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Growth and Development of the Commerce Power

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GROWTH AND DEVELOPMENT OF THE COMMERCE POWER

The first expression on the scope of the commerce power was made by the Supreme Court in 1824, in *Gibbons* v. *Ogden.*[1] In that case Chief Justice Marshall declared, "the power of Congress to regulate commerce is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution . . . the power of Congress is plenary." In addition to showing some of the important developments of the commerce power since the above mentioned case, this note proposes to consider the future treatment of the question of federal regulation of hours and wages by the Supreme Court. The Supreme Court has upheld legislation of Congress in the fields of safety, labor relations, rate discriminations and monopolies in restraint of trade. It has likewise sustained legislation on hours and wages in a case of grave and national emergency, during the duration of the emergency involving a threatened strike of railroad employees on a national scale.[2] However, in the field of general wages and hours legislation the Supreme Court has up to the present consistently denied to Congress the right to regulate local manufacturing by the regulation of hours and wages under the guise of the commerce power, particularly so in the cases of *Schechter Poultry Corp* v. *United States,*[3] *Hammer* v. *Dagenhart*[4] and *Bailey* v. *Drexel Furniture Co.*[5]

The power of Congress to regulate commerce is derived from the Federal Constitution, Article I, Section 8: "The Congress shall have the power . . . to regulate commerce . . . among the several states . . . " This commerce Chief Justice Marshall in his opinion in *Gibbons* v. *Ogden,*[6] described as "commercial intercourse between nations, and parts of nations in all its branches" not merely "buying and selling" and the "interchange of commodities." In effect he asserted that the term "commerce" has the same meaning in the phrase "commerce among the several states" that it has in the phrase "commerce with foreign nations." It must, therefore, refer to every species of commercial intercourse among the states.

The decisions since *Gibbons* v. *Ogden* have further defined the concept of what constitutes commerce. At the outset the concept was limited to the prescription of rules that should govern interstate com-

[1] 9 Wheat. 1, 6 L.Ed. 23 (1824) (holding the right of a state to grant an exclusive franchise to a navigable river was inferior to the right of Congress to regulate such river for the use of interstate commerce).
[2] Wilson v. New, 243 U.S. 332, 37 Sup. Ct. 298, 61 L.Ed. 755 (1916).
[3] Schechter Poultry Corp v. United States, 295 U.S. 495, 56 Sup. Ct. 837, 79 L.Ed. 1570 (1935).
[4] 247 U.S. 251, 38 Sup. Ct. 449, 62 L.Ed. 101 (1918).
[5] 259 U.S. 20, 42 Sup. Ct. 449, 66 L.Ed. 817 (1922).
[6] 9 Wheat. 1, 6 L.Ed. 23 (1824).

merce. This doctrine was confined in *Gibbons* v. *Ogden* to a negative use only, that of telling the states what not to do. But with the development of the United States and the Western migration pouring thousands upon the lands beyond the Appalachians and the Mississippi, this power was construed to allow Congress to authorize the construction of bridges and railroads,[7] and to build them itself.[8] Under this phase extensive internal improvements were made. Not only did Congress assume that it could provide these instrumentalities, but it also decreed that it was its duty to promote their growth and insure their safety and advancement.[9]

Where intrastate rates were a burden upon interstate commerce a serious problem arose. To remedy this situation Congress regulated activities clearly intrastate in character. In this connection the Supreme Court has decided that where an intrastate transaction is a direct burden upon interstate transportation, the power of Congress to legislate or to control such intrastate transaction will be upheld. The *Shreveport* case[10] and *R. R. Comm. of Wis.* v. *C. B. & Q. Ry. Co.*[11] clearly illustrate this point. In the *Shreveport* case rate discriminations by barriers between west-bound traffic from Shreveport, Louisiana, to a point in Texas and east bound traffic from other points in Texas to this same point in Texas, were held to be a burden upon interstate commerce. An Interstate Commerce Commission order commanding the roads to raise the rates charged to the citizens of Texas, as prescribed by the Railroad Act of Texas for intrastate traffic, to a parity with rates charged to Shreveport shippers, described by the Interstate Commerce Commission as reasonable, was held valid and within the commerce power of the federal government. This case affected persons and localities close to the border of the two states. In *R. R. Comm. of Wis.* v. *C. B. & Q. Ry. Co.,* an order of the Interstate Commerce Commission under the Transportation Act of 1920[12] authorized the establishment of a state-wide level of intrastate rates in order to prevent an unjust discrimination against interstate roads which were

[7] Luxton v. North River Bridge Co., 153 U.S. 525, 14 Sup. Ct. 891, 38 L.Ed. 808 (1894). Congress may organize a corporation for the purpose of constructing a bridge across the Hudson River and for the condemnation of property for that purpose.

[8] Cal. v. Cent. Pac. R. R. Co., 127 U.S. 1, 83 Sup. Ct. 1073, 32 L.Ed. 150 (1887).

[9] The Daniel Ball, 10 Wall. 557, 566, 19 L.Ed. 999 (1871). See Mobile County v. Kimball, 102 U.S. 691, 26 L.Ed. 238 (1880); *cf. Southern Ry Co.* v. *United States,* 222 U.S. 20, 32 Sup. Ct. 2, 56 L.Ed. 72 (1911). (Holding an Act of Congress requiring equipment used in intrastate commerce to be provided with the same safety devices required of equipment used in interstate commerce to be valid.)

[10] Houston & Texas Ry. Co. v. United States, 234 U.S. 342, 34 Sup. Ct. 833, 58 L.Ed. 1341 (1914).

[11] 257 U.S. 563, 42 Sup. Ct. 232, 66 L.Ed. 371 (1922).

[12] 41 Stat. 456, 49 U.S.C.A. 71 (1920).

charging a higher rate by order of the Interstate Commerce Commission. In both cases it appears that the decision was based upon the undue burden the intrastate rates placed upon interstate commerce. In the latter case the Interstate Commerce Commission did not attempt to lower the interstate rates to a parity with the intrastate rates, but went so far as to order the intrastate rates raised to a level found by it to be a reasonable one for interstate carriers.

The power of the federal government to control intrastate activities will be upheld where such activities are intended to burden interstate commerce, as indicated by the second *Coronado*[13] case, wherein certain producers of commodities were attempting to control and reduce the supply of such commodities by curtailment of production. The court held that while mere reduction of the quantity of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction of that commerce, nevertheless "when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate markets, it is a direct violation of the anti-trust act."

Similarly in a case involving a conspiracy of marketmen, teamsters and slaughterers, to burden the free movement of live poultry to the metropolitan area of New York City by control of prices where such poultry originated outside the state was an interference and a burden upon interstate commerce. The court here felt that the interference of conspirators "with the unloading, the transportation and sale by marketmen to retailers, the prices charged and the amount of profits exacted, operated substantially to burden and restrain the untrammelled shipment and movement of the poultry while unquestionably it was in interstate commerce."[14] It is important to note that the acts complained of occurred after the shipment in interstate commerce had ceased, but the effect was in operation even before such termination.

Federal regulation of intrastate activities is not, however, limited to the cases involving an undue burden upon interstate commerce by monopolistic violations of the anti-trust laws, or by discriminatory rates between intrastate and interstate carriers. In the recent case of *Consolidated Edison* v. *The National Labor Relations Board*,[15] the power of the Board to regulate the relationship of employer and employee was upheld even though the Edison Company was engaged

[13] Coronado Coal Co. v. United Mine Workers, 268 U.S. 295, 45 Sup. Ct. 551, 69 L.Ed. 963 (1925).
[14] Local 167 v. United States, 291 U.S. 293, 54 Sup. Ct. 396, 78 L.Ed. 804 (1934).
[15] 305 U.S. 197, 59 Sup. Ct. 206, 83 L.Ed. 131 (1938).

in the local sale of power to local customers of both a private and industrial nature in the city of New York and Westchester County. Of the amount sold, 98% was used locally, while the remaining 2% was used by consumers engaged in both foreign and interstate commerce. This latter amount was used by two interstate railroads and one interstate tunnel company for the lighting and operation of passenger and freight terminals and trains. The Western Union Telegraph, Postal Telegraph and New York Telephone Companies also used part of this latter amount for transmitting and receiving local and interstate messages. In addition many pier facilities were dependent upon some of this latter 2%, as were the federal lighthouse and harbor lights. In holding as it did the court was influenced by the probable effect of an interruption of this service upon the stream of commerce. The scope and magnitude of the operations carried on by this company greatly influenced the court to decide that the effect of interruption of such services could not be regarded as indirect and remote. The effect rather than the source of the injury determines the jurisdiction of the Board.

Prior to this time the Board had contended that if there was a reasonable probability that certain labor practices would cause strikes which would burden interstate commerce then it would have jurisdiction to control these practices. The present position, however, is that if the Board determines that stoppage of operations by industrial strife in a particular enterprise would result in what the board regards as a substantial interruption of or interference with interstate commerce, even though it be carried on wholly by others, then the Board has jurisdiction.

The magnitude of the operations of a particular intrastate activity and the probable effect of industrial strife upon interstate commerce influenced the court also in the *Jones & Laughlin*[16] case to uphold as valid a regulation of the National Labor Relations Board affecting the employer-employee relationship and the right of the employee to collective bargaining. The court here took notice of the fact that the abridgment of the right of employees to organize is a prolific source of industrial strife. Where the possibility of industrial strife would affect a group of corporations such as the Jones & Laughlin Steel Corporation, engaged in an enormous and wide-spread manufacturing enterprise, the effect upon interstate commerce of stopping such an industry was held to be sufficiently direct to allow federal regulation. The court characterized the process whereby materials from subsidiary corporations located in other states were sent to the central mill in

[16] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 Sup. Ct. 615, 81 L.Ed. 893 (1937).

Pennsylvania over company lines, there to be manufactured into finished and semi-finished products and then shipped to other states to the ultimate consumers, as a definite and well understood course of business. It was held that such movements of iron ore, coal and limestone to the mill, through it, and from it in the form of steel products to the consuming centers of the country was so interdependent and closely interwoven that the regulation must necessarily be of the whole. Hence, again it was the fear of the possible cessation of these activities and its effect upon interstate commerce that led the Supreme Court to uphold the validity of the Board's orders.

It is interesting to note the argument of the petitioner in the *Jones & Laughlin* case that even though materials used in the production of goods originated in other states, the use of such materials was essentially local and intrastate. Since this use was local in its immediacy, it counteracted and outweighed the fact that the materials had an interstate origin; otherwise, every intrastate transaction which involved interstate transportation by others would come within the federal control and thereby put an end to our federal system. It had been held that where a utility company buys its supply of gas from interstate distributors state jurisdiction is nevertheless paramount with respect to the operation of the utility company.[17] In the *Jones & Laughlin* case the court held that the *National Labor Relations Act*[18] is not to be construed and applied so as to destroy the balance of the constitutional system and federal regulation may not apply to wholly intrastate activities unless their control "is essential or appropriate to protect commerce from direct burdens and obstructions."

In the *Schechter Poultry Corporation* v. *United States*[19] case, the validity of the conviction of the corporation for violation of a poultry code set up under the N.R.A. was questioned. The code, establishing minimum wages and maximum hours, prohibiting selective killing and the selling of unfit chickens, was held to be an invalid assumption of the federal power because the transactions of the defendant did not directly affect interstate commerce so as to be subject to federal regulation. The facts in this case indicate that poultry was shipped from other states to New York City and there picked up by defendant at the railroad terminals, transported to their slaughter houses and slaughtered and sold to local retailers and butchers. The court felt that these transactions were not "in" interstate commerce. It held that neither slaughtering nor the sale by

[17] Missouri v. Kansas Natural Gas Co., 265 U.S. 298, 44 Sup. Ct. 544, 68 L.Ed. 1027 (1924).
[18] 49 Stat. 457, 29 U.S.C.A. 151 (1935).
[19] Schechter Poultry Corp. v. United States, 295 U.S. 495, 56 Sup. Ct. 837, 79 L.Ed. 1570 (1935).

defendant to local retailers and butchers was interstate commerce, therefore decisions which dealt with the stream of commerce were not applicable here.[20] The court also held that defendant's transactions did not directly "affect" interstate commerce so as to be subject to federal regulation, and further, that the hours and wages had no direct relation to interstate commerce.

Similarly, the court refused to sustain the validity of the bituminous coal act in the *Carter Coal* case.[21] The purpose of the bituminous act was the stabilization of the coal industry through the regulation of labor and prices. The court held that wages and hours were beyond the powers of Congress to regulate because they had only an indirect effect upon interstate commerce, and however great the effect might be, it was not sufficient to give Congress power unless the effect was direct. Here again the court refused to sustain legislation aimed at controlling and stabilizing an entire industry, national in scope, through the media of price, wage and hour control. In neither of these cases did the court feel that the emergency was as urgent as in the case of *Wilson* v. *New*,[22] so as to sustain the codes even for a limited time. The intricate chain of cause and effect was held an indirect rather than a direct effect.

This principle, that Congressional regulation will be upheld when the effect of the subject regulated upon interstate commerce is direct and invalidated when it is indirect, is unavoidably vague. The Supreme Court has therefore recognized the fact that the precise line must be drawn only as individual cases arise, but that it must be drawn is certain if the federal system is to survive.[23]

The court felt that to uphold the argument of the petitioner in the *Schechter* case, that the control of wages and hours was a necessary factor in maintaining the continued flow of interstate commerce in the then existing emergency, would result in imposing federal control upon all activities no matter how remote and indirect their effect upon interstate commerce may be; or as Justice Cardozo stated in the same case, "activities local in their immediacy do not become interstate and national because of distant repercussions."

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[20] Swift & Co. v. United States, 196 U.S. 375, 25 Sup. Ct. 276, 49 L.Ed. 518 (1905). Stafford v. Wallace, 258 U.S. 495, 42 Sup. Ct. 397, 66 L.Ed. 735 (1922). (It was held that Congress may prescribe regulations for the facilities and services furnished to stockyards handling livestock shipped from the Western ranches for the ultimate consumption in the East. In so holding the court characterized the stockyards as great national public utilities "to promote the flow of commerce from the ranges and farms of the West to the consumers in the East.")

[21] Carter v. Carter Coal Co., 298 U.S. 238, 56 Sup. Ct. 855, 80 L.Ed. 1160 (1936).

[22] Wilson v. New, 243 U.S. 332, 37 Sup. Ct. 298, 61 L.Ed. 755 (1916).

[23] Schechter Poultry Corp. v. United States, 295 U.S. 495, 56 Sup. Ct. 837, 79 L.Ed. 1570 (1935).

Now whereas in the *Schechter* and the *Carter Coal*[24] cases the decisions were based partly on the absence of an easily defined policy and a valid norm and partly because of the attempt to control completely the internal economic life of the states, the decisions in *Hammer* v. *Dagenhart* and the *Child Labor Tax*[25] case were based primarily on the latter reason. In *Hammer* v. *Dagenhart*[26] an act of Congress prohibiting goods manufactured within the state from entering into interstate commerce if within 30 days prior to its shipment in such commerce the manufacturer had employed any oppressive child labor was held invalid. The invalidity did not rest on the fact that there was a prohibition of goods from moving in interstate commerce, but that it was an attempt to regulate an activity within the control of the individual states. The mining of stone from the quarries and its transformation into useful products was held to be a local activity.

The right to prohibit entry of goods into interstate commerce, except where the ultimate effect is to control matters strictly within the police power of the state, has not been denied to Congress as can be seen in the case of lottery tickets,[27] impure foods,[28] stolen cars,[29] prison made goods,[30] or intoxicating liquors.[31]

In the case of lottery tickets the prohibition was based upon the evil effect resulting from the sale of such tickets upon states to which they were sent; while the evil inherent in the nature of impure foods and drugs was sufficient to sustain federal regulation. In upholding the prohibition on prison made goods the court stated that it was not the nature of the goods themselves that constituted the evil, but rather that it was the sale of convict made goods in competition with the products of free labor. It held that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison.[32] Similarly, the motor vehicles which are the subject of transportation prohibited in the *Motor Act*[33] are not in themselves inherently evil, yet in the *Brooks*[34] case the court

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[24] Carter v. Carter Coal Co., 298 U.S. 238, 56 Sup Ct. 855, 80 L.Ed. 1160 (1936).
[25] 259 U.S. 20, 42 Sup. Ct. 449, 66 L.Ed. 817 (1922).
[26] 247 U.S. 251, 38 Sup. Ct. 449, 62 L.Ed. 101 (1918); *cf.* Bailey v. Drexel Furniture Co., 259 U.S. 20, 42 Sup. Ct. 449, 66 L.Ed. 817 (1922). (Where a tax on state manufacturers' net incomes for violation of federal child labor provisions was held invalid as an attempt to control a state activity under the guise of the commerce power.)
[27] Champion v. Ames, 188 U.S. 321, 23 Sup. Ct. 321, 47 L.Ed. 492 (1903).
[28] Hipolite Egg Co. v. United States, 220 U.S. 45, 31 Sup. Ct. 364, 55 L.Ed. 364 (1911).
[29] Brooks v. United States, 267 U.S. 432, 45 Sup. Ct. 345, 69 L.Ed. 699 (1925).
[30] Whitefield v. Ohio, 297 U.S. 431, 56 Sup. Ct. 532, 80 L.Ed. 778 (1936).
[31] *In re* Rahrer, 140 U.S. 545, 11 Sup. Ct. 865, 35 L.Ed. 572 (1891).
[32] Kentucky Whip & Collar Co. v. Ill. Cent. R. R. Co., 299 U.S. 334, 57 Sup. Ct. 277, 81 L.Ed. 270 (1937).
[33] 41 Stat 324, 18 U.S.C.A. 408 (1919).
[34] Brooks v. United States, 267 U.S. 432, 45 Sup. Ct. 345, 69 L.Ed. 699 (1925).

felt that although they are in themselves useful and proper subjects of interstate commerce, their transportation by one who knows they have been stolen is "a gross misuse of interstate commerce" and Congress may punish it "because of the harmful result and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions." In comparing the act prohibiting the transportation of prison made goods with the act prohibiting the transportation of liquor into states in violation of the laws of such states the court decided that although the traffic and its effects are different, the underlying policy is the same. The pertinent point is that where the subject of commerce is one upon which the power of the state may constitutionally be exerted by restriction or prohibition in order to prevent harmful consequences, the Congress may, if it sees fit, put forth its power to prevent interstate commerce from being used to impede the carrying out of the state's policy.[35] It is equally certain that an act of Congress prohibiting the transportation of goods made with oppressive child labor into a state in violation of its laws would be upheld as valid under the theory of the above mentioned cases. But such an act would necessarily be limited in its operation to the states which have enacted valid child labor laws, and would not reach areas not having such regulations.

Apparently aware of the limited operation of such an act and not certain that the Child Labor Amendment now seeking ratification will receive the required approval by the states, Congress in 1938 passed the *Fair Labor Standards Act*.[36] This Act prescribes minimum wages and maximum hours for all industries engaged in interstate commerce or in the production of goods for such commerce. It makes it unlawful for any person to transport or sell in commerce any goods in the production of which any employee was employed in violation of the hours and wages provisions. It likewise makes it unlawful to deliver or sell any such goods with knowledge that they are intended for interstate commerce.[37] Further, it prohibits any producer or manufacturer or dealer from shipping or delivering for shipment in interstate commerce any goods produced in an establishment within the United States in or about which within thirty days prior to their removal therefrom any oppressive child labor has been employed.[38] It defines child labor as oppressive whenever an employee under the age of sixteen is employed by an employer (other than a parent) in any occupation; or any employee between the ages of sixteen and eighteen

[35] Kentucky Whip and Collar Co. v. Ill. Cent. R. R. Co., 299 U.S. 334, 57 Sup. Ct. 277, 81 L.Ed. 270 (1937).
[36] Fair Labor Standards Act, 52 Stat. 1060, 29 U.S.C.A. 201-219 (1938).
[37] *Ibid.* § 215 (Prohibited Acts).
[38] *Ibid.* § 212 (Child Labor).

in any occupation which the Chief of the Children's Bureau of the Department of Labor shall find to be hazardous or detrimental to his health and well being.[39] In addition it provides for a $10,000 fine or six months imprisonment for any violation of a prohibited act plus a liability to the employee affected to the amount of unpaid minimum wages or their unpaid overtime compensation as the case may be, and in addition an equal amount as liquidated damages.[40] In passing the regulations Congress stated its findings and policy as follows:

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

(b) It is hereby declared to be the policy of this chapter through the exercise by Congress of its power to regulate commerce among the several States, to correct, and as rapidly as practicable, to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."[41]

The validity of this act was first questioned in the recent case of *Andrew* v. *Montgomery Ward and Co.*,[42] which was decided by Judge Holly of the Seventh District on November 22, 1939. In this case the propriety of a subpoena *duces tecum* ordering a branch of the defendant company to produce its records on the number of hours worked and wages paid to its employees, to facilitate an investigation as to whether the act in question had been violated, was challenged on the grounds of unconstitutionality in respect to the commerce power and the due process clause. Judge Holly in holding the act within the commerce power stated: "Certainly it cannot be maintained now that Congress may not, in the interest of the general welfare of the country, prohibit the shipment in interstate commerce of the products of underpaid and sweated labor." And again: "Regulation of wages and

[39] *Ibid.* § 203.
[40] *Ibid.* § 216 (Penalties; civil and criminal liability).
[41] *Ibid.* § 202 (Congressional finding and declaration of policy).
[42] 30 F. Supp. 380 (N.D. Ill. 1939). Defendant company and its subsidiaries were engaged in shipping goods in interstate commerce to fill mail orders in many states throughout the country.

hours is a proper exercise of the police power. Employer and employee do not stand on a plane of equality. Wages, especially of unskilled employees, tend towards the lowest point at which the laborer cannot subsist. The resulting conditions are of interest not only to the wage earner but to the whole community. The slums of our great cities are, in large part, the fruits of low wages. Vice, crime and disease breed in these districts and spread throughout the community. Certainly . . . it is not an unwarranted exercise of the police power to prescribe minimum wages for the protection of the health and good order of society." Here, it is apparent, the decision was placed on the first finding of Congress, that the existence of certain labor conditions in industries caused commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several states.

Whether on appeal the Supreme Court will uphold the act as valid cannot be asserted with any certainty. Some basis for an expectation that it may uphold the act is found in the fact that although the Supreme Court denied to Congress the right to control hours and wages in cases where the ultimate effect was merely to regulate a purely local matter, it has never held that Congress did not have the power to control such matters where they actually affected interstate commerce. Rather it has upheld such regulation for a limited time due to a grave and national emergency.[43] It has likewise affirmed an act limiting the hours of railroad employees engaged in interstate commerce, even though they may at the same time be engaged in intrastate commerce, as a necessary measure to promote safety by lessening the causes of fatigue.[44] Further, as in the case of prison made goods, the Supreme Court could uphold the *Fair Labor Standards Act*[45] under the third finding of Congress, that existing conditions constitute an unfair method of competition in interstate commerce, since the products of free labor properly compensated cannot successfully compete with the underpaid adult and child labor. Moreover, as in the cases involving the right of the employee to collective bargaining as a necessary right to prevent labor disputes, the Supreme Court may validly hold that a minimum wage is necessary to prevent labor disputes which might burden commerce and the free flow of goods in such commerce. Needless to say the question of minimum wages and maximum hours is as prolific a source of labor disputes as the right of an employee to collective bargaining. But while the court has upheld the right of Congress to regulate such collective bar-

[43] Wilson v. New, 243 U.S. 332, 37 Sup. Ct. 298, 61 L.Ed. 755 (1916).
[44] B. & O. R. R. Co. v. I. C. C., 221 U.S. 612, 31 Sup. Ct. 621, 55 L.Ed. 878 (1911).
[45] 52 Stat. 1060, 29 U.S.C.A. 201-219 (1938).

gaining when the employer agrees to bargain with any group, it has never decided that an employer can be forced to bargain if he has not decided to do so. In such a condition the question of minimum wages and maximum hours might reach a very grave state and the National Labor Relations Board would be powerless to intervene. A strike resulting from such failure of the employer and employee to agree would, in the case of an industry engaged in interstate commerce or manufacturing for interstate commerce, burden and obstruct commerce and prevent the free flow of goods to market. It is obvious that Congress has the right to regulate a matter that would burden interstate commerce in such a manner. The Supreme Court has repeatedly asserted that Congress may use any means in accord with due process to carry out its policy, once that policy has been found to be within one of its enumerated powers.[46] If Congress choose to regulate such commerce by prescribing what hours and wages are to prevail therein, the Supreme Court can in conformity with its past declarations uphold such regulations as valid. That it will, in view of the added fact that the judicial opinion is undergoing a shift because of recent changes in personnel, may confidently be expected.

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[46] McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579 (1819); Ruppert v. Caffey, 251 U.S. 264, 40 Sup. Ct. 141, 64 L.Ed. 260 (1920); Kentucky Whip & Collar Co. v. Ill. Cent. R. R. Co., 299 U.S. 334, 57 Sup. Ct. 277, 81 L. Ed. 270 (1937).