gress.[18] Thus, this particular application of the statute seems invalid as an exercise of either the police power or the taxing power.

CONSTITUTIONAL LAW

SCOPE OF THE FAIR LABOR STANDARDS ACT

Respondents, a partnership, were engaged in furnishing meals and beds to maintenance-of-way employees of a railroad. The meals were served and beds were furnished in railway cars operated on the railroad's tracks under a contract arrangement between respondents and the railroad. The cars were located conveniently to the place of the employees' work and in emergencies followed the gang to the scene of its activities. The employees paid the respondents for these services by authorizing the railroad company to deduct the amount due from their wages and to pay it over to the respondents. The petitioner, employed by respondents as a cook on one of its commissary cars and performing all of his duties in the state of Texas, sought to recover wages for overtime under the Fair Labor Standards Act.[1] Held, the petitioner was not "engaged in commerce" or in the "production of goods for commerce" and thus does not come within the purview of the act. McLeod v. Threlkeld, 63 Sup. Ct. 1248 (1943).

The constitutionality of a minimum wage and hour law and the plenary power of Congress over all phases of interstate commerce have been well established.[2] The question involved, however, due to the variance in the different statutes as to what constitutes commerce,[3] is the determination of the scope of the Fair Labor Standards Act. This Act embraces all persons "engaged in commerce" or "engaged in

18. Pacific Coast Dairy, Inc. v. Dep't of Agriculture of California et al., —— U.S. ——, 63 Sup. Ct. 628 (1943); Baltimore Nat'l Bank v. Tax Comm., 297 U.S. 209 (1936); Owensboro Nat'l Bank v. Owensboro, 173 U.S. 664 (1899).

1. 52 Stat. 1060, 29 U.S.C.A. §201 et seq. (1938).

2. The power of Congress over interstate commerce " . . . is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." Gibbons v. Ogden, 9 Wheat. 1, 196 (U.S. 1824); see also N.L.R.B. v. Planter Mfg. Co., 105 F. (2d) 750 (C.C.A. 4th, 1939); Santa Cruz Fruit Packing Co. v. N.L.R.B., 303 U.S. 453 (1938). For the first cases upholding the broad aspects of the F.L.S.A. see United States v. Darby, 312 U.S. 100 (1941); Opp Cotton Mills, Inc. v. Administrator of the Wage and Hour Division of the Dep't of Labor, 312 U.S. 126 (1941).

3. In F.T.C. v. Bunte Bros., Inc., 312 U.S. 349, 353 (1941) the Court said, "Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business." See also Kirschbaum Co. v. Walling, 316 U.S. 517 (1941). Cf. National Labor Relations Act, 49 Stat. 448, 450, 29 U.S.C.A. §152 (1935); Bituminous Coal Act, 50 Stat. 72, 83, 15 U.S.C.A. §828 (1937); Agriculture Adjustment Act, 50 Stat. 246, 7 U.S.C.A. §601 (1937); Public Utility Holding Act, 49 Stat. 803, §1 (c), 15 U.S.C.A. §79a(c) (1935).

the production of goods for commerce."[4] However, since the petitioner is not engaged in the production of any goods, as defined in the Act,[5] he can prevail only if he can be held to be "engaged in commerce."

Unfortunately, recent decisions defining the scope and coverage of the Fair Labor Standards Act have rendered lip service in favor of strict construction, finding solace from the fact that the Act applied to the activities of the individual employee and not to the employer, and that the Act used the words "engaged in" rather than "affecting" commerce.[6] This heretofore talked-of construction finds its first serious application in the instant case which displays clearly that it is unwarranted.[7]

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4. Under Sec. 6 of the Act an employer must pay prescribed minimum wages "to each of his employees who is engaged in commerce or in the production of goods for commerce," and under Sec. 7 overtime compensation must be given "any of his employees who is engaged in commerce or in the production of goods for commerce."

   Commerce is defined as "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." 52 Stat. 1060, 29 U.S.C.A. §203(b) (1938).

5. "Goods mean goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof. . . . " 52 Stat. 1061 (i), 29 U.S.C.A. §203(i) (1938).

6. Mr. Justice Frankfurter in Kirschbaum Co. v. Walling, 316 U.S. 517 (1941), edited the legislative history of the Act in favor of strict construction, although he delivered a very liberal decision in the development of the F.L.S.A. Walling v. Jacksonville Paper Co., 317 U.S. 564 (1942), while also holding the company within the Act, repeated the Kirschbaum dicta. Demonstrating the power of such dicta the Court in Zehring et al. v. Brown Materials, Ltd. et al., 48 F. Supp. 740, 744 (S.D. Calif. 1943) states dogmatically that "it must be regarded as settled [citing the Kirschbaum case] that the Act is not as broad in its regulation of commerce as the National Labor Relations Board or the Interstate Commerce Commission."

7. 83 Cong. Rec. 9175 (1938). Senator Borah in defending the constitutionality of the Act suggested the reason for the present wording of the statute and for making the activities of the employee the test. Furthermore, the entire debate on the floor of the Senate displayed a fear of over-extension of the scope of the Act and it was not as Mr. Justice Frankfurter would seem to suggest when he said in Kirschbaum v. Walling, 316 U.S. 517, 522 (1941) that "the history of the legislation leaves no doubt that Congress chose not to enter areas which it might have entered." For cases supporting a liberal construction of the F.L.S.A. see Fleming v. Hawkeye Pearl Button Co. et al., 113 F. (2d) 52 (C.C.A. 8th, 1940); Fleming v. Atlantic Co., 40 F. Supp. 654 (N.D. Ga. 1941); see also Interpretative Bulletins Nos. 1 and 5, Wage and Hour Manual, 27-34 (1941); Sutherland, "Statutory Construction" (Horack's ed. 1943) §7207. "Laws regulating wages and hours have received wide adoption and while such laws constitute an interference with business, they must be given a liberal interpretation to accomplish their long range social objectives." Cooper, "The Coverage of the Fair Labor Standards Act" (1939) 6 Law & Contemp. Prob. 336.

In the case at hand the court refused to follow the Smith decision which had virtually identical facts,[8] although there is direct authority for using analogous cases construing the Federal Employers Liability Act.[9] The grounds for the refusal was the desire to evade the "over-refinement" reached under that Act.[10] But by this decision the court would seem to hold that although a cook for the maintenance-of-way employees of a railroad,[11] or a janitor and elevator operator of an office building in which a considerable portion of the occupants are engaged in commerce,[12] are not within the purview of the Fair Labor Standards Act; yet a cook for a lumber company,[13] the nightwatchman, fireman, or elevator operator for a loft building where the company is engaged in the production of goods for commerce,[14] come within the purview of the Act. There seems to be no logical reason for including employees who are necessary to the production of goods for commerce and excluding employees who are necessary for the instrumentalities of commerce.

The tenor of Senate debate[15] and the preliminary declaration of policy by Congress,[16] alone, point conclusively toward a liberal con-

8. Philadelphia, B. & W. Ry. v. Smith, 250 U.S. 101 (1919). This and the instant case have virtually identical facts with the exception that in the principal case the petitioner was employed by an independent contractor. This fact should be wholly immaterial. To hold otherwise would merely encourage companies to use this device as a means of evading the Act. See Comment (1942) 90 U. of Pa. L. Rev. 845.
9. Overstreet et al. v. North Shore Corp., 318 U.S. 125, 131 (1943).
10. Instant case at 1250.
11. Instant case at 1248.
12. Cochran v. Florida National Building Corp., 45 F. Supp. 830 (S.D. Fla. 1942), aff'd, 134 F. (2d) 615 (C.C.A. 5th, 1943).
13. Houson v. Lagerstrom, 133 F. (2d) 120 (C.C.A. 8th, 1943); Consolidated Timber Co. v. Womack, 132 F. (2d) 101 (C.C.A. 9th, 1942).
14. Kirschbaum Co. v. Walling, 316 U.S. 517 (1941).
15. 83 Cong. Rec. 9166 (1938). A greater part of the discussion upon the floor of the Senate concerned the constitutionality of the Act. The floor discussion showed a fear of over-extension and not a desire to exercise only part of that power which Congress possessed. Senator Bailey in reporting the bill from the committee said, "I consider the bill manifestly unconstitutional. . . . What justification is there for the view that the Supreme Court will now uphold legislation of this type, when there is case after case practically in every decade for the last 7 decades, saying that the commerce clause does not extend to manufacture, does not extend to mining, does not extend to agriculture? Yet we proceed." In a joint Hearing before the Senate committee on Education and Labor and the House Committee on Labor on S. 2475 and H.R. 2700, 75th Cong., 1st Sess. (1937) 54, Assistant Attorney General Jackson said, "The Act combines everything, and is an effort to take advantage of whatever theories may prevail on the court at the time the case is heard."
16. 52 Stat. 1060, 29 U.S.C.A. §202 (1938). Congressional finding and declaration of policy: "(a) The Congress hereby finds that the existence, in industries engaged in commerce or in production of goods for commerce, of labor conditions detrimental to the

struction of the statute. The immediate phrase, "engaged in commerce," has been held to include work which "is so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it.' "[17] Notwithstanding the seemingly clear direction toward a wholesome development of the Fair Labor Standards Act, the present decision results in an unwarranted limitation on this development, and if followed consistently will ultimately bring about the same incongruous result as did similar decisions under the Federal Employers Liability Act.[18]

CONSTITUTIONAL LAW

CURFEW FOR CITIZENS OF JAPANESE ANCESTRY

On February 19, 1942, President Roosevelt promulgated an executive order[1] conferring authority upon military commanders designated by the Secretary of War to effectuate a program for protection against espionage and sabotage to national-defense materials, premises, and utilities.[2] Pursuant to his authority under this order the commander of the Western Defense Command[3] issued various

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maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce...."

17. Overstreet v. North Shore Corp., 318 U.S. 125, 130 (1943). Cf. Overnight Motor Co. v. Missel, 316 U.S. 572 (1942); 83 Cong. Rec. 9169 (1938). Senator Bailey, even though he questioned the constitutionality of the Act, went so far as to say, "I would contend that the railroad organization is an instrumentality of commerce between the States and relates to every man wherever he may be and whatever he is doing, providing he is doing something with regard to the system. The instrumentality idea as applied to railroads takes in the whole system, not merely the men who run the engine or the conductor who manages the car or the brakeman, but the machinist in the shop who never leaves the borders of the State."

18. Shanks v. Delaware, L. & W. Ry., 239 U.S. 556 (1916); Chicago & N.W. Ry. v. Bolle, 284 U.S. 74 (1931); Chicago & E.I. Ry. v. Industrial Comm. of Ill., 284 U.S. 296 (1932); New York, N.H. & H. Ry. v. Bezue, 284 U.S. 415 (1932). Concerning the merits of such cases see Gavit, "The Commerce Clause" (1932) 155. "The truth is . . . that there was no real occasion for limiting the application of the Employers' Liability Act as it has been limited; and the present interpretation can easily be said to be too narrow." The Federal Employers Liability Act has since been amended. 53 Stat. 1404, 45 U.S.C.A. §51 (1939).

1. Executive Order No. 9066, issued February 19, 1942. 7 Fed. Reg. 1407.

2. The Order recited that "the successful prosecution of the war requires every possible protection against espionage and sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655."

3. The Secretary of War designated Lieutenant General J. L. DeWitt as Military Commander of the Western Defense Command to