

The Proposed Federal Legislation on Minimum Wages and Hours

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Certainly we cannot say that the changes contemplated here are imminent. They are suggested as a possible means through which the delay and expense of redress may be mitigated, and the consumer protected, assuming, of course, that such protection is desirable.

The public has, by banding together into various purchaser organizations, gone far in solving the problem of protecting the consumer.⁶⁸ The remaining solutions, if there are to be any, are in the hands of the legislature.

EDYTHE R. DUCKER.

THE PROPOSED FEDERAL LEGISLATION ON MINIMUM WAGES AND HOURS.

Regardless of its political sanction, the modern philosophy is concerned with the most good for the most people.

“Where there is no express command or prohibition, but only general language or policy to be considered, the conditions prevailing at the time of its adoption must have their due rights; but the changed social, economic and governmental conditions and ideas of the time, as well as the problems which the changes have produced, must also logically enter into the considerations, and become influential factors in the settlement of problems of construction and interpretation.”¹

The power conferred upon Congress “to regulate commerce with the foreign nations and among the several states * * *”² was first discussed by the Supreme Court in the case of *Gibbons v. Ogden*³ on March 2, 1824.

One hundred and thirteen years later a new import was given to the interstate commerce clause when the Black-Connelly Bill⁴ was introduced to provide for the establishment of fair labor standards in employments in and affecting interstate commerce.⁵

⁶⁸ Soule, *Consumer Protection* (1921) 4 ENCYC. SOC. SCI. 282.

¹ *Borgnis v. Falk Co.*, 147 Wis. 327, 349-350, 133 N. W. 209 (1911), per Chief Justice Winslow.

² U. S. CONST. ART. III, § 8.

³ 9 Wheat. 1, 6 L. ed. 23 (U. S. 1824).

⁴ 75th Cong., 1st Sess., Union Calendar No. 535, S. 2475, REP. NO. 1452 (Aug. 2, 1937, in the House of Representatives).

⁵ In what may be considered as groundwork to this Bill, President Roosevelt's message to Congress on May 24, 1937, declared: “One third of our population, the overwhelming majority of which is in agriculture or industry, is ill-nourished, ill-clad, and ill-housed. * * *. Today you and I are pledged to take further steps to reduce the lag in the purchasing power of industrial

Democracy, conscious of a social obligation under modern political philosophy, is seeking to enlarge the scope of existing machinery to accomplish that end. It is our purpose to determine the possible success of that action.

Provisions of the Proposed Bill.

An act⁶ has been proposed in the Congress of the United States to regulate hours and wages under the commerce clause of the Constitution. The proposed legislation affects employees engaged in interstate commerce or in producing, transporting, or otherwise working on goods transported or sold, or intended for transportation or sale in interstate commerce, or shipped, delivered, or sold with *knowledge* that shipment, delivery or sale in interstate commerce is intended, or employed in any process or occupation necessary to the production of such goods; or engaged in the local production of goods which compete to a substantial extent with goods produced in another state and sold or transported in interstate commerce.⁷ The Bill operates in cases where "substandard labor conditions" exist. A "substandard labor condition" is one under which any employee is now employed at "oppressive wages," *i.e.*, a wage lower than the minimum fixed by the board.⁸ Subject to exceptions in the discretion of the board, an "oppressive workweek" shall not result in a "substandard labor condition" if time and a half is paid for overtime.⁹ "Unfair goods"

workers and to strengthen and stabilize the markets for the farmer's products. The two go hand in hand. Each depends for its effectiveness upon the other. Both working simultaneously will open new outlets for productive capital. Our nation so richly endowed with natural resources and with a capable and industrious population should be able to devise ways and means of insuring to all our able bodied working men and women a fair day's pay for a fair day's work. *A self supporting and self respecting democracy can plead no justification for the existence of child labor, no economic reason for chiseling workers' wages or stretching workers' hours.*"

Address to Congress on July 15, 1937 by Hugo L. Black: "Our present economy of scarcity is not due to a scarcity of goods, or a scarcity of labor, but to a scarcity of purchasing power among the underpaid and the unemployed. There are plenty of workers now unemployed willing and anxious to produce more goods. There are plenty of farmers willing and anxious to produce more foodstuffs. The difficulty is that there are not enough workers who have the money to purchase the things they need. Economic theory is sound only insofar as it explains and accounts for economic fact. The pseudoeconomic theory, that shorter hours and higher wages reduces production, fails to explain why some workers should be toiling long hours at starvation wages when others cannot find work, and further it fails to explain why a third of the population should not have adequate purchasing power to acquire the necessities of civilized life when millions now unemployed would be happy to produce those necessities if given half a chance. Indeed the theory that shorter hours and higher wages will limit production is based on the assumption that our working population is fully employed, and this assumption as everyone knows, is wholly incorrect."

⁶ See note 4, *supra*.

⁷ § 2(a) (11), (14), (15), (17), and §§ 7 and 8 (a).

⁸ § 2 (a), (8), (9) and (11).

⁹ § 6 (a).

whose transportation in interstate commerce is made unlawful, comprise goods, wares, products, commodities, merchandise or articles or subjects of commerce of any kind in any step of whose production employees have been employed under a "substandard labor condition" in any occupation, including "any process or occupation necessary to the production thereof."¹⁰

The "fair labor standards" prescribed pursuant to the Bill are made operative principally by the following means:

1—by making it unlawful to transport or cause to be transported or to ship, deliver or sell with knowledge that shipment or delivery or sale thereof in interstate commerce is *intended*¹¹ any "unfair goods";¹²

2—by making it unlawful to employ under any "substandard labor conditions" any employee engaged in interstate commerce or in the production of goods *intended* for transportation or sale in violation of (1) above;¹³

3—by making it unlawful to employ any employee in violation of an order of the board requiring the maintenance of fair labor standards in the *intrastate* production of goods *competing* with goods from other states produced under such fair labor standards;¹⁴

4—by authorizing the board to apply for injunctions to prevent a threatened violation of any provision of the Bill or of any labor standard or to enforce compliance with a labor standard order;¹⁵

5—by making null and void any agreement made in violation of or binding any person to waive compliance with, any provision of the Bill or of a regulation or order of the board;¹⁶

6—by giving a cause of action to employees to recover from their employers as "reparation" the excess of applicable minimum wages

¹⁰ § 2 (a) (14), (15) and (17).

¹¹ The unlawfulness of certain of the acts declared illegal by Section 7 of the Bill is predicated upon the fact that goods are "*intended*" for shipment in interstate commerce. To this extent, the Bill would be subject to attack since the Supreme Court has said that the fact "that commodities produced or manufactured within a state are intended to be sold or transported outside the state does not render their production or manufacture subject to federal regulation under the commerce clause". *Carter v. Carter Coal Co.*, 298 U. S. 238, 301-302, 56 Sup. Ct. 855 (1936). See also *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 259-260, 43 Sup. Ct. 83 (1922); *Coe v. Errol*, 116 U. S. 517, 526, 6 Sup. Ct. 475 (1886).

¹² § 7 (1).

¹³ § 7 (2).

¹⁴ § 8 (a) and (b).

¹⁵ § 13.

¹⁶ § 17.

over those actually paid and compensation at time and a half for work in excess of applicable maximum hour standards, less any amount already paid for such excess time.¹⁷ Any person who *wilfully* performs any act declared unlawful by the Bill or who wilfully fails to perform any act, duty or obligation required by the Bill to be performed is made guilty of a misdemeanor. The employment of such employee under substandard conditions is made a separate offense.¹⁸ Common carriers are specifically relieved from liability for transporting unfair goods in the regular course of business.¹⁹

Thus, premised upon the federal power to regulate interstate commerce, the proposed legislation to establish wage and hour standards contemplates economic, social and administrative innovations the purpose of which in the words of President Roosevelt,²⁰ is "to improve * * * the standards of living of those who are now undernourished, poorly clad, and ill-housed" and "to extend the frontier of social progress."

As it now stands, the Bill is a direct prohibition against shipment in interstate commerce of goods produced under substandard labor conditions.²¹

The Proposed Bill and Existing Case Law.

Subdivision 1 of subsection A unfortunately proffers a ready opportunity to those looking for an excuse to cut down the Bill. It must be admitted that the true inspiration of the Bill is not to regulate interstate commerce as is declared,²² but is to promote conditions beneficial to the "physical and economic health, efficiency and well being * * *" of the workers of the several states. The mechanism under which this purpose is attempted to be brought under the com-

¹⁷ § 18 (a) and (b).

¹⁸ § 23 (a).

¹⁹ § 20.

²⁰ Address to Congress by President Roosevelt on May 24, 1937.

²¹ Under part 1 of legislative declarations the Bill says: "Section 1. A—The employment of workers under substandard labor conditions in occupations in interstate commerce, in the production of goods for interstate commerce, or otherwise directly affecting interstate commerce, 1—*causes interstate commerce and the channels and instrumentalities of interstate commerce to be used to spread and perpetuate among the workers of the several states conditions detrimental to the physical and economic health, efficiency, and well being of such workers*; 2—directly burdens interstate commerce; 3—constitutes an unfair method of competition in interstate commerce; 4—leads to labor disputes burdening and obstructing the free flow of goods in interstate commerce; and 5—directly interferes with the orderly and fair marketing of goods in interstate commerce. B—The correction of such conditions directly affecting interstate commerce requires that the Congress exercise its legislative power to regulate commerce among the several states by prohibiting the shipment in interstate commerce of goods produced under substandard labor conditions and by providing for the elimination of substandard labor conditions in occupations in and directly affecting interstate commerce."

²² § 1 (a), 2, 3, 4 and 5.

merce clause is exactly the same as that declared unconstitutional in the case of *Hammer v. Dagenhart*.²³ The court therein said that it appears from the act itself that the *purpose and effect of the act* is to prevent the employment of children, and not to safeguard or promote commerce or the interests of persons or communities in the states into which children-made goods might be sent.

Another attempt to give legal countenance to the real purpose of the act was also ruled out in the *Child Labor Tax* case.²⁴ The case held that an act of Congress which clearly, on its face, is designed to penalize and thereby to discourage or suppress conduct, the regulation of which is reserved by the Constitution exclusively to the states can *not* be sustained under the federal taxing power by calling the penalty a tax.²⁵ This case is essentially like the *Hammer v. Dagenhart*²⁶ case since Congress substantially said that a person in employment of children, should, instead of having his goods shut out of interstate commerce as the statute of 1916 had provided, be subjected to a so-called tax of ten per cent on all the profits of his business additional to all other taxes. Thus the court made manifest its view that the provisions of the so-called *taxing act must be naturally and reasonably adapted to the collection of the tax and not solely for the achievement of some other purpose plainly within state power*.²⁷

In *United States v. Butler*²⁸ Mr. Justice Roberts, writing for the majority of the court, said that "it is inaccurate and misleading to speak of the exaction from processors prescribed by the challenged act as a tax, or to say that as a tax it is subject to no infirmity. A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government. The word has never been thought to connote the expropriation of money

²³ 247 U. S. 251, 38 Sup. Ct. 529 (1918).

²⁴ *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 42 Sup. Ct. 449 (1922).

²⁵ *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. ed. 482 (U. S. 1869); *McCray v. United States*, 195 U. S. 27, 24 Sup. Ct. 769 (1904); *Flint v. Stone Tracy Co.*, 220 U. S. 107, 31 Sup. Ct. 342 (1910); *United States v. Doremus*, 249 U. S. 86, 39 Sup. Ct. 214 (1919) distinguished. This case was on the validity of the Narcotic Drug Act, 38 STAT. 785, which imposed a special tax on the manufacture, importation and sale or gift of opium or coca leaves, or their compounds or derivatives. It required every person subject to the special tax to register with the Collector of Internal Revenue his name and place of business, and forbade him to sell except upon the written order of the person to whom the sale was made on a form prescribed by the Commissioner of Internal Revenue. The vendor was required to keep the order for two years, and the purchaser to keep a duplicate for the same time and both were to be subject to official inspection. Similar requirements were made to sales upon prescriptions of a physician, and as to the dispensing of such drugs directly to a patient by the physician. The validity of a special tax in the nature of an excise tax on the manufacture, sale and importation of such drugs was, of course, unquestioned. The provision for subjecting the sale and distribution of the drugs to official supervision and inspection were held to have a reasonable relation to the enforcement of the tax and were therefore held valid.

²⁶ See note 23, *supra*.

²⁷ *United States v. Doremus*, 249 U. S. 86, 39 Sup. Ct. 214 (1919).

²⁸ 297 U. S. 1, 61, 56 Sup. Ct. 312 (1936).

from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effectuate regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation. But manifestly no justification for it can be found unless as an integral part of such regulation. The exaction cannot be wrested out of its setting, denominated an excise for raising revenue and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired end. To do this would be to shut our eyes to what all others than we can see and understand."

The proposed Bill would, in practical effect permit the Federal Government to regulate wages and hours and other working conditions not only of employees engaged in interstate commerce, but of the great majority of those engaged in intrastate commerce, to the necessary exclusion of state regulation thereof. That Congress may not directly deal with wages and hours of employees not engaged in interstate commerce was held recently in *Cartier v. Carter Coal Co.*²⁹ That it may do so indirectly in the manner proposed by this Bill is far from clear. To permit such result the Supreme Court would not only have to reverse *Hammer v. Dagenhart*³⁰ but go further and enunciate an entirely new doctrine as to federal control over the local affairs of the states through indirect exercise of the commerce power. This latter inference seems apparent since the Bill contemplates federal regulation of wholly intrastate production merely because goods so produced compete to a "substantial extent" with goods sold in interstate commerce.

Before proceeding it becomes necessary to discuss the Act of July 24, 1935, known as the Ashurst Sumners Act,³¹ which makes it

²⁹ 298 U. S. 238, 56 Sup. Ct. 855 (1936) (This case discussed the constitutionality of the Bituminous Coal Act which declares that the mining and distribution of such coal are so affected with a national public interest, and so related to the general welfare that the industry should be regulated. It recites that such regulation is necessary because interstate commerce is directly and detrimentally affected by the state of the industry and its practices, and that the right of the miners to organize and collectively bargain for wages, hours of labor and working conditions should be guaranteed. Held, the provisions of the Act looking to the control of wages, hours and working conditions of the miners engaged in the production of coal, and seeking to guarantee their rights of collective bargaining in these matters are beyond the powers of Congress because: 1—Congress has no general power to regulate for the promotion of the general welfare. Congress can claim no powers that are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication). *Martin v. Hunters Lessee*, 1 Wheat. 304, 326, 4 L. ed. 97 (U. S. 1816). Compare *Jacobson v. Massachusetts*, 197 U. S. 11, 22, 25 Sup. Ct. 358 (1905). 2—The power expressly granted to Congress to regulate interstate commerce does not include the power to control the conditions in which coal is produced before it becomes an article of commerce. 3—The effect of interstate commerce in the coal labor conditions involved in its production is an indirect effect.

³⁰ See note 23, *supra*.

³¹ 49 STAT. 494 (1935).

unlawful to transport in interstate or foreign commerce goods made by convict labor into any state where the goods are intended to be received, possessed, sold or used in violation of its laws. This Act was held constitutional in *Kentucky Whip & Collar Co. v. Illinois Central R. R. Co.*³² We can distinguish this from the *Hammer v. Dagenhart* case³³ in that Congress may permit interstate transportation from being used to bring into a state articles which are innocuous in themselves, but the local traffic in which, because of its harmful consequences has been constitutionally forbidden by the state. It is true that in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*,³⁴ decided in April, 1937, the Supreme Court upheld a federal statute,³⁵ requiring employers to negotiate, but not to enter into any agreement with employees, as applied to a manufacturing concern which carried on its business on a national scale. But clearly, to sustain the present Bill the Supreme Court would have to go much farther than in case of the Wagner Act.³⁶ That Act represents a direct exercise of the commerce power. This Bill seeks by an indirect exertion of that power to regular working conditions not only of employees engaged in interstate commerce but also of employees engaged in intrastate commerce, and this without regard to whether the activities of the latter directly burden or affect interstate commerce.

From a consideration of the foregoing it becomes evident that any attempt to validate the proposed Bill on the basis of existing case law is futile. But an attempt may be made to uphold the constitutionality of the Bill on other grounds: namely, to decide that the mechanism used in all these cases, and heretofore held unconstitutional, is within the commerce clause in the light of a favorable interpretation based on the historical reasons for the formation of the Constitution. President Roosevelt in an address³⁷ asking for federal regulation of hours and wages said: "Nearly twenty years ago in his dissenting opinion in *Hammer v. Dagenhart*,³⁸ Mr. Justice Holmes expressed his views as to the power of the Congress to prohibit the shipment in interstate or foreign commerce of the product of the labor of children in factories below what Congress then deemed to be civilized social standards. Surely the experience of the last twenty years has only served to reinforce the wisdom and the rightness of his views. And, surely if he was right about the power of the Congress over the work of children in factories, it is equally right that the Congress has the power over decent wages and hours in those same factories. We said: I had thought that the propriety of the exercise of a power ad-

³² 299 U. S. 334, — Sup. Ct. —, 81 L. ed. 183 (1937).

³³ See note 23, *supra*.

³⁴ 301 U. S. 1, 57 Sup. Ct. 615 (1936).

³⁵ NATIONAL LABOR RELATIONS ACT of July 5, 1935, 49 STAT. 449, 29 U. S. C. § 151.

³⁶ See note 35, *supra*.

³⁷ See note 20, *supra*.

³⁸ See note 23, *supra*.

mitted to exist in some cases was for the consideration of Congress alone and that this Court had always disavowed the right to intrude its judgment upon policy or morals. It is not for this Court to pronounce when prohibition is necessary to regulation if it ever may be necessary—to say that it is permissible as against strong drink but not as against the product of ruined lives.

“The Act does not meddle with anything belonging to the states. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend on their neighbors. Under the Constitution such commerce belongs not to the states but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the states. *Instead of being encountered by a prohibitive tariff at her boundaries the state encounters the public policy of the United States which it is for Congress to express.*³⁹ The public policy of the United States is shaped with a view to the benefit of the Nation as a whole * * *. The national welfare as understood by Congress may require a different attitude within its sphere from that of some self seeking state. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command.

“Mr. Justice Brandeis, Mr. Justice Clark, and Mr. Justice McKenna agreed. A majority of the Supreme Court, however, decided five to four against Mr. Justice Holmes and laid down a rule of constitutional law which has ever since driven into impractical distinctions and subterfuge all attempts to assert the fundamental power of the National government over interstate commerce.

“*But although Mr. Justice Holmes spoke for a minority of the Supreme Court he spoke for a majority of the American people.*”⁴⁰

An Attempt to Uphold the Constitutionality Under a Liberal Interpretation of the Commerce Clause.

Perhaps the most significant reason for the formation of the Constitution was the lack of *harmony* among the several states. One of the primary purposes of the formation of our Federal Union was to do away with trade barriers between the states. To the Congress and not to the states was given the power to regulate commerce among

³⁹ Italics ours.

⁴⁰ Italics ours.

the several states. Congress can not interfere in local affairs, but, when goods pass through the channels of commerce from one state into another, they become subject to the power of the Congress and the Congress may exercise that power to recognize and protect the fundamental interests of free labor. Any attempt to arrive at the real meaning of the commerce clause without observing the reasons for its inclusion in the Constitution of the United States, and its history in the Constitutional Convention would be futile.

The want of the power to regulate commerce was a leading defect of the Confederation. In the different states, the most opposite and conflicting regulations existed; each pursued its own real or supposed local interests; each was jealous of the rivalry of its neighbors; and each was successively driven to retaliatory measures in order to satisfy public clamor, or to alleviate private distress. In the end, however, all their measures became utterly nugatory, or mischievous, engendering mutual hostilities, and prostrating all their commerce at the feet of foreign nations. It is hardly possible to exaggerate the oppressed and degraded state of domestic commerce, manufactures and agriculture, at the time of the adoption of the Constitution. It was easy to foresee that this state of things could not long exist, without bringing on a border warfare, and a deep rooted hatred among neighboring states, fatal to the Union, and, of course, fatal also to the liberty of every member in it.⁴¹

⁴¹ STORY, *THE CONSTITUTION* (1863) 108 ("It was the want of any power to regulate commerce, as between the states themselves, and with foreign nations, which as much, and I am not sure but I am justified in saying more, than any one thing, forced the states to form the present Constitution in lieu of the Articles of Confederation under which they had won their freedom and established their independence. It is difficult now for us to fully appreciate how strong was the tendency to separate, to quarrel, and to bring their adverse interests into collision, which grew out of the want of any general power in the Federal Government, as it then existed, to control the commercial relations of the states with each other.") MILLER, *THE CONSTITUTION OF THE UNITED STATES*, notes by J. C. Bancroft Davis; SIMON STERNE, *CONSTITUTIONAL HISTORY AND POLITICAL DEVELOPMENT OF THE UNITED STATES* (Rev. ed. 1888) 433; *THE FEDERALIST*, Number XLII ("* * * a very material object of this power was the relief of the states which import and export through other states, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between state and state, it must be foreseen, that ways would be found out, to load the articles of import and export, during the passage through their jurisdictions, with duties which would fall on the makers of the latter, and the consumers of the former. We may be assured, by past experience, that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquillity."); in ELLIOT'S *DEBATES ON THE FEDERAL CONSTITUTION* (Vol. 5, 1907) p. 119, Madison said, "The want of authority in Congress to regulate commerce had produced in foreign nations, particularly Great Britain, a monopolizing policy, injurious to the trade of the United States, and destructive to their navigation; the imbecility and anticipated dissolution of the Confederacy extinguishing all apprehensions of a countervailing policy on the part of the United States. The same want of a general power over commerce led to an exercise of the power, separately, by the states, which not only proved

The tendency of the times is necessarily to weaken the power of the state on the allegiance of the individual, and to lead to a greater and greater consolidation and unity of interest of the whole United States. This tendency is still further accelerated by the inability on the part of the individual states to deal with the economic and social questions which necessarily arise from the extension of the means of intercommunication between the states, and the necessity for the extension of a general power to deal with them. Congress is authorized to regulate commerce; to make such arrangements in relation to the commerce, resting on mutual comity as exigencies may from time to time demand. As the several states have shown themselves powerless to deal with the subject either in an efficient way or upon a uniform plan, the power of the United States to regulate these gigantic enterprises is well lodged in Congress.⁴²

abortive, but engendered rival, conflicting, and angry regulations. Besides the vain attempts to supply their respective treasuries by imposts, which turned their commerce into the neighboring ports, and to coerce a relaxation of the British monopoly of the West India navigation, which was attempted by Virginia (see the Journal of her Legislature), the states having ports for foreign commerce taxed and irritated the adjoining states trading through them—as New York, Pennsylvania, Virginia, and South Carolina. Some of the states, as Connecticut, taxed imports from others, as from Massachusetts, which complained in a letter to the executive of Virginia, and doubtless to those of other states. In sundry instances, as of New York, New Jersey, Pennsylvania, and Maryland, the navigation laws treated the citizens of other states as aliens. In certain cases, the authority of the Confederacy was disregarded—as in violation, not only of the treaty of peace, but of treaties with France and Holland; which were complained of to Congress. In other cases, the federal authority was violated by treaties and wars with Indians, as by Georgia; by troops raised and kept up without the consent of Congress, as by Massachusetts; by compacts without the consent of Congress, as between Pennsylvania and New Jersey, and between Virginia and Maryland. From the legislative Journals of Virginia, it appears that a vote refusing to apply for a sanction of Congress was followed by a vote against the communication of the compact to Congress. In the internal administration of the states, a violation of contracts had become familiar, in the form of depreciated paper made a legal tender, of property substituted for money, of instalment laws, and of the occlusions of the courts of justice, although evident that all such interferences affected the rights of other states, relatively creditors, as well as citizen creditors within the state. Among the defects which had been severely felt, was want of a uniformity in cases requiring it, as laws of naturalization and bankruptcy; a coercive authority operating on individuals; and a guarantee of the internal tranquillity of the states. * * * Such were the defects, the deformities, the diseases, and the ominous prospects, for which the Convention were to provide a remedy, and which ought never to be overlooked in expounding and appreciating the constitutional charter, the remedy that was provided.”

⁴² STERNE, CONSTITUTIONAL HISTORY AND POLITICAL DEVELOPMENT OF THE UNITED STATES (Rev. ed. 1888) 324; SYDNEY GEORGE FISHER, THE EVOLUTION OF THE CONSTITUTION OF THE UNITED STATES (2d ed. 1910) 225 (“The regulation of commerce is a most interesting addition and development. As commerce increased in the course of years its regulation became of more and more importance, and in the end the necessity for this regulation was one of the most important causes of Federalism. In fact the convention which framed the national constitution of 1787 was originally called merely for the purpose of regulating the commerce between the state that bordered on Chesapeake Bay,

Conclusions.

Matters relating to the public harmony can never be finally catalogued.⁴³ In the *Lottery* case⁴⁴ it was held that lottery tickets are subjects of traffic among those who choose to buy and sell them and their carriage by independent carriers from one state to another is therefore interstate commerce which Congress may prohibit under its power to regulate commerce among the several states. Legislation under that power may sometimes and properly assume the form, or have the effect, of prohibition. Legislation prohibiting the carriage of such tickets is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress. Another example of a prohibition of interstate commerce for industrial reasons is in the quarantine of cattle fit enough as food in themselves but likely to damage the cattle industry in the receiving⁴⁵ state. It has been said in *McCray v. United States*⁴⁶ that *the Court will not restrain the exercise of a lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.*

Thus the rules as to such matters seem to be elastic and incapable of rigid definition;⁴⁷ if so, our legal system cannot be convicted of im-

and no more important clause was placed in the national document than that which gave Congress the power to, 'regulate commerce * * *'. (Italics ours.)

The sixth resolution proposed by Mr. Randolph at the Constitutional Convention on May 19, 1787, was, "Resolved that * * * and moreover to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation * * *" (Italics ours.) The debates in and proceedings of the Framers' Convention, in so far as they preserved and published, evince that it was the intention of the makers of the Constitution to vest in the National Government complete authority over external affairs. See SUTHERLAND, CONSTITUTIONAL POWERS AND WORLD AFFAIRS (1919) 41.

⁴³ Essence of speech by Lord Buckmaster in the House of Lords in London Association, &c. v. Greenland, 114 L. T. Rep. 434 (1916).

⁴⁴ 188 U. S. 321, 23 Sup. Ct. 321 (1903).

⁴⁵ Missouri, Kansas, and Texas Ry. v. Haber, 169 U. S. 613, 623, 18 Sup. Ct. 488 (1898).

⁴⁶ 195 U. S. 27, 24 Sup. Ct. 769 (1904).

⁴⁷ OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920), Law and the Court, speech given at a dinner of the Harvard Law School on Feb. 15, 1913. "I have no belief in panaceas and almost none in sudden ruin. I believe with Montesquieu that if the chance of a battle—I may add, the passage of a law—has ruined a state, there was general cause at work that made the state ready to perish by a single battle or a law. Hence I am not much interested one way or the other in the nostrums now so strenuously urged. I do not think that the United States would come to an end if we lost our power to declare an act of Congress void. I do think the Union would be imperilled if we could not make that declaration as to the laws of the several states. For one in my place sees how often local policy prevails with those who are not trained to national views and how often action is taken that embodies what the commerce clause was wont to end. *But I am not aware that there is any serious desire to limit the Court's power in this regard.* For most of the things that properly can be called evils in the present state of the law *I think the main remedy, as for the evils of public opinion, is for us to grow more civilized.*" (Italics ours.)

perfection or inconsistency by showing that different views are held at different times. Our answer to the critics who bring such a charge is that we are consistently inconsistent, and refuse to lay down fixed and unchangeable rules on this topic of public interest, and do the same in other fields. It is inevitable, or at least unlikely, that with the changing circumstances of the world and human society, the changing needs and interests of human development and social and economic structure and safety, the judicial view of these highly important matters will change. Judges cannot stand apart from the world in which they live.

No unit of an entire whole is any greater or of any more significance than the whole of which it is a component part. And the whole can only function when its actions or mandates affect, with equal force, each integral unit within its body. It was in recognition of this truism that the harmony clause must have been contained in the Constitution.

Four score less two years ago, our forefathers engaged in a conflict which determined for all time that the states of this Union were bound together in an organization which was to be directed by one central power. The extent of that power is defined by the delegated powers from the states to the National Government. One of these delegated powers was the right to pass laws as shall promote the harmony and welfare of the states.

Today the need for a minimum wages and hours bill is pronounced. Exploitation is fostered by local governments who advertise the low salary rate to be enjoyed by manufacturers seeking to avoid union-ridden municipalities. Competition by chambers of commerce in this line has reached the point where the floor mat worker is being used as a platform from which platform the chambers may beckon to manufacture.

The war between the states determined more effectively than any constitutional convention that a question of economic import, national in its scope, was amenable to national administration. A wages and hours bill, locally legislated, has for its only foundation the desideratum of local administration. The need for such a bill is apparent. The proposed bill provides for local administration, thereby answering the purpose local legislation would fulfill. We needn't repair to Delphi to predict that to leave the local agencies to legislate on the subject will permit of the refusal of some localities so to do; and in such instances, the structure must fall. It is submitted that because the bill is necessary for the most good for the most people—that the harmony among the people of the states as well as among the states themselves *necessitates national legislation* on the subject. The Congress of the United States may manifest the desirability—the call of the people as well as of the states, for such legislation. It is further submitted that, if passed, the bill should be sustained on the ground

of harmony among the states, should the issue ever be tried before the High Tribunal.

Economic considerations should be our premise in determining whether or not a minimum wages and hours bill would qualify under the harmony clause. We must show first that such a bill would operate to the welfare of the whole people and not to the benefit of any class as opposed to the interests of another class. Secondly, that a national ruling is necessary to avoid a disharmony that will result from leaving the matter to local legislation.

Social research should account for the first requirement, as well as for the second. To tie the legal technics in with economic and social needs so as to justify a national solution to this problem is the applied science of law, as creative in its usage as the inventor who puts into practical effect the finding of theorists.⁴⁸

SYDNEY SAXON.

PRICE-FIXING AND THE FAIR TRADE ACTS.

Constitutionality of the Fair Trade Acts.

The passage by 42 state legislatures of almost identical Fair Trade Acts represents the culmination of almost thirty years of persistent striving by proponents of resale price maintenance to overcome predatory price-cutting. It seemed, however, that all this work would be of no avail in New York when the first resale price maintenance contract was declared invalid by the Court of Appeals in *Doubleday, Doran & Co. v. Macy & Co.*¹ In this case, the plaintiff publishing company brought an action to restrain the defendant retailer (the plaintiff publisher's vendee) from selling or offering for sale certain books published by Doubleday, Doran & Company at a price less than that stipulated as the retail price of such books in a contract made between such publisher and another retailer of books. Macy's defense was that it had never had anything to do with this agreement made by the plaintiff and the other retailer; that the stipulations as to the resale price of the books of the contracting retailer could not possibly bind Macy & Co., a stranger to this contract; and that the Fair Trade

⁴⁸ The writer wishes to thank Arthur L. Shapiro, St. John's Law School, '38, for much of the editorial comment contained herein.

¹ 269 N. Y. 272, 199 N. E. 409 (1936). See Comment (1936) 34 MICH. L. REV. 691; (1935) 10 ST. JOHN'S L. REV. 319.