The Constitutional Authority of Several States to Deal Jointly with Social and Labor Problems

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THE CONSTITUTIONAL AUTHORITY OF SEVERAL STATES TO DEAL JOINTLY WITH SOCIAL AND LABOR PROBLEMS*

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IN CONSIDERING the use of interstate compacts to solve the social and labor problems common to more than one state, the question is not whether there shall be governmental control. Today there is such control of many social and labor conditions, and from present indications we will continue to have it. The real question is: What agency is to assume that control?

All problems cannot be divided into the formal classification of state or national. Today we realize that the social and labor conditions of one state may have an effect upon business conducted in another state. Often these conditions are sectional rather than national in scope. For solution of many of the social and labor issues of our present industrial life a middle ground must be found. It must be one that will avoid the excesses of centralized control, with all its dangerous consequences, and at the same time be one which will provide an effective method of handling problems affecting two or more states. This is the goal toward which we strive. Where the problems are regional, federal or individual state legislation is often unsatisfactory.

However, the difficulties in this method must be considered. State problems heretofore solved by use of regional compacts are different in nature as well as complexity from the problems arising out of social and labor conditions. The effectiveness of permanent state compacts in adjusting these latter problems concerning several states is yet unknown. The mere fact that interstate compacts have been an available and satisfactory remedy in the past for disputes involving water rights, boundaries, etc., does not mean that they are a cure for our present-day social and labor troubles.

There are constitutional limitations upon the use of the compacts in certain types of problems, just as there are such restrictions upon federal or state action. But in fields where the federal government cannot act because of the absence of interstate commerce or other constitu-

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2 See pamphlet by Delph Carpenter on *Interstate River Compacts* and Frankfurter and Landis, *A Study in Interstate Adjustments*, (1925) 34 Yale L. J. 730, for lists of such compacts.
tional power, the regional compact is often the only means of solving uniformly certain of these problems. In general, such compacts, so far as applicable to social and labor conditions merely would remove the question of interstate or local commerce from the problem. However, in many situations there still remain other constitutional restrictions upon the use of interstate compacts. What one state cannot do within its own sphere by itself it cannot do with another similar state merely because the United States has consented. The Constitution places restrictions upon the state and federal governments for the benefit of the people which only they can alienate.

II.

Constitutional Limitations Imposed by the Fifth and Fourteenth Amendments

It cannot be assumed that by means of state compacts the states have omnipotent power to deal with all social and working conditions within their borders. The Fifth and Fourteenth Amendments place fairly well-defined constitutional limitations upon certain types of governmental action. Without authority, express or implied, in the Constitution the federal government cannot act. Some problems the state can deal with only because of its police powers. The Supreme Court has found it difficult on more than one occasion to define the boundary of the police power beyond which its exercise becomes an invasion of the guaranty of liberty of person and freedom of contract under the Fifth and Fourteenth Amendments. The use of the compact insofar as social and labor questions are concerned encounters the same difficulty.

The question is still open as to the extent of the power which the national and state government possess in dealing with certain problems pertaining to labor and social conditions. While the compact can unify the efforts of state governments, it cannot create power in them which they do not already possess. In determining the effectiveness of the compact method of adjusting such disputes we must consider the nature and extent of the constitutional authority as it has been defined and clarified by judicial decisions.

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3 Uniform state laws passed separately by each state often may reach the desired result. However, in this method the necessity of permanency is lacking. An interstate compact probably would be so binding on each state involved as to prevent one from withdrawing during the contracting period. See Green v. Biddle, 8 Wheat. 1, 69, 5 L.Ed. 547 (1823).
A. Interstate Compacts Relative to Hours of Employment

More than twenty years ago, in the case of W. C. Ritchie & Co. v. Wayman, it was decided that a law fixing an eight-hour day for women in industry was unconstitutional. The basis of this decision was that such a restriction violated the liberty of an individual to use his time and talents in any way he saw fit. As industrial life became more complex and the actual handicaps of women in industry were realized, the attitude of the courts as to legislation dealing with hours of work for women changed.

There is a long line of cases upholding legislative limitations upon the freedom of employers to contract with women in industry. These cases are based upon the theory that the great mass of women workers cannot secure terms of employment needful from the point of view of public welfare unless they are aided by legislation.

The validity of legislation prescribing how long men shall work is more doubtful. In Holden v. Hardy, the Supreme Court held that the length of time any person, regardless of age or sex, may be employed in dangerous occupations was a matter to be determined by reasonable legislation of state governments. This case related to workers employed in mining and smelting, where conditions of employment bear directly and substantially upon the health of the workers. Because the health of the employee is a concern coming within the police power of the state, the legislation in this case is properly outside the restrictions of the Fifth and Fourteenth Amendments. But in Lochner v. New York, the Court concluded that a law restricting those employed in bakeries to ten hours a day was an arbitrary and invalid interference with the liberty of contract secured by the Fourteenth Amendment. Later, in Bunting v. Oregon, the Supreme Court upheld an act regulating the hours of labor and prescribing a maximum of ten hours a day for any person, whether man or woman, working in any mill, factory, or manufacturing establishment. The law had been attacked upon the ground that it constituted an attempt to fix wages. That contention was rejected.

4 244 Ill. 509, 91 N.E. 695 (1910).
and the act sustained as a reasonable health regulation pertaining to hours of service. It is clear, therefore, that a state can make reasonable regulations relative to the hours of labor of children and women employed in industry. As the law now exists, reasonable regulations of hours or wages may also be made applicable to men employed in dangerous industries or occupations directly involving the public health. In both cases, however, the legislation must be in fact a police power regulation reasonably adapted to that end. Two or more states, in consequence, by interstate compacts may enact uniform regulations pertaining to hours of service provided these regulations can be termed valid health regulations. However, when one state, or two or more states by an interstate compact, make such laws or compacts pertaining to maximum hours of labor which cannot be sustained under the police powers, the compact and the laws would be invalid under the Fourteenth Amendment as infringing upon the rights of employers and employees.

B. STATE COMPACTS RELATING TO WAGES

As to the regulation of wages and the attempt to establish a minimum standard, there is greater difficulty. The war-time case of Wilson v. New,11 upholding the Adamson Act, casts doubt upon the power of the federal government to regulate wages paid railway employees engaged in interstate commerce. While the act in that case was upheld, the case involved an industry which was affected with the public interest, and in addition it dealt with an emergency of an unusually serious character. That case involved a labor dispute in which the two parties refused to come to an agreement as to wages. The result of this refusal was to affect interstate commerce directly. It was the threat to that commerce which gave Congress its power to act, and having acquired jurisdiction in this manner, it derived the right to fix wages in this particular industry in interstate commerce.

Because of the language of the Court, there still remains doubt as to whether the federal government has power to fix wages in industries

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9 Chief Justice Taft in his dissenting opinion in Adkins v. Children's Hospital, 261 U.S. 525, 43 Sup. Ct. 394, 67 L.ed. 785 (1923), was of the opinion that the Bunting case overruled the Lochner case sub silentio. Not being able to reconcile the substantial distinction between a minimum wage law and a maximum hour law in limiting the freedom of contract, he contended that a restriction as to one is no greater in essence than the other and is of the same kind.


engaged in interstate commerce, and even in utilities operating in such commerce, unless a serious threat to the interruption of such commerce can be shown to arise out of the character of the wages being paid.\(^\text{12}\) Apparently similar restrictions are placed upon the power of the states to fix minimum wages.

It was thought in 1916 that the constitutional powers of the several states to regulate wage payments within their borders had been established by the cases of \textit{Stettler v. O'Hara} and \textit{Simpson v. O'Hara}.\(^\text{13}\) These cases upheld an Oregon statute fixing minimum wages for women and minors. Other labor laws restricting wage contracts of employment had also been upheld. Thus, employers of miners had been required to pay for coal by weight before screening.\(^\text{14}\) Employers had been required to redeem cash store orders accepted by their employees in payment.\(^\text{15}\) Payment of salaries in advance had been prohibited.\(^\text{16}\) While some of these laws did not impose a minimum in wages, they did take away from the employee the freedom to agree as to how his wages should be fixed, in what medium they should be paid, and when they should be paid.

But in 1923, in \textit{Adkins v. Children's Hospital},\(^\text{17}\) the Supreme Court held invalid the Minimum Wage Act of 1918 fixing minimum wage standards for adult women in any occupation in the District of Columbia. In holding that the act interfered with the liberty of contract, the Court made a number of statements which indicated limits to legislative authority in fixing wages.

In support of the constitutionality of the Minimum Wage Act, it was urged that the due process clauses impose a standard of fair dealing to be applied to the myriad variety of facts which are involved in modern legislation, and that the Supreme Court had interpreted that standard to mean freedom from arbitrary or wanton interference and protection against spoliation of property. On the other side it was urged that if every law which expediency may suggest may be called a public health or public welfare law and thus become an exercise of police power, the restrictions on the action of the legislative body completely break down, and in effect the legislatures would be permitted to amend the Constitution under the guise of the exercise of police


\(^{13}\) 243 U.S. 629, 37 Sup. Ct. 475, 61 L.ed. 937 (1917). This case was decided by an evenly divided Court without opinion.


\(^{17}\) 261 U.S. 523, 43 Sup. Ct. 394, 67 L.ed. 785 (1923).
power. It is submitted that neither of these statements represents the true test of constitutionality of an attempted exercise of police power. The proper test would seem to be whether or not the act in question is in fact designed to protect the health of employees or to be otherwise within the police power of the state; whether it is reasonably adapted to that purpose; and whether it sets up a standard sufficiently definite and certain for administration. The distinctions made in the cases between hours and wages are pointed out by Mr. Justice Holmes in his dissenting opinion as distinctions of degree. However, it would seem proper that the regulation of wages, as well as hours, might well be directed solely to the necessary protection of health and would, therefore, be a valid exercise of police power.

By basing legislation on a different set of premises than existed in the Adkins case, it may be possible to overcome the objections which the Supreme Court had to that act. Such a law was attempted in New York about two years ago. This law recites that women are under particularly serious disadvantage in bargaining with employers and that the wage standards which are set up under the law are based on a wide variety of facts which must be considered by special boards sitting in respect to particular industries. These boards hold public hearings in which employer, employee, and the public present their views. This law has been held constitutional by one of the lower courts in New York State.

The decision relied upon the considerations which have been indicated above and, in addition, upon the fact that emergency brought about by the depression evoked the power to enact reasonable wage standards.

It is conceivable that in some such manner as this the Adkins decision may be qualified, if not reversed by the Supreme Court itself. If this should happen it could well be that interstate compacts would be workable instruments for the regulation of wages of women and children both in local and interstate commerce. While this has not yet been determined, it may well be that in the future a doctrine will be liberalized along the lines of the Bunting decision in regard to hours of employment.

The industrial development of recent years, which has given rise to widespread demand for governmental control of wages and hours

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18 There the statute provided for a wage based on the needs of the employee rather than upon the value of the services rendered and the ability of the employer to pay. The act set up arbitrary rates of wages.
19 New York Labor Law, Art. 19 (1933). See Note (1933) 43 YALE L. J. 1250 for discussion of this statute.
21 In such a situation there apparently would be no inherent restriction on a similar law pertaining to men employed in industry. Such legislation as to men workers apparently would have to have a more substantial relation to the need of the exercise of health or other police power as concerns men workers.
of employment, may conceivably provide a basis for a change in the attitude of the courts. In the meantime, however, we must recognize certain limitations placed upon the governmental power to regulate generally hours of labor or wage standards. Legislatures have such power so far as women and children are concerned by appropriate and reasonable laws within the police power. Similar control may be exercised where men are employed in dangerous industries or on public works. But unless a given law is a direct health or safety measure, a state cannot regulate constitutionally the hours of labor or wages of men in ordinary industries and pursuits. Under such a constitutional limitation, a state cannot do by interstate compact what is denied to it to do alone.

Whatever jurisdiction the federal government may enjoy in these matters depends upon the interstate commerce clause or some other federal power in certain situations. The validity of the regulation of the payment of wages and of the fixing of hours by the federal government depends upon whether such wages or hours substantially and directly affect the flow of interstate commerce. The recent decision of the Supreme Court in the *Schechter* case\textsuperscript{22} settles this question.

C. State Compacts for Other Social Plans

The authority of the national and state governments within their respective jurisdictions to control child labor, to establish old age unemployment insurance, and to require employers to bargain with their employees collectively are further questions which arise. In certain instances the state constitutions have been considered by state courts to prevent certain types of such legislation. These decisions present peculiar local problems which can be taken care of in many cases by proper amendments to state constitutions, where such amendments prove necessary.

The problems that we meet in these fields are political and economic more than constitutional. They center around the fact that any effort to set up particular standards in any part less than the whole of a territory in which a given industry operates runs the danger of opposition in that territory which is placed at a competitive disadvantage. Also, even in an entire territory a given industry regulated by interstate compacts may migrate to unregulated regions.\textsuperscript{23}

As to certain social and labor questions, when the states have not enacted uniform laws or entered into interstate compacts the federal

\textsuperscript{22} 295 U.S. 495, 55 Sup. Ct. 837, 79 L.ed. 888 (1935).

\textsuperscript{23} An illustration of these problems is the expansion of the bituminous coal mining industry into states south of the Ohio River at a time when production capacity was quite adequate in the older fields. A consideration of the rise of the textile industry in the South also is an illustration of this fact.
government has attempted to impose national regulation. The failure of the states to pass adequate child labor laws inevitably led to the attempt by Congress to solve this question. In the Child Labor Tax Case\(^2\) it was held that the taxing power of Congress could not be used to equalize the discrepancy which resulted from the enactment of child labor laws in one state without their enactment in another competitive state. Such attempt by Congress was held unconstitutional as being in substance an attempt to regulate interstate commerce through the use of the taxing power. The first child labor case, *Hammer v. Dagenhart*,\(^2\) had declared unconstitutional a federal statute purporting to exclude from interstate commerce articles manufactured by the use of child labor. This statute had been passed with the thought that it was similar in principle to the Webb-Kenyon Act, which in pre-prohibition days prevented the shipment of liquor into states in which its sale had been forbidden. The Webb-Kenyon Act was upheld in *Adams Express Co. v. Kentucky*.\(^2\) The Court placed great emphasis on the fact that in that case the particular article involved was inherently of an injurious character, the sale of which had been forbidden. One of the points of difference between the *Hammer* and the *Adams* cases was that in the *Hammer* case exports from the state of origin rather than imports into the state of destination were prohibited. This difference was necessary because it is obvious that without it the manufacturers in the states which have child labor laws would be at a disadvantage everywhere except in their own state.

We may speculate on the basis of later decisions and changed circumstances as to whether the *Hammer* case may be qualified by the Supreme Court in the future. It cannot be said with any degree of security that such a qualification will be made.

It is clear, however, that a state by itself may validly impose under its police power regulations involving child labor. In like manner, several states by interstate compacts may solve this question among themselves. The establishment of uniform old age and unemployment insurance systems also are matters which normally come within the proper sphere of state action. Regional compacts on such matters may prevent migration of employees and establish equal competitive advantages of businesses in the respective states.

### III

**Considerations in Making Interstate Compacts Effective**

We must recognize that one state may seek, for political or economic motives, to take advantage of another and thus impede the use


\(^2\) 238 U.S. 190, 35 Sup. Ct. 824, 59 L.ed. 1267 (1915).
of a compact in regard to social and labor conditions. This difficulty
was encountered in the Colorado River compact, involving water rights
of the adjacent states.

One way to avoid this danger is to so draft these compacts that the
abstention of one state will not preclude the compact from going into
effect in the states which ratify it, thus making it possible for a single
recalcitrant state to hold back legislation over a large area for a long
time.

This brings us to a consideration of the minimum wage compact
with respect to women and children in industry which has been signed
by the commissioners of seven of the important industrial states in the
East, and which has been ratified by the legislatures of New Hamp-
shire and Massachusetts. This compact provides, as it has been sug-
gested a properly drafted compact should provide, that it should go
into effect in the ratifying states without regard to the abstention of
other states which might refuse to sign, ratify, or enact legislation.

This compact is a pioneering effort. Like most pioneering efforts,
it is not perfect. Its drafters were obliged to proceed carefully, partly
because of the underlying constitutional limitations which I have
already discussed and partly in view of the economic and political situa-
tions which we have in mind. The compact was designed to make pos-
sible minimum wage legislation of the character of the New York
statute which has been mentioned before. It does not establish any
fixed interstate or local rates in any industry. The states to the compact
merely agree that they will enact legislation to prevent unjust and
oppressive wage rates affecting women and children. State commis-
sions somewhat similar to those which have been heretofore set up
in New York under the New York Minimum Wage Law are provided
for in this compact. A supervising interstate commission, but without
compulsory powers of any kind, is likewise set up.

The experience in New York has been that, because of the pro-
cedural complexities and the difficulty of obtaining sufficient funds, the
establishment of these minimum wage standards in the various indus-
tries proceeds slowly. But this, of course, is essentially a procedural
problem, and one which can be remedied easily if the legislature desires
to do so. However, there is no strong guaranty that this type of inter-
state compact will produce sufficient uniformity of minimum wage
standards in each of the states which is a party to the compact. This
again will depend in considerable part on the extent to which business
men realize the importance of establishing reasonable standards by
regional action in order to avert the imminent federal control which

27 See Reports Nos. 1325, 1641, and 1850 of the Commission on Interstate Com-
pacts Affecting Labor and Industries to the General Court of Massachusetts.
almost certainly will be assumed if they fail to take advantage of these opportunities.

It also depends not only on the extent to which compacts are made to operate effectively within the states which ratify them, but also on the extent to which they are actually signed and ratified by other states and the extent to which legislation is passed under them by sufficient states to make it possible to regulate regional industries as a whole.

That these problems are quite real must not be overlooked. The extent to which they affect the usefulness of the interstate compact has been made clear not only by the compact signed by the northeastern states with regard to minimum wages for women, but also by the failure to agree last summer upon compacts concerning child labor and maximum hours. In the case of the latter proposal an effort was made to establish a uniform standard of about forty hours a week. The procedure was thus somewhat different from that adopted with regard to minimum wages, where the precise wage to be paid was left to each state. The various commissioners could not agree that forty hours was not too stringent a regulation, and in consequence action was deferred on this proposal. If, on the other hand, a flexible compact had been agreed upon which left to each state the right to determine the maximum hours of employment, the problem would have been partially solved.

**IV**

**Constitutional Amendment to Make Interstate Compacts Effective**

It must be expected that those who advocate amendment to the Federal Constitution as the only way by which social and labor legislation may be surely achieved will be quick to point out all the disadvantages which we have discussed. Unless industry is ready to search out and act upon every opportunity which develops to make the interstate compact a workable instrument of self-government, then it should abandon all pretense of an effort to meet the popular demand and need for legislation by this means.

The processes of democracy are slow. It is our belief that this slowness of democratic action is amply compensated for by the soundness and the justness of the results which are ordinarily achieved in due course of time by such democratic methods. If, however, in the face of the strong beliefs of many people that social and labor legislation of the kind we have been discussing is imperatively necessary, and if, in the face of their determination to obtain such legislation, proposals are made to that end which, though workable, are not made to work, not only will the proposals themselves be discarded in time, but also their faith in democratic processes will be weakened.
It is a fundamental proposition, therefore, that if the interstate compact is to accomplish the purposes which we hope it may accomplish, each state and the business men of each state must earnestly endeavor to forget their particular interests to the extent that it is possible for them to join hands in working out their common problem. Moreover, politics as such must be allowed to play no part in the conferences which may be called to set up compacts or in the committees which may be appointed to administer the interstate and intrastate application of the laws passed pursuant to such compacts.

If, in the negotiations which take place in an endeavor to adopt interstate compacts pertaining to social and labor conditions, it becomes apparent that the constitutional barriers which I have pointed out are impassable, then we should not hesitate to examine the possibilities of an amendment to the Federal Constitution of such a nature as to permit interstate compacts in the labor legislation field. Such an amendment will not enlarge the powers of the federal government. My concern as to the alteration of the Constitution does not relate to the mere fact of alteration. The Constitution was never intended to be and has not been a fixed and rigid instrument. This is indicated not only by the changing interpretations of its provisions, but also by the long list of amendments. My concern is with the extension of the federal control which may be set up by such an amendment. We should avoid the dangers inherent in a centralized bureaucracy, with the political spoils upon which it may lay its hands, with its ignorance of and lack of interest in local conditions, and with the extraneous considerations which bear upon the judgment of legislators when local or regional problems are made the subject of national political bargaining.

It is for these reasons that amendments should not be passed, which would permit Congress to regulate without restriction all industries over any territory and over all subjects which it might consider related to social welfare. But an amendment permitting the adoption of social legislation by the states by means of the procedure already available under the interstate compact clause of the Federal Constitution would be another matter. If such an amendment proves necessary to make the interstate compact work, then it should be considered with due care.

The solution of regional problems should be on a regional basis, subject to the qualifications pointed out above: first, that the constitutional authority of the state and federal governments acting together must be ascertained and, if necessary, established; and second, that the will to cooperative action must exist in the states and in the industries of those states. It is believed that the interstate compact will prove to be a just and workable instrument in the field of social and labor legislation.