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COMMENTS

CONSTITUTIONAL LAW — COMMERCE CLAUSE — SCOPE OF FEDERAL POWER OVER INTRASTATE ACTIVITIES — FAIR LABOR STANDARDS ACT — Authority of Congress to regulate intrastate activities through the commerce clause is derived from two principal sources: (1) the federal power to preserve the flow of commerce by eliminating potential burdens and obstructions; (2) the federal power to prohibit the interstate transportation of goods resulting in the spread of conditions which Congress considers detrimental to the general welfare. Utilization of the first source of authority over intrastate activities is exemplified by the National Labor Relations Act,¹ enabling the federal government to regulate an aspect of local production likely to burden commerce. Utilization of the second source of authority is exemplified by the Fair Labor Standards Act,² recently held constitutional in the case of *United States v. Darby Lumber Co.*³ The FLSA prohibits the interstate transportation of goods⁴ produced by industries not complying with the minimum wage and hour standard established for all employees "engaged in commerce or in the production of goods for commerce."⁵ Since the *Darby* case indicates a more liberal interpretation of the commerce power than hitherto announced, it warrants an examination of the scope of federal jurisdiction over intrastate activities under the two theories of the commerce clause.

I.

A brief resume of the evolution of Congressional power over commerce may be helpful in appreciating this recent development. The power to regulate interstate commerce was declared by the Supreme Court in the *Lottery Case*⁶ to include the power to prohibit absolutely the interstate shipment of certain articles. The Court, in that decision, announced in broad terms that the power over commerce was plenary, subject only to the limitations found in the Constitution. Development

¹ 49 Stat. L. 449 (1935), 29 U. S. C. (Supp. 1939), §§ 151-166.

² 52 Stat. L. 1060 (1938), 29 U. S. C. (Supp. 1939), §§ 201-219. On the FLSA in general, see Cooper, "Extra Time for Overtime' Now Law," 37 MICH. L. REV. 28 (1938); 39 COL. L. REV. 818 (1939); 52 HARV. L. REV. 646 (1939).

³ (U. S. 1941) 61 S. Ct. 451, reversing (D. C. Ga. 1940) 32 F. Supp. 734.

⁴ 52 Stat. L. 1068, § 15 (a) (1) (1938), 29 U. S. C. (Supp. 1939), § 215 (a) (1). It also prohibits the interstate transportation of goods produced in violation of the child labor provision, § 12. Although § 12 was not in issue in the *Darby* case, it was automatically upheld when the wage and hour provisions were found valid.

⁵ 52 Stat. L. 1062-1063, §§ 6, 7 (1938), 29 U. S. C. (Supp. 1939), §§ 206, 207.

⁶ *Champion v. Ames*, 188 U. S. 321, 23 S. Ct. 321 (1903).

of the federal power to prohibit commerce was advanced by judicial approval of statutes prohibiting the interstate movement of articles ranging from diseased cattle to misbranded foods.⁷ In the broader field of trade regulation, a virtual prohibition of the interstate transportation of goods produced by illegal trusts was used to reinforce the Sherman Act.⁸ Apparently, Congress could determine what articles were fit for distribution through interstate commerce, and could prescribe the conditions precedent to admissibility. But long before the limits of the commerce power as announced in the *Lottery Case* had been reached, the Supreme Court temporarily stemmed its growth in *Hammer v. Dagenhart*,⁹ which declared unconstitutional a prohibition upon the interstate shipment of goods produced with child labor. This case stated that the power to prohibit interstate transportation extended only to articles obnoxious in themselves, and that the Child Labor Act was in reality a regulation of production, a local matter, rather than a regulation of interstate commerce. While neither distinction was justified by the language or logic of previous decisions,¹⁰ there was a difference between the result of the Child Labor Act and the prior prohibitory legislation. A statute which had the effect of requiring industries to employ individuals of certain age was a greater intrusion into the realm of state affairs than one prohibiting the transportation of articles such as lottery tickets or misbranded foods. It was not surprising that a court fearing the encroachment of the federal government into state spheres should establish the doctrine that the commerce power is limited by the effect its exercise may have upon intrastate activities.¹¹

Subsequent decisions undermined the significance of *Hammer v.*

⁷ Lottery tickets, *Champion v. Ames*, supra; diseased cattle, *Reid v. Colorado*, 187 U. S. 137, 23 S. Ct. 92 (1902); impure food, *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 S. Ct. 364 (1911); women enticed for immoral purposes, *Hoke v. United States*, 227 U. S. 308, 33 S. Ct. 281 (1913), and *Caminetti v. United States*, 242 U. S. 470, 37 S. Ct. 192 (1917); misbranded food, *McDermott v. Wisconsin*, 228 U. S. 115, 33 S. Ct. 431 (1913); prizefight films, *Weber v. Freed*, 239 U. S. 325, 36 S. Ct. 131 (1915); intoxicating liquors violating laws of states of destination, *Clark Distilling Co. v. Western Maryland Ry.*, 242 U. S. 311, 37 S. Ct. 180 (1917).

⁸ 26 Stat. L. 210, § 6 (1890), 15 U. S. C. (1934), § 6. Sec. 6 authorizes the government to confiscate goods in interstate commerce produced by invalid trusts. The main portion of the Sherman Act, prohibiting restraints of trade, can be classified as a protection of the flow of commerce. A similar example is the commodities clause, which prohibits railroads from hauling their own goods, upheld in *United States v. Delaware & H. Co.*, 213 U. S. 366, 29 S. Ct. 527 (1909).

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

¹⁰ See Gordon, "The Child Labor Law Case," 32 HARV. L. REV. 45 (1918).

¹¹ Infringement upon state activities was the principal reason why the lower court decision in the *Darby* case declared the FLSA unconstitutional. *United States v. Darby Lumber Co.*, (D. C. Ga. 1940) 32 F. Supp. 734.

Dagenhart. In *Kentucky Whip & Collar Co. v. Illinois Central R. R.*¹² the Court sanctioned the attempt of Congress to prohibit the interstate transportation of convict-made goods destined for states forbidding the sale of such goods. The effect of the prohibition upon the states of production was not considered. Because the prohibition applied only to shipments into states having related statutes, and not to shipments into states permitting the sale of prison-made goods, the decision was not a complete repudiation of *Hammer v. Dagenhart*. It also might be distinguished on the ground that the effect upon intrastate activities caused by prohibiting the interstate shipment of convict-made goods is not as great as that resulting from prohibiting the interstate movement of child-made goods.

An effort of Congress to regulate certain phases of production through its power to preserve the flow of commerce was rebuked when the National Industrial Recovery Act was declared unconstitutional in *Schechter Poultry Corp. v. United States*.¹³ The Supreme Court refused to accept the economic argument that the regulation of wages and hours would raise prices and bring about prosperity, thus promoting commerce. Again in *Carter v. Carter Coal Co.*¹⁴ the Court failed to find a relation between production and commerce, and ignored the contention that the regulation of wages and hours would prevent labor disputes which obstruct commerce. However, the regulation of at least one aspect of production was recognized to be within the scope of the commerce power in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,¹⁵ upholding the NLRA. The Court there determined that the promotion of harmonious labor relations is a proper means of preventing obstructions to commerce caused by strikes in industries "affecting commerce."

¹² 299 U. S. 334, 57 S. Ct. 277 (1937). *Hammer v. Dagenhart* also was weakened by *Electric Bond & Share Co. v. Securities & Exchange Commission*, 303 U. S. 419, 58 S. Ct. 678 (1938), sustaining the right of Congress to prohibit interstate transactions of utilities which do not make certain disclosures. Other cases upholding Congressional prohibitory legislation since *Hammer v. Dagenhart* are: *Brooks v. United States*, 267 U. S. 432, 45 S. Ct. 345 (1925) (stolen motor vehicles); *Gooch v. United States*, 297 U. S. 124, 56 S. Ct. 395 (1936) (kidnapped persons).

¹³ 295 U. S. 495, 55 S. Ct. 837 (1935).

¹⁴ 298 U. S. 238, 56 S. Ct. 855 (1936).

¹⁵ 301 U. S. 1, 57 S. Ct. 615 (1937). Congressional power to protect the flow of commerce also is the constitutional basis for fixing minimum milk prices for the purchases of milk "in the current of interstate . . . commerce, or which directly burdens, obstructs or affects interstate . . . commerce." *United States v. Rock Royal Co-op.*, 307 U. S. 533, 59 S. Ct. 993 (1939); 48 Stat. L. 34 (1933), as amended, 7 U. S. C. (Supp. 1939), § 608b. See 39 MICH. L. REV. 621 (1941). Both the power to protect commerce, and the power to prevent the spread of evil through commerce form the constitutional basis for the regulation of tobacco quotas. *Mulford v. Smith*, 307 U. S. 38, 59 S. Ct. 648 (1939).

Since the *Jones & Laughlin* case, the coverage of the NLRA has undergone considerable expansion by interpretation. The Court, in that case, emphasized the profound effect the Jones & Laughlin Steel Corporation had upon commerce because of its large size and its great volume of interstate business. Subsequent decisions have minimized this feature. The Court has expressly denied that the jurisdiction of the NLRB depends upon the size of a particular industry, or the percentage of its business involved in interstate commerce.¹⁶ To regulate the whole field of labor relations affecting commerce it is necessary to regulate all of the small composite parts. Consequently, as presently defined, the concept "affecting commerce" refers to the possibility that labor relations as a whole may burden commerce, not that the labor relations of any particular industry under the NLRA necessarily have such an effect.

2.

United States v. Darby Lumber Co. presents further judicial recognition, in broader terms, that production is not a thing divorced from commerce, and that it may be subject to regulation through Congressional control over interstate commerce. In reaching its decision, the Court first establishes the constitutionality of section 15 (a) (1) of the Fair Labor Standards Act, which prohibits the interstate transportation of goods produced in violation of the wage and hour provisions. Starting with the premise that the commerce power includes not only those measures aiding, fostering and protecting commerce, but also those prohibiting commerce, the Court repudiates the limitation of *Hammer v. Dagenhart* which restricted the latter aspect of the power to articles obnoxious in themselves. Rather, Congress "is free to exclude from the

¹⁶ *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453 at 567, 58 S. Ct. 656 (1938); *National Labor Relations Board v. Fainblatt*, 306 U. S. 601 at 606, 59 S. Ct. 668 (1939). Purely on the basis of the facts of the NLRB cases it is possible to discover a judicial regard for the volume of an employer's interstate commerce. Of the industries held by the Supreme Court to be under the jurisdiction of the NLRB, the one with the lowest percentage (37%) of interstate imports and exports, cumulatively, is a large canning factory, so it may have a substantial volume of interstate commerce even though such commerce may be a small percentage of a large business. *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, supra. The employers which are small in size in the NLRB cases have a large percentage of their business in interstate commerce, so may have substantial volume because of a high percentage of a small business. In *National Labor Relations Board v. Fainblatt* the employer produced only one-half of one per cent of the men's clothes in the country, but exported 80 per cent of his product, and imported most of his raw materials. For a similar situation, note the facts in *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 301 U. S. 58, 57 S. Ct. 615, 630, 645 (1937).

commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use."¹⁷ The harm at which the FLSA is aimed is the economic coercion that forces industries in one state to restrict wages and maintain hours in order to compete with goods produced under inferior labor conditions in another state.

While the Court expends considerable argument to show that the incidental effect upon activities within states of destination furnishes no grounds for invalidating the FLSA, it gives little attention to whether the effect upon activities within the state of original production affects the validity of the act. The latter possibility is briefly dismissed in overruling the thesis of *Hammer v. Dagenhart* by a statement that a measure regulating intrastate affairs in *either* the state of destination or the state of production is not unconstitutional if the regulation flows from the supreme power of Congress to prevent the interstate distribution of articles injurious to the public welfare. Thus, the Court applies the broad language of the *Lottery Case* to its fullest extent in upholding the FLSA.

The above portion of the opinion would have been sufficient to sustain the fundamental principles of the FLSA. If Congress can prohibit the interstate transportation of goods produced under substandard labor conditions, it certainly can announce the requisites of standard labor conditions. But it was necessary expressly to uphold the wage and hour provisions, sections 6 and 7, because one of the indictments in the *Darby* case was for the separate violation of section 15 (a) (2), which prohibits the contravention of sections 6 and 7. Furthermore, the provision enabling employees to sue employers for violation of the act¹⁸ is based on sections 6 and 7, not on the prohibition of commerce clause.

Validity of the wage and hour provisions, according to the Court, depends upon whether this factor of production so affects commerce as to be within Congressional power. In finding that wages and hours do so affect commerce, the concept "affecting commerce" is given a different meaning from that attributed to it in the NLRA cases. The Court does not say the regulation of wages and hours is necessary to protect the flow of commerce. It does not spell out the proposition that just as poor labor relations may lead to strikes obstructing commerce, inferior wages and hours may cause labor disputes which will burden commerce; NLRB cases are cited merely as examples of how intrastate activities may be regulated in the exercise of the commerce power.

¹⁷ *United States v. Darby Lumber Co.*, (U. S. 1941) 61 S. Ct. 451 at 457.

¹⁸ 52 Stat. L. 1069, § 16 (b) (1938), 29 U. S. C. (Supp. 1939), § 216 (b).

The real basis for the constitutionality of the wage and hour provisions as such is found in the Court's statement that,

"Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities."¹⁹

In other words, since Congress has power to prohibit interstate shipment of particular articles, it can proceed a step farther to regulate directly their production before they reach the channels of commerce.²⁰ The prohibitory provision is an exercise of the commerce power; therefore any measure which reasonably promotes the enforcement of that provision necessarily affects commerce. This is more than an adoption of Justice Holmes' dissent in *Hammer v. Dagenhart*, for his opinion was predicated on the supposition that the Child Labor Act confined itself to prohibiting the interstate transportation of certain goods and did not propose directly to regulate production.

The Court states that it *also* believes the wage and hour provisions can be sustained independently of the provision of the act prohibiting commerce. The independent ground for the provisions is not the direct prevention of obstruction to commerce, as in the NLRB cases. Instead, the Court points out that the goods produced under substandard conditions in competition with goods produced under better conditions will destroy or impair local businesses, causing a general dislocation of commerce itself. Such a relation between commerce and production is reminiscent of the indirect economic arguments rejected in several previous cases.²¹ An analogy is drawn between the purpose of the FLSA and the object of the anti-trust acts to suppress unfair competition, the difference lying only in the types of unfair competition suppressed by the respective statutes. Low wages and long hours are considered means of unfair competition, just as are rebates, false advertising and other practices. At most, this portion of the decision implies that there are several constitutional bases for the wage and hour provisions, any one of which is sufficient in itself to support them. It does not mean that the provisions would be invalid if they could not be upheld entirely on

¹⁹ *United States v. Darby Lumber Co.*, (U. S. 1941) 61 S. Ct. 451 at 460.

²⁰ The power to regulate wages and hours of employees who may be engaged in the production of goods for both intrastate commerce and interstate commerce where the two are inseparable is sustained on the basis of *Curran v. Wallace*, 306 U. S. 1 at 11, 59 S. Ct. 379 (1939), and cases there cited.

²¹ See notes 13 and 14, *supra*.

the theory of the NLRA or the anti-trust acts.²² Nor does anything in the decision indicate that the prohibition of commerce would be invalid unless the wage and hour provisions could be independently upheld.

Stated briefly, the wage and hour provisions are sustainable as necessary and proper supplements to the prohibition of the interstate transportation of goods produced under substandard working conditions. The ability of Congress to restrain the interstate shipment of such goods, in turn, is derived from the power to prohibit interstate commerce for certain purposes. If validity of the wage and hours provisions depends at all on the "affecting commerce" concept, in the sense of promoting or protecting the flow of commerce, the economic effect on commerce of permitting the spread of goods produced under substandard conditions is sufficient to bring wages and hours within the scope of Congressional authority. Upon last analysis, the FLSA may be regarded as a valid exercise of Congressional power to prevent the channels of interstate commerce from being used as a medium for spreading a condition or activity which Congress deems detrimental to the general welfare.²³

The doctrine of the *Darby* case probably does not present an alternative constitutional basis for the NLRA. Conditions which Congress can remedy on this theory are those capable of dissemination through commerce. The evils of low wages and long hours are reflected in the price of the product, and hence may be propagated by commerce. But it is not so clear that unwholesome labor relations are reflected in products shipped in commerce.²⁴ If Congress in the future desires to regulate a particular intrastate activity regulation of which is not necessary for a direct protection of commerce, the activity may nevertheless be within Congressional power provided it results in a condition which may be spread through interstate commerce to the detriment of other states. The next logical step in expanding federal power is for the Court to permit Congress to prohibit interstate commerce merely to retard undesirable intrastate activities. While the shipment of certain

²² Once the Court has established the validity of prohibiting the interstate shipment of goods produced under substandard labor conditions, it would be rather anomalous to hold that a provision which amplifies the prohibition by enumerating standard conditions is invalid unless there is some independent constitutional basis for it.

²³ Since the wage and hour provisions can be upheld as supplements to the prohibition clause, they might be sustainable even in the absence of a prohibition of commerce. Both the prohibition clause and the wage and hour provisions are methods of accomplishing the main purpose of preventing commerce from being used to spread an evil. If Congress chooses, it should be able to employ the latter method without also utilizing the former.

²⁴ Unless it is assumed that no collective bargaining, or unregulated collective bargaining, usually results in lower wages and longer hours, and hence lower prices.

articles may not be detrimental to other states, the ability to market them in interstate commerce helps keep alive the objectionable condition in the producing state. Congress might be able to eradicate this stimulus,²⁵ and directly regulate the intrastate activity as a supplementary measure.

3.

The broad interpretation of the commerce power utilized by the Court in sustaining the FLSA is of importance principally as a guide for future legislation. The actual coverage of the act probably is no more inclusive than if it were upheld solely as a protection of commerce similar to the NLRA. The application of the FLSA does not depend upon the size of an industry, or upon the percentage of its products entering interstate commerce.²⁶ But in view of the constant expansion of the jurisdiction of the NLRB, it is very doubtful if the application of the NLRA is restricted by size or percentage factors. An industry of any size shipping any amount of goods into interstate commerce at fairly regular intervals is subject to both acts.²⁷ Variations in the coverage of the two statutes are due mostly to differences in their wording.²⁸

Every employee in an industry shipping goods in commerce is entitled to benefits under the FLSA unless he is not engaged in the "production of goods for commerce."²⁹ In view of the act's liberal

²⁵ Under this interpretation of the commerce clause the NLRA could definitely be brought within the theory of the Darby case, if the statute were worded appropriately. It might also permit the federal government to prescribe safety devices for industries producing goods for commerce, the lack of which do not necessarily result in lower prices, capable of being spread in commerce, as do inferior wages and hours.

²⁶ *United States v. Darby Lumber Co.*, (U. S. 1941) 61 S. Ct. 451 at 461.

²⁷ Preventing the spread of evil through interstate commerce is merely the general basis for the constitutionality of the FLSA, and undoubtedly will not be used as a factor in determining whether a particular industry is under the act. A producer operating under substandard working conditions who ships in interstate commerce could not avoid the act by showing that he is not spreading the evil because his product sells in other states at a price as high as the price of similar goods produced in the states of destination. The Court precludes the possibility of having seriously to consider such a contention by mentioning several grounds for sustaining the FLSA.

²⁸ The constitutional phrase of the FLSA is "employees . . . engaged in commerce or in the production of goods for commerce." 52 Stat. L. 1062 (1938), 29 U. S. C. (Supp. 1939), § 206. The constitutional phrase of the NLRB is "to prevent any person from engaging in any unfair labor practices affecting commerce." 49 Stat. L. 453 (1935), 29 U. S. C. (Supp. 1939), § 160 (a).

²⁹ Interpretative Bulletin No. 1, § 3, WAGE AND HOUR MANUAL 130 (1940). Whether goods are produced for interstate commerce depends upon the intent of the producer at the time of production, and is unchanged by subsequent events. Interpretative Bulletin No. 5, § 2, WAGE AND HOUR MANUAL 131 (1940).

definition of a person engaged in the production of goods to include a person "in . . . any manner working on such goods, or in any process or occupation necessary to the production thereof, in any state,"³⁰ the possibility of such an exclusion is practically hypothetical.³¹ The NLRA in prohibiting the engaging in unfair labor practices affecting commerce may, nevertheless, be broader than the FLSA in certain situations. A company which conducts two distinct businesses, one intrastate and the other interstate, may have its intrastate business subject to the NLRA because labor disturbances in it would have repercussions in the interstate business affecting commerce. Employees of the intrastate business would not be engaged in an occupation necessary for the production of goods by the interstate business, and therefore would not be under the FLSA.³²

Because of the inclusive definition of a person engaged in the production of goods for commerce, it is claimed that the FLSA applies to an industry sending no goods into commerce, directly or indirectly, but whose activities are necessary for production in another industry which does ship in commerce.³³ Thus an employee subjects his employer to the FLSA when the employee is engaged in an occupation necessary for the production of goods for commerce although the goods actually entering interstate commerce are produced by another company. Since the former production also affects commerce, the industry probably is under the NLRA.³⁴

A manufacturing or processing plant importing raw materials from

³⁰ 52 Stat. L. 1061, § 3 (j) (1935), 29 U. S. C. (Supp. 1939), § 203 (j).

³¹ See Interpretative Bulletin No. 1, § 5, WAGE AND HOUR MANUAL 130 (1940), which claims that the maintenance of an employee on the payroll is proof that he is necessary for the production of the goods. The producer has the burden of proving that a particular employee is not engaged in the production of goods for commerce.

³² In *Virginia Electric & Power Co. v. National Labor Relations Board*, (C. C. A. 4th, 1940) 115 F. (2d) 414, a utility engaged in distributing gas locally, operating a local streetcar and bus line, and distributing electricity interstate, was held to be under the jurisdiction of the NLRB as to the first two activities as well as the last because of the repercussions a labor dispute in the former might cause in the latter. It is quite probable that the gas, bus, and streetcar employees are not under the FLSA because their occupation is in no way necessary for the interstate distribution of the electricity.

³³ Interpretative Bulletin No. 5, § 11, WAGE AND HOUR MANUAL 135 (1940). The FLSA includes tool and die concerns which sell their products within the state for use by producers of goods for commerce. See 4 W. H. R. 73 (1941) where the Wage and Hour Division ruled that employees engaged in the installation of oil tanks sold to oil companies within the state are under the FLSA when the tanks will be used to store oil, some of which will be shipped in interstate commerce.

³⁴ *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 59 S. Ct. 206 (1938); *Consumers Power Co. v. National Labor Relations Board*, (C. C. A. 6th, 1940) 113 F. (2d) 38.

other states, but selling entirely to consumers within the state, probably must comply with the NLRA.³⁵ A strike at the receiving end would obstruct commerce as much as one at the producing end. Such an industry, however, is not under the FLSA because it has no employees engaged in the production of goods for commerce.³⁶ While a company importing goods from other states and selling intrastate is not "engaged in the production of goods for commerce," it may be "engaged in commerce" and consequently subject to the FLSA. This includes intrastate wholesalers importing merchandise from other states because the goods are in the stream of commerce as long as they are in the original packages.³⁷

An employer does not escape application of the FLSA or NLRA by selling his goods within the state when it is known that the vendee or some subsequent vendee will ship them out of the state.³⁸ The problem of tracing the goods is more difficult, however, when they are sold within the state to another industry where they are combined with other goods to create a finished product, or are substantially changed in form before being exported. Since the FLSA defines "goods" as any part or ingredient,³⁹ it is contended that the first producer is subject to the FLSA.⁴⁰ No NLRB case has gone quite that far,⁴¹ but if the courts trace the goods into their combined or altered form in applying the FLSA, it seems likely that the production of the component parts would be deemed to be "affecting commerce."

A detailed speculation as to the coverage of the FLSA⁴² is not warranted by the *Darby* case, but in view of the unrestrained manner in which the Court upheld the FLSA, the liberal interpretations issued by the Administrator of the FLSA⁴³ probably will be sustained. At least, a producer who reasonably contemplates that any of his goods in

³⁵ The case closest approaching this fact situation is *National Labor Relations Board v. A. S. Abell Co.*, (C. C. A. 4th, 1938) 97 F. (2d) 951, in which a newspaper imported most of its materials, but shipped only 7 per cent of its circulation into interstate commerce.

³⁶ Interpretative Bulletin No. 5, § 10, WAGE AND HOUR MANUAL 135 (1940).

³⁷ Interpretative Bulletin No. 5, §§ 14, 15, WAGE AND HOUR MANUAL 136 (1940). For the problem of the wholesaler-retailer, see *id.* 137.

³⁸ Interpretative Bulletin No. 5, § 4, WAGE AND HOUR MANUAL 132 (1940).

³⁹ 52 Stat. L. 1060, § 3 (i) (1938), 29 U. S. C. (Supp. 1939), § 203 (i).

⁴⁰ Interpretative Bulletin No. 5, §§ 5, 6, WAGE AND HOUR MANUAL 132 (1940).

⁴¹ In *National Labor Relations Board v. Idaho-Maryland Mines Corp.*, (C. C. A. 9th, 1938) 98 F. (2d) 129, the NLRA was held not to apply to a California mine selling ore to the United States, which processed the metal and shipped it out of the state.

⁴² For other speculations as to the coverage of the FLSA see, 52 HARV. L. REV. 646 at 650 (1939); 39 COL. L. REV. 818 at 828 (1939).

⁴³ See WAGE AND HOUR MANUAL 125-151 (1940).

the usual course of business will enter the channels of interstate commerce is unwise to question the applicability of the act to any of his employees unless he can show that they had nothing whatever to do with the production of the goods for commerce, or unless the producer comes within one of the statutory exceptions.⁴⁴

⁴⁴ For a discussion of statutory exemptions, see *WAGE AND HOUR MANUAL* 151-276 (1940).