Children of the Rich and Children of the Poor

THE WAGES AND HOURS BILL

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FOR years we have heard easy lip service "in principle" to the commonplace that it is bad for America, economically as well as socially, to have child labor, sweated labor, low standards of living, inhumane and unhealthy working conditions.

Today we are considering something more than "approval in principle" of these ideas. We have an effort, in the specific and exact terms of a bill, to make this devotion to ideals statutory instead of merely rhetorical.

Bringing principles down to statutory reality is a tough-minded process. It means making decisions, practical decisions, on the balance of advantage and disadvantage, in the face of legal ambiguity, economic variation, and the human limitations of administration. It often means choosing the lesser evil, and making the choice work.

I have been asked by the chairmen of both of these committees to discuss the constitutional problems suggested by the pending bill. I undertake this discussion in what I hope will be a realistic way, on the assumption that these committees are interested in finding a way to insure decent labor conditions for the submerged third of our population rather than in regretful excuses why nothing can be done.

At the outset there is a popular and widespread impression that Congress rightfully has nothing to do with labor standards or working conditions in industry and that any effort to improve them must be a subtle encroachment on local government and a subversion of constitutional limitations. This misunderstanding is laid at rest by the recent statement of Chief Justice Hughes writing for a unanimous Court that "The Congress in exercising the powers confided to it by the Constitution is as free as the States to recognize the fundamental interests of free labor." (Kentucky Whip Co. vs. Illinois Central, 299 U. S. 334.)

The power confided to Congress which this bill proposes to exercise, and in exercising, to recognize the fundamental interests of free labor, is the expressly given power to regulate commerce among the several States. The constitutional basis for the proposed legislation will appear from an examination of the scope of this power.

The Supreme Court has upheld various types of regulation of interstate commerce upon several distinct constitutional theories. The attempt is to consolidate in a single bill

all hopeful approaches to constitutionality, each complete in itself, so that if one or more falls at the hands of the Court, we will not be left for an interval while a new bill is being adopted. The result is that there is some overlapping in its provisions, but no inconsistency in the operation or its objectives.

Different judicial theories of the commerce power, which this bill invokes may be classified as follows:

1. There is the power directly to regulate or prohibit movement across State lines of goods deemed for any reason to offend against sound national policy. This power has been applied in many cases and denied in but one, the famous Child Labor case to be discussed later.

This bill invokes that power to regulate and prohibit by directly forbidding transportation of the products of labor of children under 16 years of age, which ought not to be accepted in any fair market, and products made under conditions where workers are denied the right of self-organization by fear of labor spies and where their right to strike and to enforce collective bargaining is rendered ineffective by the use of professional strikebreakers. Such use of espionage and of professional strikebreakers is both a provocation of violence and an excuse for it and offends against our national policy.

2. Congress has the power to regulate competition in interstate commerce. It has exercised this power without question since the adoption of the Sherman Anti-Trust Act in 1890 and again through the Clayton Act and the Federal Trade Commission Act.

In the exercise of this power Congress has prohibited certain practices deemed injurious to competition in interstate commerce. It has prohibited many acts in themselves local, by employers engaged in productive industry, but which tended to monopoly or to destroy competition.

Under this power Congress has prohibited, under certain circumstances, the acquisition of the stock of one corporation by another. It has defined and prohibited unfair methods of competition.

What then may be said of the employer who cuts wages, employs children, and sweats labor, for the purpose of gaining a competitive advantage in marketing his product in an interstate market? As pointed out by Professor Thomas Reed Powell of the Harvard Law School and by other students of constitutional law, since Congress has the power to regulate conditions of competition as it has done through the Anti-Trust Acts, it may likewise prohibit the securing of a competitive advantage in interstate commerce through the adoption of oppressive and sweatshop labor conditions.

It will be noted that Part IV of this bill proceeds upon this theory and its provisions may be sustained, without overruling the child labor case. The factual basis for this view is that by prohibiting the use of substandard labor conditions by those who compete with employers who use fair labor standards, the great majority of employers who really desire to treat labor fairly are thereby protected against the unfair methods of competition of those who utilize sweatshop methods to gain a competitive advantage.

And since Congress may regulate the conditions of competition in interstate commerce, it may protect the fair employer shipping in interstate commerce against the unfair competition of even his intrastate competitor under the doctrine of the Shreveport Rate Cases, 234 U. S. 342, a case to which the Supreme Court had occasion to allude with approval in the recent Wagner act decision.

3. The power to regulate commerce includes the power to eliminate labor conditions which lead to labor disputes which will directly burden or obstruct commerce. (National Labor Relations Board vs. Jones & Laughlin.) This power is invoked in eliminating excessive hours, inadequate pay and child labor in so far as they tend to provoke such labor disputes.

4. The power to regulate commerce is held to include the power to prohibit transportation of goods into States in violation of the laws of such States and making such interstate goods subject to such State laws. This doctrine is supported by the decisions involving prison-made goods. (Kentucky Whip & Collar case, Jan. 4, 1937, and Whisfield vs. Ohio, 299 U. S. 431.) This bill invokes this constitutional power by prohibiting consignment of goods into a State if produced under conditions that would have been unlawful within that State.

5. The power to regulate commerce has been held to include power to eliminate a condition which affects the movement of goods, the price of goods, or which causes undue price fluctuations in interstate commerce. This doctrine is set forth in the cases relating to the regulations of stockyards and grain exchanges. (Olsen case, 262 U. S. 1; Stafford case, 258 U. S. 495.) This bill invokes this power by eliminating from interstate commerce goods produced by substandard labor conditions which affect interstate commerce in the manner stated.

6. The power to regulate interstate commerce has been held to include the power to regulate conduct intended to divert or substantially affect the movements of goods in interstate commerce. This is the doctrine of the Coronado Coal case, 268 U. S. 295. This bill invokes such power to regulate such substandard labor practices as are found to be the result of an intention to divert the movement of goods in interstate commerce.

It will be observed that these theories of the interstate commerce power, as laid down by the Court, are complicated and overlapping and that some could be directly and automatically applied while others could be applied only where circumstances were found to warrant.

It was therefore inevitable that any bill which tried to use these available weapons to fortify itself against the constitutional attack which labor and commerce legislation always faces, should to a considerable extent sacrifice simplicity. For neither the subject-matter of the bill nor the legal theories underlying it can with practical safety be reduced to any one simple formula. But the bill is believed not to be conflicting within itself or self-defeating.

In addition to rigid and direct exclusion from the channels of interstate commerce of those products made under conditions deemed oppressive at any time and under any circumstances, such as labor of children under 16, spied-upon labor, or strike-breaker-browbeaten labor, there is also included administrative proceedings before an independent board, similar to the National Labor Relations Board or the Federal Trade Commission.

As President Roosevelt has stated: "Even in the treatment of national problems there are geographical and industrial diversities which practical statesmanship cannot wholly ignore."

Portions of the bill relating to wages and hours would become operative as and when the board created by the act orders their application. This bill does not plunge the nation headlong into a rigid and widespread policy of regulating wages and hours. It permits the building up a body of experience and prevents the extension of regulation faster than capacity properly to administer is acquired.

The investigations of the board will also provide the evidence and the findings upon which the government can rest its argument if the constitutionality of the act is assailed.

The proposed bill therefore is (except as to the child labor case to be dealt with later) backed by long established precedents defining Federal power to regulate interstate commerce. Congress may so use the power as to stop interference from State laws, and it can equally protect it against employer lawlessness. It can foster the legitimate and helpful trade as well as stop the unwholesome.

To quote again from the Chief Justice in the Kentucky whip case:

"The power to prohibit interstate transportation has been upheld by this court in relation to diseased livestock, lottery tickets, commodities owned by the interstate carrier transporting them, except such as may be required in the conduct of its business as a common carrier, adulterated and misbranded articles, under the Pure Food and Drugs Act; women, for immoral purposes; intoxicating liquors, diseased plants, stolen motor vehicles, and kidnapped persons."

A commerce clause broad enough to protect the children of the rich from kidnapping would seem not to be abused if it should also protect the children of the poor from exploitation. As Justice Holmes said, with the approval of Justices Brandeis, Clark, and McKenna, it was not intended to leave Congress free to prohibit traffic between States in lottery tickets and strong drink but not to prohibit the interstate shipment of "the product of ruined lives."

The power of Congress to enact the bill is clear under the decisions, both old and recent, except for the denial by the Supreme Court in the child labor case of the most simple and clear of all these theories. In 1918 by a five-to-four vote the Supreme Court in Hammer vs. Dagenhart, 247 U. S. 251, held invalid an act of Congress prohibiting interstate transportation of goods manufactured in violation of certain child labor standards.

In view of the President's recommendation of legislation of the type proposed in the pending bill, and of the unique constitutional situation presented by that Supreme Court decision, it has seemed appropriate for the Department of Justice to furnish these committees with the result of our studies of this bill, notwithstanding precedents against so doing.

The Court's decision sheltering child labor from Federal action could affect only a part of the bill at most. But if it were overruled it would permit a simple and more understandable dealing with the question.

The child labor decision was promulgated by a bare majority of numbers. They were Mr. Chief Justice White and Justices Van Devanter, Pitney, McReynolds, and Day, who wrote the prevailing opinion. A ringing dissent was written by Mr. Justice Holmes and supported by Justices McKenna, Brandeis, and Clark, who could not be regarded as a minority in prestige.

Legal scholarship received the decision with indignation and derision which time has not softened. A leading authority on the Constitution has said:

"There is certainly nothing in the Constitution which requires the decision of the majority. It is wretchedly supported by the argument of the opinion. The assertion [which the majority made] that 'the act in its effect does not regulate transportation among the States' is obviously unfounded." (Thos. Reed Powell, 3 Southern Law Quarterly 175.)

Others pointed out that if a State attempted to stop the shipping in or shipping out of child-labor-made goods, it would be held to be interstate commerce and void, while if the nation prevented the shipment it was held not interstate commerce and void. (Gordon, 32 Harvard Law Review 45-51-52.) The game, so far as the children were concerned, seemed to be heads they lost and tails they didn't win.

We owe it to our times to challenge the perversion of our Constitution injected into our law by the child-labor decision. This bill would challenge it. We should give the courts a chance to remove this blemish from our judicial history.

The doctrine of the majority in the child-labor case belongs to the same dark era of legal thought as the decision holding that the minimum wage law was unconstitutional. (Adkins vs. Children's Hospital, 267 U. S. 525, decided in 1923.)

The Court recently said that the importance of the minimum-wage question, the close division of the Court by which the former decision was reached, and "the economic conditions which have supervened" in the years since it was decided made it "not only appropriate, but we think imperative" that the subject should receive "fresh consideration."

Every condition that led to fresh consideration of the minimum-wage case with equal force renders not only appropriate but imperative fresh consideration of the child-labor decision.

Reconsidering the minimum-wage case, which it had only a few months before followed as good law in striking down the New York statute, the Court held, in the language of the Chief Justice, that the 1923 case (and of course the 1936 case to the same effect) "was a departure from the true application of the principles" of law, and frankly and courageously said "our conclusion is that the case of Adkins vs. Children's Hospital should be and it is overruled."

And in National Labor Relations Board vs. Jones and Laughlin the Court, without expressly overruling earlier cases, plainly receded from decisions such as Carter vs. Carter Coal Company, 298 U. S. 238, which had seemed to cramp the interstate commerce power into its lowest visible dimensions.

The Court seems again to have been persuaded as Chief Justice Taney said, that it is "the law of this court that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether upon the force of the reasoning by which it is supported." (Passenger cases, 7 Howard 283, 473.)

In face of the willingness of the Supreme Court to decline to let obsolete precedent limit the exercise of its own reason, Congress may with propriety decline to let such decisions stall legislative reason. Had not the legislators persisted in challenging the minimum wage cases, their inaction

and acquiescence would have prevented the Court from amending its doctrine.

Nothing but a challenge to the child labor decision will enable the Court, even if it is so minded, to correct the old decision, now without support in scholarship, reason, or enlightened public sentiment. It is the distinguishing feature of judge-made law that it is made only by the case method. The court must await another case to correct an error. It has no technique for initiating reconsideration of closed cases. If old decisions are not challenged by lawmakers judicial development is arrested and advancement of legal science stops.

Hence, I have no hesitation in urging that the time has come when the child labor decision should be challenged and reargued. We may reasonably entertain the hope that Hammer vs. Dagenhart will be laid to a tardy and unmourned repose beside the lifeless remains of Adkins vs. Children's Hospital.

In view of the frequent confusion on the subject, it is due to those considering this bill to analyze the effect which it has upon the reserved powers of the States.

Let us assume each State as completely sovereign as a nation could be. No State would then have any right to send its goods into another State. Each State would have the right to stop all incoming goods at its border, to exclude any goods unfairly competing in its own market, or to lay a tariff on those admitted to equalize any advantage that the incoming goods had over its own producers.

The exercise of this right by the Colonies threatened to disrupt commerce and to divide our people. The exercise by the several States of their own parochial and conflicting rules to protect their own markets was a powerful incentive to formation of our government.

Each State therefore largely surrendered its sovereignty over incoming goods to the national government. This was not intended to surrender the home market place to the undercutting competitor States. The power was granted to the national government that the rule of the market place should be fixed by a national policy for the common good.

A State may wish to meet advancing wealth of production with advancing standards of life for those who work in production. But if its own market place, as well as outside markets, are overrun with goods cheapened by child labor or sweated labor, it has lost its power over its own working conditions.

Is it confined then to appeals to its competitors for protection from such unfair competition? Its appeal is in law, as it is in common sense, to the nation to which was given power to establish the rule by which goods should move among the States.

Mr. Justice Holmes in his dissent in the child-labor case demolished the whole argument that States' rights are impaired by such legislation as this in the following language:

"The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the State line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors.

"Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a prohibitive tariff at her boundaries, the State encounters the public policy of the United States, which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole."

Care has been taken to hold the pending bill to a good-faith regulation of interstate commerce, and nothing more. Any State may use child labor or sweated labor for products of home consumption as much as it pleases so long as it does not divert or affect interstate commerce in so doing. The State may exploit youth in its internal affairs as far as its own conscience will permit, but it cannot dump its children into the nation's markets to demoralize our national standards.

It has been suggested that the child-labor provisions should be embodied in separate legislation. It is not my function to advise as to policy, but we believe it would be more difficult to sustain separately than in company with the other substandard labor provisions.

All of the labor practices attacked by this bill are related. All are types of oppression utilized for the purpose of gaining unfair competitive advantage in interstate commerce. One employer cuts wages, while another employs child labor, and still another employs sweatshop conditions, and all of these practices are a part of the vicious competition used in forcing down labor standards which it is appropriate to treat together in the regulation of interstate commerce.

One of the constitutional bases of the pending bill is the principle announced in reference to the National Labor Relations Act that prolific causes of strife which may have a serious effect upon interstate commerce may be prevented. It is obvious that this principle is applicable to wages, hours of employment and the use of strike-breakers and spies, for those practices have been prolific causes of labor strife.

It is not clear that child labor standing alone has been the cause of industrial strife, although it is clearly one of the elements of unfair labor competition.

One reason for the unfortunate decision of the child labor case was that the Court failed to perceive that the legislation was related to the regulation of interstate commerce, but regarded it as merely a police regulation to accomplish a local social objective.

The inclusion of child labor with the other prohibited practices in an undertaking to prohibit unfair interstate commerce and to foster American standards makes plain that the law in which it is included is a genuine exercise on a broad front of the power to regulate interstate commerce and gives the prohibition of child labor a strength that it would not have if standing alone.

Two recent decisions have aroused hope of a new method of Federal and State cooperation to enforce proper labor standards. In Kentucky Whip & Collar Company vs. Illinois Central Railroad Company (Jan. 4, 1937), the Supreme Court upheld the Ashurst-Sumners act making it unlawful knowingly to transport in interstate commerce goods made by convict labor into any State where they would be received, possessed or sold in violation of the State laws, and requiring labeling of convict-made goods.

In Whitfield vs. Ohio, 297 United States 431, the Supreme Court sustained convictions, under a State law, forbidding sale within the State of convict-made goods, even in the original package. It accepted the Hawes-Cooper Act.

Even if the method is approved as to other labor standards, it is open to grave administrative difficulty. It would seem that if the Court is to sustain any Federal regulation of commerce in goods made under substandard labor conditions, it would overrule the child labor decision and permit direct, simple and effective regulation instead of reaching the same result by going round Robin Hood's barn.

If Congress can give national scope to the standards set up by a receiving State it would seem able to give force to standards of its own making. If the Court will give effect to forty-eight non-uniform State standards, operating like tariff laws and difficult to administer, it would seem able to sustain a single Federal standard for goods in movement between the States.

But there is a lawyerly preference for a difficult way of doing a simple thing and the Kentucky Whip method may commend itself to the Court when direct regulation does not. If so, this bill is designed to get the benefit of such approval.

While the Court is not certain to apply the prison-made goods precedents lately established to goods made by underaged or underpaid free labor, the constitutional experiment is worth trying. If easier administered provisions are sustained, resort to this less practicable plan will not be necessary.

Even if the subject matter is within Federal power, constitutional controversialists may claim that it violates the due process of law clause or illegally delegates Congressional power.

Regulation of both wages and hours does not of itself violate due process, and is not necessarily "unreasonable, arbitrary, or capricious," where "there is reasonable relation to an object within the governmental authority." (Wilson vs. New, 243 U. S. 332; Bunting vs. Oregon, 243 U. S. 426.)

Standards for determination of fair wages and reasonable working hours contained in the present bill are drawn with fairness to the employer. The standards are based on the value of the service rendered and the reasonableness of the period of working time considering the nature of the employment.

Furthermore, fairness to all parties concerned and reasonable treatment of special cases are assured by the provisions of the bill which require the board to grant exemptions from the wage and hour regulations as the need appears.

It is hard to see how employers who wish to maintain decent labor standards, or those who wish to see a better level of purchasing power in the masses of the people, can feel aggrieved at the general purposes and effects of this bill.

Advancement of those objectives State by State, each exposed to the competition of States which tarry, has been the foundation of the employers' most legitimate objection to labor legislation. He is so far from being injured by this bill, that it may be his chief protection against undermining of his market by methods which his own standards forbid.

Neither in its general scope nor in its special treatment of particular cases can the bill be pronounced arbitrary. For fair labor standards are required to be maintained only to the extent necessary in order to accomplish the interstate commerce purposes of the legislation—purposes which fall clearly under the regulatory power of the Congress under the commerce clause.

Due process is defined in respect of both Federal and State legislation in Nebbia vs. New York, 291 U. S. 502, 525:

"The Fifth Amendment, in the field of Federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process.

"And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

If regulation may be dependent on "relevant facts" there can be no objection to delegating power to an administrative or quasi-judicial board to investigate, hear evidence and decide those facts.

It must be borne in mind that there is nothing whatever in the Constitution that forbids Congress to make a delegation of its power. The prohibition is purely judge-made, not Constitution-made.

The Supreme Court rarely finds fault with a Congressional delegation of power. There is nothing in the recent decisions of the Court which would justify the Congress in abandoning administrative handling of modern complexities too numerous and diverse to be subjected to a single and inflexible rule directly imposed by the Congress. There are, it should be remembered, only two cases where Congressional delegation of power has been adjudged invalid in one hundred and fifty years of constitutional practice.

The proposed bill deals with difficult and complex industrial situations. The draftsmen have been painstaking to make the standards as definite as the conditions with which they have had to deal permit without imposing upon the diversities of American industry inflexible and unworkable rules.

Nearly every legislative proposal dealing with complex economic conditions is attacked as arbitrary by those who do not like it. If the bill includes detailed standards it is said to be arbitrary for want of discretion in enforcement. On the other hand, if it gives discretion to an enforcement agency it is denounced for setting insufficient limits to "arbitrary discretion."

This bill has been attacked on both grounds. The very inconsistency of this attack suggests that the draftsmen of the bill have attempted a fair, equitable and constitutional balance between the legal requirement of a standard and the practical requirement of workable flexibility.

A separate memorandum of the law on the subject of delegation of power has been prepared and will be filed with the committees.

During this flash of liberalism that illuminates a judicial record, otherwise pretty black for labor, we may reasonably hope that after being balked a score of years, Congress will now be sustained in adding to the list of interstate contraband what Mr. Justice Holmes so aptly called "the product of ruined lives," and in establishing commerce among the States on the basis of industrial justice to disadvantaged men.