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Labor Law-Fair Labor Standards Act-- Coverage of Construction Workers

David G. Davies
University of Michigan Law School

LABOR LAW—FAIR LABOR STANDARDS ACT—COVERAGE OF CONSTRUCTION WORKERS—Respondent construction firm was engaged in building a dam, the sole purpose of which was to enlarge a reservoir that supplied water to the city of Corpus Christi, Texas. Industrial producers of goods for interstate commerce and operators of instrumentalities of interstate commerce consumed nearly half of the water supplied by the city's system. The Secretary of Labor sought an injunction against violations of the overtime provisions of the Fair Labor Standards Act[1] The district court granted the injunction; the court of appeals reversed,[2] relying primarily upon the "new construction" doctrine. On certiorari to the United States Supreme Court, *held*, affirmed, four Justices dissenting. Although the new construction rule was not a proper basis upon which to deny coverage, construction workers in this case, nevertheless, were too remotely related to the production goods for interstate commerce to come within the scope of the act. *Mitchell v. H. B. Zachry Co.*, 362 U.S. 310 (1960).

The FLSA governs a segment of labor law in which Congress has chosen to exercise a jurisdiction less extensive than that available to it under the commerce clause.[3] Since the passage of the act in 1938, the courts have tended to expand the boundaries of its application. During the past seven years this has been particularly true in the construction industry. In the principal case, however, the Court takes a restrictive view of further expansion of federal wage and hour regulation. In doing so the Court completes the unfinished picture left in 1955 by its decision in *Mitchell v. Vollmer*[4] and clarifies the distinction between the two branches of coverage of individual workers: those engaged "in commerce" within the meaning of section 3(b) of the act and those employed "in the production of goods for commerce" under section 3 (j).

The distinction between these two branches is central to the history of the application of the FLSA. Early litigation under the act dealt primarily with the more general "production" wording of section 3 (j) and resulted

1 52 Stat. 1061 (1938), as amended, 29 U.S.C. § 201 (1958).
2 H. B. Zachry Co. v. Mitchell, 262 F.2d 546 (5th Cir. 1959).
3 Kirschbaum v. Walling, 316 U.S. 517 (1942) (dictum).
4 349 U.S. 427 (1955).

in the extension of coverage to employees connected by an indirect causal relationship to interstate operations.[5] On the other hand, "in commerce" coverage was at first limited to operational employees immediately concerned with the movement of goods.[6] Then, in *Overstreet v. North Shore Corp.*,[7] the Court drew upon an old Federal Employers' Liability Act decision[8] to extend "in commerce" coverage to maintenance employees. In one respect this proved an unfortunate importation, for within FELA jurisprudence was a doctrine, resulting from a narrow interpretation of the commerce clause, that construction of new facilities did not come within the reach of Congress before the facilities were actually placed in service.[9] Through *Overstreet,* this "new construction rule" became embedded in the FLSA decisions of the lower courts as a limitation on the scope of the phrase "in commerce."[10] By further importation, the rule also became a limitation on "production of goods" coverage.[11]

In 1955 *Mitchell v. Vollmer*[12] summarily dismissed the new construction rule as belonging to "another vintage." This decision was the culmination of a gradual expansion of application of the FLSA to construction activities. Expansion had followed two routes: first, an attempt to use the broader concept of "production of goods" to reach suppliers of construction materials for transportation facilities;[13] and, second, examination of the degree of integration which a facility under construction would have with existing facilities when completed rather than during its construction,[14] a technique built upon the traditional "improvement" exception

[5] *E.g.*, Kirschbaum v. Walling, *supra* note 3, at 524, in which the Court held that operating and maintenance employees of the owner of a loft building, space in which was rented to persons producing goods principally for interstate commerce, performed work "necessary to the production of goods for commerce."

[6] Higgins v. Carr Bros., 317 U.S. 572 (1943); Walling v. Jacksonville Paper Co., 317 U.S. 564 (1943); Overnight Motor Co. v. Missel, 316 U.S. 572 (1942).

[7] 318 U.S. 125 (1943).

[8] Pedersen v. Delaware, L. & W.R.R., 229 U.S. 146 (1913).

[9] Raymond v. Chicago, M. & St. P. Ry., 243 U.S. 43 (1917).

[10] *E.g.*, Van Klaveren v. Killian-House Co., 210 F.2d 510 (5th Cir. 1954); Scholl v. McWilliams Dredging Co., 169 F.2d 729 (2d Cir. 1948); Nieves v. Standard Dredging Co., 152 F.2d 719 (1st Cir. 1945). The Supreme Court impliedly recognized the doctrine in Fitzgerald Co. v. Pedersen, 324 U.S. 720 (1945). Construction workers were given special treatment in Murphy v. Reed, 335 U.S. 865 (1948). Mr. Justice Rutledge's partial dissent shows that some consideration was given to the status of new construction at that time.

[11] *E.g.*, Spencer v. Porter, 183 F.2d 445 (8th Cir. 1950); Parham v. Austin Co., 158 F.2d 566 (5th Cir. 1946); Hartmaier v. Long, 361 Mo. 1151, 238 S.W.2d 332, *cert. denied,* 342 U.S. 833 (1951). For an extreme example of differentiation between the "in commerce" and the "production of goods" phraseology, see Schroeder v. Clifton, 153 F.2d 385 (10th Cir.), *cert. denied,* 328 U.S. 858 (1946), *holding disapproved,* H.R. REP. No. 1453, 81st Cong., 1st Sess. 15 (1949).

[12] *Supra* note 4, at 429.

[13] Alstate Constr. Co. v. Durkin, 345 U.S. 13 (1953); Thomas v. Hempt, 345 U.S. 19 (1953); Tobin v. Johnson, 198 F.2d 130 (8th Cir. 1952), *cert. denied,* 345 U.S. 915 (1953).

[14] Mitchell v. Chambers Constr. Co., 214 F.2d 515 (10th Cir. 1954); Bennett v. V. P. Loftis Co., 167 F.2d 286 (4th Cir. 1948); Walling v. McCrady Constr. Co., 156 F.2d 932 (3d Cir.), *cert. denied,* 329 U.S. 785 (1946); Walling v. Patton-Tulley Transp. Co., 134 F.2d 945 (6th Cir. 1943).

to the new construction doctrine. The *Vollmer* decision followed the latter of these two approaches. It did not categorically abolish the new construction exception to coverage;[15] rather, it expanded the test of integration with existing facilities to a point where little construction "in commerce" could be imagined which would be sufficiently independent to be "new."[16] *Vollmer* did not make clear whether its broader concept of integration would also be applicable to "production of goods" litigation, the older arena of FLSA contention in which integration with existing facilities is a far less frequent factor and into which the new construction doctrine entered only indirectly from the FELA decisions. Unlike the expanding "in-commerce" jurisdiction, the once-broader section 3 (j), "production of goods," branch was restricted in 1949 by an amendment which substituted "directly essential" for "necessary" in describing the relationship between covered activities and the production for commerce itself.[17] The Court had not previously dealt with this amendment.[18]

Dictum in the *Zachry* decision appears to confirm the thesis that *Vollmer* destroyed the new construction rule. At the same time, however, when coverage is predicated on section 3 (j), the fact that the activities involve construction remains a relevant factor in determining the issue of remoteness within the 1949 amendment.[19] In essence, the Court in *Zachry* confirms the "factor" approach suggested by the Wage and Hour Administrator.[20] The facts of the principal case indicate that three factors will be particularly important in predicting coverage: (1) *Whether the facility is to be used "in commerce" or for "the production of goods for commerce."* If the former, the construction is one degree more closely related to commerce proper. Moreover, the restrictive effect of the 1949 amendment is not encountered. There is no reason to doubt that the expanding coverage indicated by *Vollmer*[21] will continue in this area. However, it appears that

15 But *see* Southern Pacific Co. v. Gileo, 351 U.S. 493, 500 (1956) (dictum).

16 *E.g.*, new buildings to house radio guidance systems are integrated with the existing system of aerial navigational aids. Mitchell v. Southwestern Eng'r Co., 170 F. Supp. 310 (W.D. Mo. 1959), *rev'd on other grounds*, 271 F.2d 427 (8th Cir. 1959). *Cf.* Archer v. Brown & Root, Inc., 241 F.2d 663, 667 (5th Cir. 1957). The verbal formula for determining jurisdiction in relation to commerce, "so closely related to it as to be practically a part of it," has remained unchanged since Shanks v. Delaware, L. & W.R.R., 239 U.S. 556, 558 (1916) (FELA case). Compare McLeod v. Threlkeld, 319 U.S. 491, 497 (1943), and Mitchell v. Vollmer, *supra* note 4.

17 63 Stat. 911 (1949), 29 U.S.C. § 203 (1958). In interpreting this legislation, the majority in *Zachry* rely primarily on the House managers' report, H.R. REP. No. 1453, 81st Cong., 1st Sess. (1949). The Senate managers did not join in this report, but rather filed a separate report after the Senate had passed the bill, 95 CONG. REC. 14875 (1949), on which the *Zachry* dissent places more emphasis.

18 Maneja v. Waialua Agricultural Co., 349 U.S. 254 (1955), would have denied coverage even without the 1949 amendment.

19 This method of dealing with construction activities was foreseen in WECHT, WAGE–HOUR LAW, COVERAGE 252 (1951).

20 29 C.F.R. § 776.17 (c) (2) (Supp. 1960).

21 *Supra* note 4. Mitchell v. Lublin McGaughy, 358 U.S. 207 (1959), illustrates a more recent application of this approach.

not all facilities furnishing *support* to interstate instrumentalities will themselves be considered "in commerce" and therefore subjected to federal wage and hour regulation, for in *Zachry* the Court attaches little weight to the fact that the water was to be used to a small extent by railroads, airlines, and other instrumentalities of commerce. On the other hand, if the facility under construction is to be used for "the production of goods for commerce," *Vollmer* dictates that construction alone does not preclude coverage of activities; rather, the interaction of remaining factors will govern the degree of remoteness from commerce. (2) *The number of steps separating the completed facility from "the production of goods for commerce."* The dam under construction in *Zachry* would, *inter alia,* support factories. Still undecided is the degree of remoteness involved in the construction of factories themselves, an activity that is one step closer to commerce proper than the *Zachry* dam. The administrator continues to refuse to regard the fact that construction is "new" as in itself determinative of coverage.[22] The only recent case found in point[23] proceeds upon the theory that *Vollmer* dealt only with "in-commerce" construction activities; this interpretation was invalidated by *Zachry*. In place of the indiscriminate "new-construction" test, it is submitted that the issue of "remoteness" raised now in the *Zachry* approach should be judged by balancing the degree to which the wage and hour policy followed during its construction is reflected in the pricing of a finished product in interstate competition, against the undesirable interference with a local labor market which is likely to result from federal regulation. (3) *The relation of the completed facility to existing units or facilities.* Under the traditional new construction doctrine, the dam in the principal case might have been classed as improvement of the existing reservoir.[24] However, with the disappearance of that doctrine, whether the thing constructed is totally new, an improvement, or a replacement becomes merely another factor to consider in determining remoteness. *Zachry* distinguishes construction from repair, noting that the latter is more nearly an integral part of operation. Nevertheless, the Court appears to leave open the possibility that even repair might be considered noncovered employment in some projects distantly related to commerce; the Court assumes only *"arguendo* that maintenance and repair of the completed dam would be covered employment. . . ."[25] Two questions of degree are relevant: how radically is the existing facility changed, and how immediate is the effect of wage and hour policy on the price of an eventual product? Closely related is the contention, argued and rejected in a district court,[26] that integration is not to be defined in mere physical terms,

22 29 C.F.R. §§ 776.26, .27 (c) (1) (Supp. 1960).
23 Mitchell v. Tune, 178 F. Supp. 138 (W.D. Ark. 1959).
24 Walling v. McCrady, *supra* note 14.
25 Principal case at 319. *But see* 29 C.F.R. § 776.27 (a) (Supp. 1960) and Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755 (1949).
26 Mitchell v. Tune, *supra* note 23.

but should also include planned use of the completed facility in an existing physically-diversified complex of production plants performing steps in the manufacture of a product for commerce. It is possible, of course, that this issue would never be reached, for construction of a primary facility of production might itself be covered. If such construction is not automatically covered, then the degree of integration with a production sequence would also be a factor to consider in determining remoteness within the act's "production of goods" language.

The construction industry represents a particularly complex area for the application of principles of federalism to labor law. In 1957 FLSA covered less than half of all construction workers.[27] However, covered and non-covered construction activities are closely related because of the pattern of employee mobility and area-wide collective bargaining between associations of diversified contractors and individual construction unions.[28] As a result of these special circumstances, federal regulation of some projects has a more direct effect on other purely local practices than it might if there were a more stable employment pattern. This situation justifies the unwillingness of the Court to abandon entirely the differential treatment which in the past has been accorded the construction industry. The general approach taken by the majority in *Zachry* appears to call for a balancing of federal and state interests, with greater weight given to the states' interests than would be required by the Constitution. Liberal interpretation of the commerce clause has furnished a vehicle for assertion of broad federal power in the general field of labor regulation; any attempt to preserve a role for the states must rest on congressional legislation, and more particularly on judicial policy operating within necessarily broad legislative mandates.[29] Perhaps the principal case represents a guidepost for a more precise judicial definition of a balanced federal-state relationship in labor law.[30]

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[27] 1,293,000 of a total of 2,909,000 construction workers were covered, according to figures compiled from Wage and Hour Division sources. *Hearings on S.25 [et al.] Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare,* 86th Cong., 1st Sess. 56 (1959).

[28] Covington, *Union Security Elections in the Building and Construction Industry under the Taft-Hartley Act,* 4 IND. & LAB. REL. REV. 543, 546-48 (1951).

[29] COX, *Federalism in the Law of Labor Relations,* 67 HARV. L. REV. 1297, 1347 (1954). Wage and hour regulation is less subject to the criticism of an imbalance between federal and state power than other more critical fields of labor legislation for several reasons: First, the choice is between federal law and either complementary state law or no state law at all, not between conflicting solutions. Professor Cox's recognition of the unfortunate equation of states' rights with inaction, *id.* at 1302, 1346, is particularly appropriate. Second, since the FLSA is administered by both federal and state courts and affords private remedies, there is little problem of the administrative over-expansion experienced in the early days of the NLRB, *id.* at 1300. Third, an objective of federal wage and hour legislation *is* to affect indirectly conditions in non-covered areas. Scrupulous delineation of federal and state domains serves only to delay the impact of federal standards upon the latter.

[30] In 1960 Congress considered legislation that would have affected coverage of the FLSA in the construction industry. S. 3758, 86th Cong., 2d Sess. (1960), proposed by