized. There is a crying need for the protection of their wages.

Although difficulties may be expected in enforcing the law in connection with these workers, the problem is not an insuperable one. It has been solved to some extent in foreign countries. Legal minimum wage control of workers in industrialized agriculture is feasible. To continue their exemption from the Act's privileges is to ignore an industrial sore spot in need of immediate treatment.

3. <u>The statute of limitations for employee suits should be increased from two to three years</u>.

There is neither equity nor logic in a statute of limitations as short as two years in connection with employee suits for back wages. It is inequitable to cancel out the employer's debt to his employee at the end of two years when the employee himself is liable for his debts for a much longer period. It is discriminatory in that suits under other federal statutes are permitted over a much longer period of time.

The two-year statute of limitations is illogical in

addition to being inequitable. Is the reason for such a short period due to the fact that it is desirable to bring the suit into court while the evidence is available? Not at all. There is no such problem for the employer must maintain records concerning the wages of the worker for a much longer period than two years. Is a short period indicated because the issue involved is a matter not in the public interest, a matter of only minor importance? That obviously is not the reason for the rights of workers to collect back wages are generally regarded as a matter of the most vital public interest.

In effect, a two-year statute of limitations means that violating employers who are not inspected within the two-year period have an excellent chance of never paying these back wages at all. The workers themselves, while they are employed by the violator, will not jeopardize their jobs by suing. They usually wait until they have left the employer before they start suit. Their discontinuance of employment may occur long after the two-year period has elapsed. Furthermore, most employees are not aware of what their legal rights are and for this reason may never sue at all.

The disadvantageous position in which a short statute of limitations places a worker is made even worse by the fact that the only other way he has of obtaining his back wages is to have an inspector effect the restitution. Yet the number of inspectors which are available is constantly

dwindling. Congress simultaneously with the enactment of the two-year statute of limitations also cut the appropriations for enforcement.

A two-year statute of limitations puts the honest and conscientious employer at a competitive disadvantage. With the Administrator handicapped in making his inspections and with his employees hesitant to sue, the unscrupulous employer is able to cut costs by violating the law with little risk of any legal sanctions. A period of three years is long enough to enable the employee to assert his rights properly and, at the same time, enables an employer to close his books to possible suits within a reasonable time.

4. The Administrator's power should be increased by giving him the authority to sue for back wages and the right to issue authoritative rulings, definitions, and interpretations which are binding in all cases.

Several of the state minimum wage laws provide that the administrative agency which enforces the law has the right to sue directly for the restitution of unpaid wages to employees upon the assignment of their claims. Such a provision should be incorporated into the Act. It would increase the efficiency of enforcement and the collection of restitution would be facilitated. In addition, in connection with such a provision, the Act should be amended to provide that employers who voluntarily pay restitution due their employees should be relieved from the threat of further court action for liquidated

damages and attorney fees, except where the employers are involved in wilful and flagrant violations.

The necessity of vesting the right of suit in the Administrator lies in the fact that so few employees have taken advantage of their right to sue for back wages. They are afraid to risk their jobs. This means poor enforcement of the law. But, furthermore, the fact that the employees themselves control the suits means that the law is interpreted by the courts in a haphazard manner. With the Administrator able to sue, the Act's interpretations would be developed in a more consistent manner. In addition, the fact that payment of back wages on a voluntary basis under the Administrator's supervision would close the case to future suits for liquidated damages would result in a decrease in the number of cases the courts would have to handle and more employees would get their back wages.

The rule making power enacted in the Portal-to-Portal Act of 1947 is unfair to employees. It is rule making power which strictly favors the employer. Under it the Administrator does not have the power to issue rules which are equally binding on both employers and employees until reversed by the courts. On the contrary, if the ruling of the Administrator is favorable to an employer, the employer may abide by it, and if it is subsequently reversed by the courts he has lost nothing. But if the rule is favorable to employees, there is nothing in the law saying that the employer must abide

by it. He may disregard it and take a chance on the courts later reversing the Administrator. Adequate rule making power would mean that the Administrator's rulings would be binding in all cases, not just those which the employer chooses to follow, until the courts reverse the Administrator.

5. The provisions of the Portal-to-Portal Act of 1947 should be repealed and legislation should be enacted to permit the compromise of portal-to-portal pay suits and suits involving the applicability of the "area of production" regulations arising as a result of the new definition.

If the Administrator is given the authority that is recommended in Item 4 above, there would be no necessity for such drastic and unfair legislation as the portal-to-portal legislation. The compromise of the suits which led to its enactment would result in an equitable disposition of these cases. This problem having been solved, the portal-to-portal legislation should be promptly repealed. The conception of hours worked which is ascribed therein is not only vague, indefinite, and unfair, it is not based on a sound conception of what work is. Suffice it to say that under this legislation work is not work which must be paid for if it occurs prior to or after the regular workday unless it is paid for under custom, practice or contract. As has been mentioned before, the law contains a number of additional provisions which make it impossible for the Administrator to do an effective enforcement job. This unnecessary, inequitable,

and, possibly, even unconstitutional, legislation should be done away with as soon as possible.

6. Section 7 (b) (2) of the Act should be amended so that it could be used more frequently in connection with collective bargaining agreements calling for employment on an annual basis.

Section 7 (b) (2) of the Act provides that employers are exempt from the overtime provisions of the Act where, under collective bargaining agreements certified as bona fide by the National Labor Relations Board, they have provided for the employment of their employees on an annual basis, if such employees are not employed more than 2,080 hours in 52 consecutive weeks, and if they are paid time and one-half for hours over 12 per day and 56 per week.

This approach to an annual wage has been remarkably neglected by employers. By December, 1946, only 60 individual establishments and two employer associations had filed such agreements with the Divisions. The reason for the failure of the industry to make use of this device lies in its rigidity, i.e., if an employer exceeds the 2,080 limitation by even a single hour, he becomes retroactively liable for overtime payments on the basis of time and one-half for hours over 40 per week. In addition, the prescription that the employment be given on an annual basis rules out industries normally working less than one year. Some industries normally work between nine and eleven months a year.

Therefore, section 7 (b) (2) should be amended to permit the working of hours in excess of 2,080 annually. It also should permit employment guarantees approximating but not necessarily equalling 2,080 hours. Thus, the chance of exceeding the legal limitations of hours worked annually would be lessened, in the first place, and, secondly, those plants regularly operating less than 12 months per year would be able to take advantage of the provisions of this section.

7. The Act's provisions should be integrated with other federal laws related to labor standards such as, for example, the Davis-Bacon Act and the National Labor Relations Act.

Such a consolidation would centralize the interpretative and enforcement provisions of the Act, amalgamate the agencies which deal with the Act's provisions, make for greater efficiency in the adjudication of claims arising under the Act, clarify the problem of the Act's jurisdiction, and make possible the use of common definitions for terms used in federal labor legislation. One federal agency could enforce the various labor laws more efficiently than a variety of agencies. One legal department in one federal agency could handle claims made by employees because of labor law violations. All who deal with labor laws will welcome the elimination of varying interpretations of such terms as "commerce" and "independent contractor."

BIBLIOGRAPHY*

Alldredge, J. Haden. The Interterritorial Freight Rate Problem of the United States. Washington: Government Printing Office, 1937.

American Retail Federation. The District of Columbia Minimum Wage for Women in the Retail Trade. Washington: 1938.

Anderson, Mary. "Tips and Legal Minimum Wages." The American Labor Legislation Review, XXXI (March, 1941), 11-13.

Arkansas State Department of Labor, An Annotated Digest of the Labor Laws of the State of Arkansas. Little Rock: 1943.

Armstrong, Barbara Nachtreib. Insuring the Essentials. New York: Macmillan Co., 1932.

Australian Commonwealth Bureau of Census and Statistics. Official Year Book of the Commonwealth of Australia, No. 35, 1942-1943. Canberra: 1944.

Beyer, Clara M. "Wage-Hour Inspection, A Federal Program." The American Labor Legislation Review, XXXI (June, 1941), 81-87.

Birnie, Arthur. An Economic History of the British Isles. London: Methuen, 1935.

Bland, A. E., R. H. Tawney, and P. A. Brown. English Economic History: Select Documents. New York: Macmillan Co., 1919.

Boles, Walter E. Jr. "Some Aspects of the Fair Labor Standards Act." Southern Economic Journal, VI (April, 1940), 498-511.

Bowden, Witt. "Hours and Earnings before and after the N.R.A." Monthly Labor Review, LXIV (January, 1937), 13-36.

*A supplementary bibliography is contained on page 369.

Bowman, Mary Jean and Bach, George Leland. Economic Analysis and Public Policy. New York: Prentice-Hall, 1944.

Brissenden, Paul F. "Economic Implications of the Wages and Hours Act." Vital Speeches, V (February 15, 1939), 284-288.

British Ministry of Labour and National Service. Wages Boards and Councils. Typewritten statement. London, 1946.

"British Wages Councils Act, 1945." Monthly Labor Review, LXI (July, 1945), 120-123.

Brown, Weir M. "Some Effects of Minimum Wages upon the Economy as a Whole." American Economic Review, XXX (March, 1940), 98-107.

Bureau of National Affairs. The Portal-to-Portal Act of 1947. Washington: 1947.

Bureau of National Affairs, Inc. Wage and Hour Manual, 1941 Edition. Washington: 1941.

Bureau of National Affairs, Inc. Wage and Hour Manual, 1942 Edition. Washington: 1942.

Burns, E. M. Wages and the State. London: Ming and Son, 1926.

Burns, Francis Leo. The Needs Factor in Wage Determination. Unpublished Ph. D. thesis, University of Michigan, 1946.

Canadian Department of Labour, Labour Legislation Branch. Labour Legislation in Canada. Ottawa: 1945.

Canadian Department of Labour, Labour Legislation Branch. Post-War Wages Policy in Britain. Ottawa: 1945. (typewritten)

Canadian Department of Labour, Labour Legislation Branch. Provincial Labour Standards Concerning Child Labour, Annual Holidays, Hours of Work, Minimum Wages, and Workmen's Compensation. Ottawa: 1946. (mimeographed)

Cheney, Alice L. "The Course of Minimum Wage Legislation in the United States." International Labor Review, XXXVIII, (July, 1938), 26-43.

Clark, John Bates. "Minimum Wage." Atlantic Monthly, CXII (September, 1913), 289-297.

Clark, John Bates. The Distribution of Wealth. New York: Macmillan Co., 1938.

Clay, Henry. Problems of Industrial Relations. London: Macmillan Co., 1929.

Clough, Shepard Bancroft and Cole, Charles Woolsey. Economic History of Europe. Boston: D. C. Heath, 1941.

Commerce Clearing House, Labor Law Service. Federal Wage-Hour Guide. Washington: Commerce Clearing House, Inc., 1947.

Commonwealth of Massachusetts. Report of the Commission on Minimum Wage Boards. House Report No. 1697. Boston: 1912.

Congressional Record, as cited.

Cooke, Morris L. and Murray. Organized Labor and Production. New York: Harper, 1940.

Cooper, Frank E. "The Coverage of the Fair Labor Standards Act and Other Problems in Its Interpretation," Law and Contemporary Problems, VI (Summer, 1939), 332-352.

Court, Andrew T. "The Economic Basis of Health." Reprinted from the Proceedings of the Ninth Annual Meeting of the Industrial Hygiene Foundation of America (November, 1944).

Court Cases, as cited.

Crawford, Ruth. "Development and Control of Industrial Homework." Serial No. 1659. Reprinted from the Monthly Labor Review (June, 1944), of the U. S. Bureau of Labor Statistics.

Davis, Anne S. "Wage and Hour Law Administration." The American Labor Legislation Review, XXXI (March, 1941), 22-29.

Davisson, Malcolm M. "Coverage of the Fair Labor Standards Act," Michigan Law Review, XLI (June, 1943), 1060-1088.

Davisson, Malcolm M. "Coverage of the Fair Labor Standards Act," Michigan Law Review, XLIII (April, 1945), 867-900.

Dempsey, Bernard W. "Ability to Pay." Quarterly Journal of Economics, LX (May, 1946), 351-364.

Dickinson, Z. C. Collective Wage Determination. New York: The Ronald Press Co., 1941.

Dickinson, Z. C. "The Organization and Functioning of Industry Committees under the Fair Labor Standards Act." Law and Contemporary Problems, VI (Summer, 1939), 353-367.

Dobb, Maurice. Wages. London: Nisbet, 1933.

Dodd, E. Merrick. "The Supreme Court and Fair Labor Standards." Harvard Law Review, LIX (February, 1946), 321-373.

Douglas, Paul H. "The Economic Theory of Wage Regulation." University of Chicago Law Review, V (February, 1938), 184-218.

Douglas, Paul H. The Theory of Wages. New York: Macmillan Co., 1934.

Douglas, Paul H. "Wage Theory and Wage Policy." International Labour Review, XXXIX (March, 1939)(1-43) Reprint.

Douty, H. M. "Minimum Wage Regulation in the Seamless Hosiery Industry." Southern Economic Journal, VIII (October, 1941), 176-190.

Douty, H. M. "Some Effects of Wage Orders under the Fair Labor Standards Act." American Labor Legislation Review, XXXII (December, 1942), 171-175.

Estey, James Arthur. Business Cycles. New York: Prentice-Hall, 1942.

Foenander, Orwell de R. Solving Labour Problems in Australia. Melbourne: Melbourne University Press, 1941.

Foenander, Orwell de R. Towards Industrial Peace in Australia. Melbourne: Melbourne University Press, 1937.

Forsythe, John S. "Legislative History of the Fair Labor Standards Act." Law and Contemporary Problems, VI (Summer, 1939), 464-490.

Foster, W. T. and Catchings, Wadill. Profits. New York: Houghton Mifflin, 1925.

Golden, Clinton S. and Ruttenberg. The Dynamics of Industrial Democracy. New York: Harper, 1942.

Golding, Elroy D. "The Industry Committee Provisions of the Fair Labor Standards Act." The Yale Law Journal, L (May, 1941), 1141-1179.

Gray, Alexander. The Development of Economic Doctrine. London: Longmans, Green, 1931.

Haberler, Gottfried. Prosperity and Depression. Geneva: League of Nations, 1941.

Hammond, Mathew B. "The Minimum Wage in Great Britain and Australia." Annals of the American Academy of Political and Social Science, XLVIII (July, 1913), 22-36.

Hart, James. An Introduction to Administrative Law. New York: F. S. Crofts, 1940.

Herman, Samuel. "The Administration and Enforcement of the Fair Labor Standards Act." Law and Contemporary Problems, VI (Summer, 1939), 368-390.

Hinrichs, A. F. "Effects of the 25-Cent Minimum Wage on Employment in the Seamless Hosiery Industry." Journal of the American Statistical Association, XXXV (March, 1940), 13-23.

Hobson, J. A. Economics of Unemployment, London: George Allen and Unwin, 1922.

International Labor Office. The Minimum Wage, an International Survey. Geneva: International Labor Office, 1939.

Kuczynski, Jurgen. "Great Britain, 1750 to the Present Day." Vol. I, Part 1 of A Short History of Labour Conditions under Industrial Capitalism. London: Frederick Muller, 1944.

Latimer, Murray W. Guaranteed Wages. Report to the President by the Advisory Board, Office of War Mobilization and Reconversion, Office of Temporary Controls. Washington: Government Printing Office, 1947.

Laughlin, J. Laurence. "Monoply of Labor." Atlantic Monthly, CXII (October, 1913), 444-453.

Lester, Richard A. Economics of Labor. New York: Macmillan Co., 1941.

Lester, Richard A. "Effectiveness of Factory Labor: South-North Comparisons." Journal of Political Economy, LIV (February, 1946), 60-75.

Lester, Richard A. "Trends in Southern Wage Differentials since 1890." Southern Economic Journal, XI (April, 1945), 336-338.

Locklin, D. Philip. Economics of Transportation. Chicago: Business Publications, Inc., 1938.

Lyon, Leverett S. et al. Government and Economic Life. Washington: Brookings, 1940.

Lyon, Leverett S. et al. The National Recovery Administration. Washington: Brookings, 1935.

Marsh, L. C. "The Arcand Act: A New Form of Legislation." The Canadian Journal of Economics and Political Science, II (August, 1936), 404-419.

Mill, J. S. Principles of Political Economy. New York: D. Appleton, 1901.

Millis, Harry A. and Montgomery, Royal E. Labor's Progress and Some Basic Labor Problems. New York: McGraw-Hill, 1938.

Minnesota Department of Labor and Industry, Employment of Women, Minors and Children and Sanitation Code. St. Paul: 1943.

Mittleman, E. B. "Wage Determinations: The Evidence Before the Wage and Hour Division." Political Science Quarterly, LVII (December, 1942), 564-597.

Moloney, John F. "Some Effects of the Federal Fair Labor Standards Act upon Southern Industry." Southern Economic Journal, IX (July, 1942), 15-23.

Morris, Richard B. Government and Labor in Early America. New York: Columbia, 1946.

National City Bank. Monthly Letter on Economic Conditions and Government Finance. April, 1947.

National City Bank. Monthly Letter on Economic Conditions and Government Finance. August, 1947.

National Health Survey. "Receipt of Medical Services in Different Urban Population and Groups." Reprint No. 2213 from the Public Health Reports, LV (November 29, 1940), 2199-2224.

National Health Survey. "Some General Findings as to Disease, Accidents, and Impairments in Urban Areas." Reprint No. 2143 from the Public Health Reports, LV (March 15, 1940), 444-470.

New Hampshire Bureau of Labor. Minimum Wage Law for Women and Minors. Concord: 1943.

New York State Department of Labor, Division of Women in Industry and Minimum Wage. Minimum Wage and the Laundry Industry. New York, 1938.

New York Times, as cited.

New Zealand Census and Statistics Department. New Zealand Official Yearbook, 1945. Wellington: Government Printer, 1945.

Nichols, Egbert Ray and Joseph H. Baccus, eds. Selected Articles on Minimum Wages and Maximum Hours. New York: H. W. Wilson, 1936.

Papert, Kate. "The Importance of Enforcement of Minimum Wage Standards." The American Labor Legislation Review, XXXI (June, 1941), 73-76.

Peterson, Florence. American Labor Unions. New York: Harper, 1945.

Pigou, Arthur C. The Economics of Welfare. London: Macmillan Co., 1920.

Pool, A. G. Wage Policy in Relation to Industrial Fluctuations. London: Macmillan Co., 1938.

Prentice-Hall. Wage and Hour Law Service. New York: Prentice-Hall, Inc., 1947.

Price, L. F. R. Industrial Peace. London: Macmillan Co., 1887.

Ricardo, David. Political Economy and Taxation. New York: E. P. Dutton, 1933.

Richter, Irving. "Four Years of the Fair Labor Standards Act of 1938: Some Problems of Enforcement." The Journal of Political Economy, LI (April, 1943), 95-111.

Robert R. Nathan Associates, Inc. A National Wage Policy for 1947. Washington: 1946.

Rosenman, Samuel I. The Public Papers and Addresses of Franklin D. Roosevelt. New York: Macmillan Co., 1944.

Rowe, J. W. F. Wages in Theory and Practice. London: G. Routledge, 1928.

Say, Jean-Baptiste. A Treatise on Political Economy. Philadelphia: Grigg & Elliot, 1834.

Sells, Dorothy. British Wages Boards. Washington: The Brookings Institution, 1939.

Shishkin, Boris. "Wage-Hour Law Administration from Labor's Viewpoint." The American Labor Legislation Review, XXIX (June, 1939), 63-72.

Slichter, Sumner H. Basic Criteria Used in Wage Negotiations. Chicago: Chicago Association of Commerce and Industry, 1947.

Slichter, Sumner H. Modern Economic Society. New York: Henry Holt, 1931.

Slichter, Sumner H. Union Policies and Industrial Management. Washington: Brookings, 1941.

Smith, Adam. The Wealth of the Nations. New York: E. P. Dutton, 1933.

Stigler, G. J. "The Economics of Minimum Wage Legislation." American Economic Review, XXXVI (June, 1946), 358-365.

Taussig, F. W. "Minimum Wages for Women." Quarterly Journal of Economics, XXX (May, 1916), 411-442.

Teller, Ludwig. A Labor Policy for America. New York: Baker, Voorhis, 1945.

Time, as cited.

U. S. Congress, House. Committee on the Judiciary. Limiting the Time for Bringing Certain Actions under the Laws of Congress. House Report 1141 to accompany H. R. 2788 79th Cong., 1st Sess. Washington: Government Printing Office, 1945.

U. S. Congress, House. Committee on the Judiciary. Limiting the Time for Bringing Certain Actions under the Laws of the United States. Hearings on H. R. 2788. 79th Cong., 1st Sess. Washington: Government Printing Office, 1945.

U. S. Congress, House. Committee on the Judiciary. Regulating the Recovery of Portal-to-Portal Pay, and for Other Purposes. House Report 71, to accompany H. R. 2157. 80th Cong., 1st Sess. Washington: Government Printing Office, 1947.

U. S. Congress, House. Committee on Labor. Amendment to the Fair Labor Standards Act of 1938. House Report 1448 to accompany S. 1234. 76th Cong., 1st Sess. Washington: Government Printing Office, 1939.

U. S. Congress, House. Committee on Labor. Fair Labor Standards Act. House Report 1452 to accompany S. 2475. 75th Cong., 1st Sess. Washington: Government Printing Office, 1937.

U. S. Congress, House. Committee on Labor. Fair Labor Standards Act of 1938. House Report 2182 to accompany S. 2475. 75th Cong., 3rd Sess. Washington: Government Printing Office, 1938.

U. S. Congress, House. Committee on Labor. Fair Labor Standards Act of 1938. House Report 2738 to accompany S. 2475, 75th Cong., 3rd Sess. Washington: Government Printing Office, 1938.

U. S. Congress, House. Committee on Labor. Proposed Amendments to the Fair Labor Standards Act. Hearings. 79th Cong., 1st Sess. Washington: Government Printing Office, 1945.

U. S. Congress, Senate. Committee on Education and Labor. Amendment of the Fair Labor Standards Act. Hearings on S. 1349. 79th Cong., 1st Sess. Washington: Government Printing Office, 1945.

U. S. Congress, Senate. Committee on Education and Labor. Amendments to the Fair Labor Standards Act of 1938. Senate Report 1012, Part 2, to accompany S. 1349. 79th Cong., 2d. Sess. Washington: Government Printing Office, 1946.

U. S. Congress, Senate. Committee on Education and Labor. Amendments to the Fair Labor Standards Act of 1938. Senate Report No. 1012 to accompany S. 1349. 79th Cong., 2d. Sess. Washington: Government Printing Office, 1946.

U. S. Congress, Senate, Committee on Education and Labor. Fair Labor Standards Act. Senate Report 884 to accompany S. 2475. 75th Cong., 1st Sess. Washington: Government Printing Office, 1937.

U. S. Congress, Senate. Committee on Education and Labor. Health Insurance. Subcommittee Report No. 5 pursuant to S. Res. 62. 79th Cong., 2d. Sess. Washington: Government Printing Office, 1946.

U. S. Congress, Senate Committee on Education and Labor and House Committee on Labor. Fair Labor Standards Act of 1937. Joint Hearings on S. 2475 and H. R. 7200. 75th Cong., 1st Sess. Washington: Government Printing Office, 1937.

U. S. Congress, Senate. Committee on the Judiciary. Exempting Employers from Liability for Portal-to-Portal Wages in Certain Cases. Senate Report 48 to accompany H. R. 2157. 80th Cong., 1st Sess. Washington: Government Printing Office, 1947.

U. S. Congress, Senate. Committee on the Judiciary. Portal-to-Portal Wages. Hearings on S. 70. 80th Cong., 1st Sess. Washington: Government Printing Office, 1947.

U. S. Congress, House. Committee on the Judiciary. Regulating the Recovery of Portal-to-Portal Pay, and for Other Purposes. Hearings before Subcommittee No. 2 on H. R. 584 and H. J. Res. 91. 80th Cong., 1st Sess. Washington: Government Printing Office, 1947.

U. S. Congress, Senate. Committee on Labor and Public Welfare. Labor Relations Program. Hearings on S. 55 and S. J. Res. 22. 80th Cong., 1st Sess. Washington: Government Printing Office, 1933.

U. S. Department of Agriculture, Bureau of Agricultural Economics. National Survey of Liquid Asset Holdings, Spending, and Saving. Washington: 1946.

U. S. Department of Labor. Annual Report of the Secretary of Labor for the Fiscal Year Ended June 30, 1946. Washington: Government Printing Office, 1947.

U. S. Department of Labor, Bureau of Labor Statistics. "Expenditures and Savings of City Families in 1944." Serial No. R. 1818. Reprinted from the Monthly Labor Review. (January, 1946).

U. S. Department of Labor, Bureau of Labor Statistics. "Food Purchases by City Families in February 1945." Serial No. R. 1825. Reprinted from the Monthly Labor Review (February, 1945). Washington: Government Printing Office, 1945.

U. S. Department of Labor, Bureau of Labor Statistics. "Labor in the South." Serial No. R. 1855. Reprinted from the Monthly Labor Review (October, 1946). Washington: Government Printing Office, 1946.

U. S. Department of Labor, Bureau of Labor Statistics. Minimum Wage Legislation in Various Countries. Bulletin No. 467. Washington: Government Printing Office, 1928.

U. S. Department of Labor, Bureau of Labor Statistics. "Productivity Changes Since 1939." Serial No. R. 1854. Reprinted from the Monthly Labor Review (December, 1946). Washington: 1946.

U. S. Department of Labor, Bureau of Labor Statistics. Progress of State Minimum-Wage Legislation, 1943-45. Serial No. R. 1841. Washington: Government Printing Office, 1946.

U. S. Department of Labor, Division of Labor Standards. Annual Digest of State and Federal Legislation. Bulletin No. 84. Washington: Government Printing Office, 1946.

U. S. Department of Labor, Wage and Hour Division. Annual Report for the Calendar Year 1939. Washington: Government Printing Office, 1940.

U. S. Department of Labor, Wage and Hour Division. Annual Report for the Fiscal Year Ended June 30, 1940. Washington: Government Printing Office, 1941.

U. S. Department of Labor, Wage and Hour Division. Annual Report for the Fiscal Year Ended June 30, 1941. Washington: Government Printing Office, 1942.

U. S. Department of Labor, Wage and Hour and Public Contracts Divisions. Annual Report for the Fiscal Year Ended June 30, 1942. New York, 1943. (mimeographed)

U. S. Department of Labor, Wage and Hour and Public Contracts Divisions. Annual Report for the Fiscal Year Ended June 30, 1943. New York, 1944. (mimeographed)

U. S. Department of Labor, Wage and Hour and Public Contracts Divisions. Annual Report for the Fiscal Year Ended June 30, 1944. New York, 1945. (mimeographed)

U. S. Department of Labor, Wage and Hour and Public Contracts Divisions. Annual Report for the Year Ended June 30, 1946. Washington: Government Printing Office, 1947.

U. S. Department of Labor, Wage and Hour and Public Contracts Divisions. Findings of Fact Made by the Wage and Hour Administrator in Redefining the Term "Area of Production" as Used in Section 7 (c) and 13 (a) (10) of the Act. Release D-147, December 18, 1946. New York: 1946.

U. S. Department of Labor, Wage and Hour Division. Interpretative Bulletin No. 1. Washington: Government Printing Office, 1938.

U. S. Department of Labor, Wage and Hour Division. Interpretative Bulletin No. 6. Washington: Government Printing Office, 1941.

U. S. Wage and Hour and Public Contracts Divisions. Regulations Defining the Term "Area of Production" as Used in Section 7 (c) and in Section 13 (a) (10) of the Fair Labor Standards Act. 29 Code Fed. Reg., c.5, Pt. 536. New York: 1946.

U. S. Department of Labor, Wage and Hour Division. Report and Recommendations of Harold Stein, Presiding Officer, in the matter of Proposed Amendments to Part 541 of Regulations With Respect to the Definition of the Terms, "Executive, Administrative, Professional . . . Outside Salesman," October 10, 1940. Washington: Government Printing Office, 1940.

U. S. Department of Labor, Wage and Hour and Public Contracts Divisions. Report to the Senate on Conditions and Practices of Employment of Redcaps in Railroad and Terminal Companies by L. Metcalf Walling, Administrator. Release R-1908, November 9, 1943. New York: 1942. (mimeographed)

U. S. Department of Labor, Wage and Hour and Public Contracts Divisions. Summary of Statistical Materials Bearing on Proposals for Revising the Minimum Wage Provisions of the Fair Labor Standards Act. New York: 1945. (mimeographed)

U. S. Department of Labor, Women's Bureau. Analysis of State Minimum-Wage Orders. Supplement No. 1 to Bulletin No. 191. Washington: 1945. (mimeographed)

U. S. Department of Labor, Women's Bureau. Analysis of State Minimum-Wage Orders. Supplement No. 2 to Bulletin No. 191. Washington: 1946. (mimeographed)

U. S. Department of Labor, Women's Bureau. Application of Labor Legislation to the Fruit and Vegetable Canning and Preserving Industries. Bulletin No. 176. Washington: Government Printing Office, 1940.

U. S. Department of Labor, Women's Bureau. The Commercializatio of the Home through Industrial Home Work. Bulletin No. 135. Washington: Government Printing Office, 1935.

U. S. Department of Labor, Women's Bureau. The Effect of Minimum-Wage Determinations in Service Industries. Bulletin No. 166. Washington: Government Printing Office, 1938.

U. S. Department of Labor, Women's Bureau. History of Labor Legislation for Women in Three States. Washington: Government Printing Office, 1929.

U. S. Department of Labor, Women's Bureau. State Minimum-Wage Laws and Orders: 1942. Bulletin No. 191. Washington: Government Printing Office, 1942.

U. S. Department of Labor, Women's Bureau. State Minimum-Wage Legislation--A Postwar Necessity. Washington: Government Printing Office, 1944.

U. S. Department of Labor, Women's Bureau. Women Workers in Ten War Production Areas and Their Postwar Employment Plans. Bulletin No. 209. Washington: Government Printing Office, 1946.

Van Sickle, John V. "Geographical Aspects of a Minimum Wage." Harvard Business Review, XXIV (Spring, 1946), 277-294.

Van Sickle, John V. Planning for the South. Nashville: Vanderbilt University Press, 1943.

de Vyver, Frank T. "Regulation of Wages and Hours prior to 1938." Law and Contemporary Problems, VI (Summer, 1939), 323-352.

Walker, Francis A. The Wages Question. New York: Henry Holt, 1876.

Wallace, Leon H. "The Fair Labor Standards Act." Indiana Law Journal, XXII (January, 1946), 113-149.

Webb, Sidney. "Economic Theory of a Legal Minimum Wage." Journal of Political Economy, XX (December, 1912), 973-998.

Weiss, Harry. "Economic Coverage of the Fair Labor Standards Act." Quarterly Journal of Economics, LVIII (May, 1944), 460-481.

Weiss, Harry. "Minimum Wage Fixing under the United States Fair Labor Standards Act: The Working of the Industry Committees." International Labour Review, LI (January, 1945), 17-48.

Whittaker, Edmund. A History of Economic Ideas. New York: Harper, 1940.

Williams, Gertrude. The State and the Standard of Living. London: P. S. King, 1936.

Yoder, Dale. Labor Economics and Labor Problems. New York: McGraw-Hill, 1939.

Zevin, B. D., ed. Nothing to Fear. The Selected Addresses of Franklin Delano Roosevelt, 1932-1945. Cambridge: Houghton Mifflin, 1946.

SUPPLEMENTARY BIBLIOGRAPHY

British Columbia Department of Labour. Annual Report for the Year Ended December 31, 1945. Victoria: 1946.

Hinrichs, A. Ford. "The Budget in Perspective." Monthly Labor Review, XLVI (February, 1948), 131-132.

Kellogg, Lester S. and Dorothy S. Brady. "The City Worker's Family Budget." Monthly Labor Review, XLVI (February, 1948), 133-170.

U.S. Congress, House of Representatives. Committee on Agriculture. Industrialization and the South. Project VII. Reprint from Hearings on Study of Agricultural and Economic Problems of the Cotton Belt before Special Subcommittee on Cotton. 80th Cong., 1st Sess. Washington: Gov't. Printing Office, 1947.

Viner, Jacob. "The Role of Costs in a System of Economic Liberalism." Wage Determination and the Economics of Liberalism. Ed. by Ralph Bradford. Washington: Chamber of Commerce of the United States, 1947, pp. 15-33.