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Cover Page Footnote
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GUARANTEED WAGES UNDER NEW YORK STATE MINIMUM WAGE LEGISLATION

GODFREY SCHMIDT†

AMERICAN minimum wage legislation, after a rather uneven career, became endowed with constitutional respectability in 1937 when the United States Supreme Court wrote its decision in *West Coast Hotel Company v. Parrish*.1 Recently the Court of Appeals of the State of New York passed upon a novel and nationally significant question affecting such legislation.2 For the first time in the history of the United States a high court has ruled upon the validity of the so-called "guaranteed wage."3

The mere establishment of minimum hourly rates for a given industry makes no substantial contribution to a living wage, unless the worker can be assured that he will have the opportunity to work at least a certain number of hours per week at the minimum rate. Minimum wage legislation, which confines its attention merely to rate of pay, unrelated to the length of regularity of employment, does not confer obvious benefits on all workers. This was realized by the Factory Investigating Commission of the State of New York, which in its Fourth Report (February 15, 1915) wrote as follows on the subject, "The Relation of Irregular Employment to the Living Wage for Women":

"In the discussion of the legal minimum wage for women, provided for by

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3. "Guaranteed wage" is a term not free from ambiguity. As used here, it implies units of remuneration (and units of time during which pay accrues at a stipulated rate) which are reasonable but irreducible minima. Such quanta of remuneration or time are not subject to a diminution or fraction simply because a proportional unit of service has not been rendered by the employee. Either the employee is entitled to the full quantum or none at all. The employer must pay for potential service or for potentially productive employee's time even if through faulty arrangement of work schedules or for other reasons no work is available during the given minimal time unit. But the obligation to pay the guaranteed wage does not usually apply to new employees or to employees who either refuse to work or voluntarily absent themselves during the minimum time unit."
nine states in 1912 and 1913, practically all of the emphasis thus far has been placed upon only one of the two essential factors, namely the rate of pay. Almost no attention has been given to the other equally important factor, namely the regularity of employment. Both factors must be taken into consideration if the working woman is to receive a 'living wage'.

"All minimum wage rates so far established in this country have been weekly rates based upon the necessary cost of living per week. Such wage awards therefore really set rates per hour. In effect they say, 'You may have a living wage for each hour you work, but if you have no work you must get along the best you can'. For the awards make no allowance for short time employment. To establish rates which will take unemployment into account is admittedly a difficult problem. But in at least one country this need has been recognized and effectively dealt with. . . .

"The importance of regular work has also been recognized in America. The Massachusetts Commission of 1911 said 'Regularity of employment is as vital to the worker as a living wage. It presents another problem but yet one inextricably bound up with the question of what wages are necessary to maintain the employees of any given industry'. The Massachusetts Wage Board for the brush industry also saw the need of something more than an hour rate. 'Any minimum wage finding which stops with merely naming a minimum hourly rate merely looks well on paper, but accomplishes no actual result beyond a somewhat pale moral effect'.

"It must be obvious, therefore, to all thoughtful students of the problem that if we seriously desire to secure for working women a living wage we must either (1) grant them a wage rate sufficiently high to cover periods of unavoidable unemployment or (2) devise some method whereby fairly steady employment will be supplied. Some system of unemployment insurance might also well be considered in this connection. The problem is a difficult one and invites the serious attention of those interested in the welfare of working women."

The "guaranteed wage" is a step, and indeed a very small step in the direction of devising "some method whereby fairly steady employment will be supplied." A few employers in the United States have been able to develop guaranteed wages on an annual basis. Such a plan simply

5. Id. at 507.
6. Among the rare employers offering plans for guaranteeing income or employment are: Proctor and Gamble Co., Cincinnati, soap manufacturers; Nunn-Bush Shoe Co., Milwaukee, manufacturer of men's shoes, 3000 workers; George A. Hormel & Co., Austin, Minn., meat packers, 1000 workers; The Columbia Conserve Co., 3000 workers. In addition annual wage or guaranteed employment provisions were contained in only 14 out of several thousand union agreements on file in the Bur. of Labor Statistics in
means a minimum wage in relation to a relatively long unit of time, a
year. Unfortunately, most industries are not in a position, what with
unpredictable economic conditions and their uncertain financial status,
to commit themselves to minimum annual wage schemes. Industry's
reluctance in this respect would probably be roughly proportionate to
the length of the time unit involved. Guaranteed wages on an hourly
or even daily basis furnish no outstanding difficulty. The difficulties
begin to multiply, however, once the week or the month or a longer
period is used. State minimum wage statutes do not expressly authorize
a single, fixed unit of time for the computation of wages.

Article 19 of the New York State Labor Law exemplifies the general
principles of most living wage legislation in the United States. Usually,
such statutes provide for the establishment of minimum wage standards
for women and minors and not for men.7 The New York statute will
be used as a convenient model for discussion. Selection of the wage rate
and the time unit to which it is related is usually the result of an elabo-
rate administrative process which includes the following steps:

1. Field investigation of the economic area8 involved by persons
trained in statistical methods and economic research. Wide statutory
powers of investigation and subpoena are designed to prevent economic
analysis from being curtailed through lack of voluntary cooperation
from employers and others in possession of data and information on
wages and working conditions.9

2. Convocation of an advisory board, comprising representatives of
the public and of employers and employees in the occupation under

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7. Most of the state laws apply to women and minors, the exception being the Connect-
ticut and Hawaii Acts, which also apply to men. The Oklahoma Law was also written
to cover men, women and minors but because of a defective title the minimum-wage
provisions of the act cannot be applied to men and minors; enforcement of the orders
for women is prevented by injunction. See State Minimum Wage Laws and Orders: 1942
U. S. Dept' of Labor, Women's Bureau Bull. 191.

(1941), 50 YALE L. J. 1141, 1151 sub-heading "Selection and Delineation of the 'Industry'".

9. N. Y. LABOR LAw § 553: "The Commissioner shall have power . . . To enter the
place of business . . . of any employer of women and minors . . . for the purpose of exam-
in ing and inspecting any and all books, registers, payrolls and other records . . . that in
any way appertain to or have a bearing upon . . . wages . . ." No administrative diffi-
culties have been experienced in the enforcement of this section.
consideration. To this board the Labor Department submits a report detailing the results of investigation into the wages and working conditions of the industry.  

3. Study, debate and deliberation by the Wage Board, which results in the formulation of wage standards and the final submission of recommendations to the promulgating authority in the form of a proposed wage order. A Wage Board has power to make its own investigation, to conduct hearings of witnesses and experts.

4. Consideration of the recommendations of the wage board by the promulgating authority, the Industrial Commissioner, who may accept or reject the recommendations. If they are rejected, the problem may be submitted to the same or to a new wage board.

5. If the recommendations are accepted, a public hearing is convened for the purpose of giving interested persons an opportunity to express approval or disapproval of the proposed wage order. Copies of the proposed wage order are furnished to anyone on request and are also mailed to practically every employer in the industry. Proceedings at the public hearing are recorded stenographically, and there is an

10. N. Y. LABOR LAW § 556, (1-2): "A wage board shall be composed of not more than three representatives of employers, an equal number of representatives of employees and of not more than three disinterested persons representing the public. . . . The commissioner shall appoint the members of such wage board, the representatives of the employers and employees to be selected so far as practicable from nominations submitted by employers and employees in such occupation or occupations. . . . The commissioner shall present to a wage board . . . all . . . the information in his possession relating to the wages of women and minor workers . . . and all other information which he may deem revelant. . . ." For a discussion of group interests as sources of public policy and for a recent appraisal of representative advisory committees and their role in administrative regulation, see Leiserson, Administrative Regulation, A Study of Representative Interests (1942). See also Fuchs, Procedure in Administrative Rule Making (1939) 52 HARV. L. REV. 259.

11. The Confectionery Minimum Wage Board first met on Monday, August 8, 1938. Its deliberations involved 18 sessions in all, the last on Friday, October 7, 1938. The minutes of these meetings (comprising a redaction of the verbatim minutes of actual discussion) are spread over 140 pages or 421 folios of the printed record on appeal. Some of the most heated discussion was "off the record".

12. N. Y. LABOR LAW § 557 (1): "A wage board shall submit its report and recommendations to the commissioner who shall within ten days thereafter accept or reject such report. . . . If the report is rejected the commissioner shall resubmit the matter to the same wage board or to a new wage board. . . ."

13. N. Y. LABOR LAW § 557 (1): "If the report is accepted . . . The commissioner shall give notice of a public hearing to be held not sooner than fifteen nor later than thirty days after such publication at which all persons in favor of or opposed to the recommendations contained in such report or in such proposed regulations, may be heard."
opportunity to file written briefs or letters of criticism or suggestion for a period of several weeks after the final public hearing. Usually hearings are conducted in three or four different communities, such as New York City, Buffalo, Rochester and Albany.

6. Consideration of the proposed wage order in the light of materials and information elicited by reason of the public hearings; and promulgation of a "directory order".14

7. After the directory minimum wage order has been in effect for at least three months, the Industrial Commissioner may review the enforcement experience as recorded by the Enforcement Bureau of the Division of Women in Industry and Minimum Wage.15 Additional research materials and studies are prepared by the Research Bureau staff for the purpose of determining whether or not there is such persistent non-observance of the directory order as constitutes a threat to the maintenance of the established minimum wage standards. If the Commissioner is of the opinion that there is such non-observance, he gives notice of intention to make the order "mandatory", after a public hearing at which all persons in favor of or opposed to a mandatory order may be heard.

14. N. Y. LABOR LAW § 557 (2): "Within thirty days after such hearing the commissioner shall approve or disapprove the report of the wage board. . . . If the report is approved the commissioner shall make a directory order which shall define minimum wage rates in the occupation or occupations as recommended in the report of the wage board. . . ." Under a directory order, punishment of the recalcitrant employer involves publication of his name for failure to observe the provisions of the minimum wage order. If at any time after a directory order has been in effect for three months, the commissioner is of the opinion that the persistent non-observance of such order by one or more employers is a threat to the maintenance of minimum wage standards, the order may be made mandatory, in which case an employer failing to pay the rates applicable under the minimum wage order is guilty of a misdemeanor and upon conviction is subject to a fine of not less than $50 or more than $200 or imprisonment or both. Each failure to pay any employee in any one week the rate applicable under a minimum-wage order may then constitute a separate offense. See Comment, Notice and Hearing in Minimum Wage Legislation (1939) 24 WASH. U. L. Q. 233.

15. N. Y. LABOR LAW § 559: " . . . at any time after a directory minimum wage order has been in effect for three months, . . . the commissioner may give notice of his intention to make such order mandatory and of a public hearing . . . at which all persons in favor of or opposed to a mandatory order may be heard. . . ." An analysis of inspection records and of sworn payrolls submitted by employers is made to determine the extent of compliance among employers; where the percentage of firms complying with the law is so low as to constitute a threat to the maintenance of minimum wage standards in the industry, a mandatory order is usually deemed necessary. Davis, The Requirement of Opportunity to be Heard in the Administrative Process (1942) 51 YALE L. J. 1093.
8. Finally, promulgation of a mandatory order or of a decision to retain the directory order with or without modification.\(^{16}\)

By statute,\(^{17}\) the Industrial Commissioner and the Wage Board are permitted to consider the following norms or criteria in developing a minimum wage:

a) Amount sufficient to provide adequate maintenance and to protect health.

b) The value of the service or class of service rendered.

c) Wages paid in the state for work of like or comparable character.

On questions of fact arising under Article 19 of the Labor Law the finding of the Commissioner is final.\(^{18}\) Questions of reasonableness and validity are, however, reviewable by the State Board of Standards and Appeals, and thereafter directly by the Appellate Division, Third Judicial Department on any question of law involved.

The preliminary research before convocation of a wage board is painstakingly detailed and time consuming. It comprises two phases. In the first place there is the annual cost-of-living survey which estimates in dollars and cents the expenses involved in the adequate maintenance and protection of the health of women workers in the state. A whole staff of trained research people work on this project for approximately six months, for the purpose of transmuting the abstract living wage idea into concrete and specific information for wage board use. In order to guide the research in this phase, there is prepared as accurately as possible a list of the goods and services which reasonably exemplify what is meant by adequate maintenance. Then a corps of field investigators report the prices that have to be paid for all of these items in the significant towns and cities of the state. To meet the requirements of law, the budget thus prepared must be adequate and not merely an emergency standard. Such a budget should make the woman worker independent of social case work or philanthropic agencies. The clothing budget must provide for modest but current wardrobe needs. The food budget must be proportionate to the needs of good health over long periods. In short, the budget must cover all the needs of self-support.

The commodity-quantity budget\(^ {19}\) is different for a woman living as

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\(^{16}\) Comment, *Wage-Fixing by Administrative Agencies—Legislative or Judicial?* (1939) 27 Geo. L. J. 486.

\(^{17}\) N. Y. Labor Law § 555.

\(^{18}\) N. Y. Labor Law § 562.

\(^{19}\) The services of experts on housing, dietetics and the other elements of the cost of
a member of a family and for a woman who lives alone. Research has shown, too, that it differs somewhat in metropolitan and in rural areas. Such a budget includes literally hundreds of items under the general headings of housing, fuel and light, food, household equipment and supplies, clothing up-keep, personal and medical care, leisure time activities, transportation and other living essentials. Since cost-of-living surveys are made each year they include a description of the adjustments made in the list of goods and services, and of the changes of prices as compared with previous years. Finally, there is a tabulation of the annual cost of adequate maintenance and protection of health for a woman worker living as a member of a family and another for a woman worker living alone. For the year 1939 (which is the one involved in the Court of Appeals decision under discussion) the total annual cost in New York State was estimated at $1,059.68 for a woman living as a member of a family, and $1,160.75 for a woman living alone.

The second phase of the economic and statistical research which is preliminary to the meeting of a wage board, takes the form of an economic and statistical report (of the Industrial Commissioner to the minimum wage board) relating to wages and other conditions of employment for women and minors in the industry under consideration. For the confectionery industry the report comprised some 245 printed pages in the record on appeal and included 31 tables.20 Obviously, such

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20. Here again, it is obvious that litigants who seek to challenge the bases on which a
a report can usually be based on the study of only a fair sample of the industry. In the case of the confectionery industry order, the sample studied included approximately 50% of both women employees and establishments. Wage and hour data were collected for 3,968 women and 157 boys under 21 years employed in the actual production of confectionery or in the maintenance of the plant. In all, 119 plants were tabulated in the sample. These plants were distributed in 17 different communities of the state. Wage and hour data were transcribed directly from the records of employers and general information regarding busy and slack months, methods of stabilizing employment and other problems of the industry were obtained through interviews. The period selected for study was the first week in December because at that time in the confectionery industry the production reaches its peak and all types of plants and workers can be included in the sample.

Some idea of the detail and scope of the Commissioner's report to the Wage Board is useful and can be gathered from a cursory review of the outstanding items on the table of contents. In the first place, there is a statement of the facts and circumstances indicating the need for investigation of wages and working conditions in the confectionery industry. Previous wage regulation history is reviewed. The findings and conclusions revealed by previous research studies are summarized. Requests by workers and employers for wage controls are noted. In the second place, the importance of the industry is indicated by a study of its size and by comparison with the same industry in other states. In this connection the characteristics of the industry as to types of product, size and distribution of plants, and types of firm are reviewed. In the third wage order is predicated would be put to huge expense to prepare an exhaustive study, by modern research and statistical methods, of the involved industry. For all practical purposes preparation under private auspices of a report like the one usually prepared by the Research Bureau of the Division of Women in Industry and Minimum Wage is out of the question. The collaboration of scores of field representatives is only a prelude to the work of economic and statistical analyses by which the gathered data are marshalled. The question whether such a report as prepared by numerous departmental employees should be excluded as hearsay has not been formally raised or decided under the New York State Minimum Wage Law. It would seem that in line with the non-technical character of evidentiary rules before administrative tribunals, such hearsay evidence is admissible. It is the type of evidence which in the ordinary business of life motivates serious decisions by responsible persons.

22. Ibid. folios 763-767.
23. Ibid. folios 517.
place, the scope and method of investigation is described and the various branches of the industry are classified for statistical and other purposes in order to make references accurate. Hourly, weekly and annual earnings by plant, product, occupation and type of worker. This includes results of interviews with workers and management.

Then, the problem of seasonality comes in for careful analysis, as well as the sanitary and health conditions, the hours, wages and working conditions of male minors and incidental problems like deductions from wages for uniforms or other charges. Finally, the summary and conclusions of the whole economic report are set forth.24

Up to the present, the following wage orders have been issued under the New York State Minimum Wage Law: Mandatory Order No. 1 Governing Minimum Wages in Laundry Occupations; Mandatory Order No. 2 Governing Minimum Wages in Beauty Occupations; Directory Order No. 3 Governing Minimum Wages in the Confectionery Industry; Directory Order No. 4 Governing Minimum Wages in the Cleaning and Dyeing Industry; Directory Order No. 5 Governing Minimum Wages in the Restaurant Industry; Directory Order No. 6 Governing Minimum Wages in the Hotel Industry. In addition, the Division of Women in Industry and Minimum Wage is completing its studies of the Retail Trades Industry with a view to the promulgation of a wage order for that industry. The laundry order which heads the list just given contains the first guaranteed wage clause in the American history of minimum wage legislation. It reads:

"The minimum weekly wage shall be $14.00 in Zone 1 for such employees who have been employed at all in any given week."25

24. Ibid., folios 710-712: "Information regarding hourly and weekly wages was obtained for the week of December 1, 1937, a week which was the peak of the busy season for most firms in the confectionery industry. Hourly wages represent the lowest common denominator of what the employer pays and what the employee receives for her services. Median hourly wages of the 3464 women for whom this information was available were 38 cents; that is, half the women earned more and half less than this amount. The largest single group of women, 31 per cent, earned between 35 and 40 cents an hour. While 13 per cent had wages of 50 cents or more per hour, 7 per cent, or 232 women, received less than 25 cents an hour. Nine women were paid less than 15 cents an hour." This is quoted as an example of some of the "conclusions" of the departmental confectionery record.

25. The remaining parts of this Wage Order are given over to definitions and so-called "administrative regulations". These have an unfortunate tendency to multiply complications, apparently because the draftsmen concentrate on an effort to avoid gaps in coverage. Both the employer and employee representatives are concerned with such gaps because of the competitive advantages and cost differentials which may result.
In the Mary Lincoln Candies Inc. case the Court of Appeals ruled upon a guaranteed wage provision reading as follows:

"A. Period September 1 to April 1
1. Employment for three days or less in any work week containing three or more work days, entitles an employee to at least $10.00 wages for that week.
2. If employee is called to work on the fourth day, regardless of whether she works or not, that will be considered a full day of eight hours, and she will receive compensation of at least $11.20 for four work days.
3. Employment during more than four work days in any week entitles employee to a minimum compensation of at least $11.20 plus 35¢ for each hour worked beyond the fourth work day up to and including the 40th hour."

It will be noted that the significant feature of this type of wage order provision is the requirement that employers pay employees, if hired at all, for a certain minimal number of hours or days per week, regardless of whether the employee actually works during that time and regardless of whether work is available during the period.

Such sub-legislation amounts to another notable modification of the employment contract by legal rule. There is, of course, no requirement upon any employer that he hire anyone. However, if the employer

26. Mary Lincoln Candies Inc. v. Dep't of Labor, Record on Appeal, Exhibit A.
27. Obviously the reasonableness of such a rule must depend upon the individuating circumstances of the industry as a whole and not on the particular plant to which the order is to be applied. Thus the inquiry would have to be whether, in the long run average, the irreducible minimum unit of pay would be matched, on the employees part, by services for which the employer would wish to pay. If the irreducible unit of pay is too large in relation to the actual service of the employee, the employer's demand curve will be affected so that fewer workers will be hired. It is impossible in social legislation to adjust the rule to each individual case. That is for the efficiency expert, motion and time study analysts, social case workers, personnel managers and specialists on planning and procedure. Sometimes applications for dispensations or variations are in order. [N. Y. LABOR LAW § 30.] The criterion is somewhat similar to that presented by traffic regulation. In individual cases it is perfectly safe at times to cross street intersections despite the red light. If, however, the rule were relaxed to permit the exercise of discretion in individual cases, the social price in accidents would exceed the social cost of obedience to a general rule not strictly needed for all individual cases. The general rule does, however, work satisfactorily for the vast majority of the cases. It is therefore reasonable. By making guaranteed wage rules too complicated or by unrealistically expanding the irreducible minima, the efficiency of the regulation to achieve a living wage can be decreased to the vanishing point.
in the covered industry makes a contract of employment with a given employee, that employee must be paid no less than the wage provided for the guaranteed period. The employee cannot be hired for less than a minimum time.

No wage law in the United States, it is believed, expressly provides for the promulgation of guaranteed wage orders. Moreover, no wage orders issued under existing laws mandate "guaranteed" wages for units of time longer than an hour. However, the germ idea of a guaranteed wage is fairly implicit in the very notion of "living wage" legislation.

The basic objective behind modern minimum wage legislation is to provide for the necessities of existence of workers who are thought valuable enough by employers to be hired to do work in the employer's establishment. The Parrish case contains the following language:

"... if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end?" 29

But, in the Parrish case the issue was not as squarely raised as it would have to be raised under a "guaranteed wage" provision.

Reasoning from the natural law to the general conclusion that minimum wage legislation is permissible is fairly easy. The task, however, becomes complicated and technical when one descends to concrete applications and one has to make what St. Thomas calls a "determination of certain generalities." 30 It is one thing to say that an employee should get a "living wage". There are many texts from the social encyclicals to justify such a statement. 31 It is quite another thing to say concretely and circumstantially that in the candy industry in New York State, A.D. 1939, the employee who does only one day's work because the

30. "It is difficult to state in absolute terms what constitutes a substandard wage. Weekly total wages of $31.00, an average hourly rate of $.515, and an average hourly rate including overtime of $.64 have been considered substandard, while average hourly rates of $.76 for men and $.60 for women, or rates starting at $.73 an hour and going up have been held not to be substandard." Union Security and Wage Policies of the War Labor Board (1942) 42 Col. L. Rev. 1320, 1327-1328. See also Whether Every Human Law Is Derived from the Natural Law, ST. THOMAS AQUINAS, SUMMA THEOLOGICA (P.S.) Q. 95 Art. 2; ADLER, co-author, ESSAYS IN THOMISM (1942) 205.
31. Cf. PRINCIPLES FOR PEACE selections from Papal Documents Leo XIII to Pius XII (N. C. W. C. Wash., D. C.) paragraphs 157, 158 (Leo XIII), paragraphs 984-987 (Pius XI), paragraph 1851 (Pius XII).
employer has no more work to give, should be paid for two or three days' services.

Fair inferences from the natural law and from the encyclicals seem to support such sub-legislation. But, in due honesty it must be recognized that men of good will might differ from such a concrete conclusion; and that lawyers with healthy social instincts might consider such administrative legislation unconstitutional. In other words, the question is not free from all reasonable doubt, as the fact that the Court of Appeals divided four to three, in dealing with it, demonstrates.

When the matter first came before the Board of Standards and Appeals of the Labor Department of the State of New York in February of 1939, counsel for the candy companies, who argued that the guaranteed wage order was unconstitutional and invalid, presented several uneven arguments. They argued that Article 19 of the Labor Law, governing minimum standards for women and minors in industry, made no provision, either directly or by fair intendment, for a guaranteed wage for part-time employment, irrespective of service actually rendered. Further, they contended that if the Labor Law could be interpreted as authorizing the Industrial Commissioner to provide for guaranteed minimum wages, irrespective of services actually rendered, then the statute itself would be unconstitutional, on the ground that it would confiscate property without due process of law, in violation of federal and state constitutions.

There was the usual argument to the effect that a statute which authorized the Industrial Commissioner to provide for guaranteed wages regardless of services rendered would be unconstitutional by reason of improper delegation of legislative power. Finally, there were

32. ST. THOMAS AQUINAS, ibid. Quest. 94 “Of the Natural Law”; MARITAIN, LES DROITS DE L'HOMME ET LA LOI NATURELLE (1943).

33. This argument was, of course, made before the National War Labor Board's "equalization" decisions which held that the financial inability on the part of a firm to pay proper wages is not a ground to deny an increase, New England Textile Operators, July 6, 1942; Detroit and Cleveland Navigation Co., July 3, 1942. The "confiscation" argument against social and other legislation has been overruled in numerous due process cases long before the present war. Home Building and Loan Association v. Blaisdell, 290 U. S. 398, 54 Sup. Ct. 231 (1934); Nebbia v. People of New York, 291 U. S. 502, 54 Sup. Ct. 505 (1934); Euclid v. Ambler Realty Co., 272 U. S. 365, 47 Sup. Ct. 114 (1926); Munn v. Illinois, 94 U. S. 113 (1876); West Coast Hotel v. Parrish, 300 U. S. 379, 57 Sup. Ct. 578 (1937).

34. Delegation of quasi-legislative authority has been held to be valid when limited by reasonably clear and adequate standards supplied by the legislature. Many standards far more vague and unlimited than those imposed by Article 19 of the New York State Labor Law (Minimum Wage Standards for Women and Minors) have been considered.
two rather strained claims, that sub-legislation involving guaranteed wages was in conflict with the Federal Fair Labor Standards Act, and that any state statute permitting guaranteed minimum wages, irrespective of services rendered, would be unconstitutional on the ground that it imposed an undue burden on interstate commerce.

In the “Factual Background” statement set forth at the beginning of the New York State Minimum Wage Law there is a reference to wages “sufficient to provide adequate maintenance and to protect health.” The body of the statute frequently uses words like “wages”, “wage standards”, “wage rates”, “basic minimum wage rates”. The State reasoned that nothing in these formulae expressly or by implication marries wage rates to hourly wage rates. Only on the assumption that there was a statutory limitation to hourly wage rates could there be implied a condemnation of guaranteed wage rates which use days or weeks, rather than hours, as the relative unit of time. Indeed, a review of the history and background of minimum wage legislation and of the writings of those who dealt with this subject fails to disclose any reason why the “guaranteed wage” idea is incompatible with the idea of a “living wage”.


35. In 1834 Villeneuve-Bargemont (1784-1850) who wrote that “a just wage should be the first condition of an industrial enterprise” included the following in 1 ECONOMIE POLITIQUE CHRETIENNE (1837, trans. by author) 275: “It should provide the laborer according to the customs and requirements of the country in which he lives: (1) the wherewithal to exist properly, that is to say, to have nourishing food, clean and durable clothes, and a ventilated dwelling affording proper protection against the rigors of the seasons; (2) the wherewithal to support his family, which may be presumed to include a wife and two children under fourteen years of age; (3) the wherewithal to make some provision for times of sickness and for old age. If the wage cannot provide all these things for the workingman, it is no longer in conformity with the laws not only of nature, of justice, and of charity, but even of political prudence. It would perhaps be more advantageous to the worker not to have work, than to have an insufficient wage.”

See also The Development of Minimum Wages in the United States 1912 to 1927, U. S. Dept of Labor, Bull. 61. This document, dated 1928, quotes from a statement made by the Wisconsin Commission in 1919 as follows: “... the commission agrees with the advisory wage board that the living wage should be established upon an hourly basis rather than at a definite figure per week which disregards the hours of labor.” The Women’s Bureau criticizes this reasoning: “The second mistake was in presupposing that there was no alternative except an hourly rate or a ‘definite figure per week which disregards the
wage feature of the candy order could be matched by constitutional decisions antedating the war and presenting fair analogies wherein even more drastic administrative action was approved by the courts.

One of the "confiscation" arguments particularly emphasized by counsel for the candy companies dealt with the impact of such sub-legislation upon the solvency of the candy manufacturers. The claim was made that if the candy manufacturers were required to pay for services not actually rendered they would be put out of business, not alone because of the added expense, but because of competitive cost differentials which would thus be caused among rival employers. No broad and detailed factual research supported this claim. Some attempt was made to supply witnesses who could talk more or less accurately about the affairs of individual companies. In the oral argument before the Board of Standards and Appeals, this argument was met as follows by the attorney for the Labor Department:

"I simply want to call attention to the argument, obvious in this connection, that no piece of social legislation that has ever been put on the books of any state or nation operated so smoothly that some people were not hurt. Now, if your argument is that some individuals find the operation of a given order oppressive, then I say, it is too bad, I am sorry, I have sympathy for them, but that is the inevitable price we must pay when we put that kind of legislation on the books."36

The Board dismissed the legal assaults made upon the living wage

hours of labor," (p. 235). There is an illuminating chapter on minimum wage in Ryan, Distributive Justice (3d ed. 1942).

Roethlisberger & Dickson, Management and the Worker (1939) 12-13, in describing the incentive wage as used by the Hawthorne Works of the Western Electric Co. Inc. wrote: "In general, the forms of incentive compensation could be divided into two kinds: individual payment and group payment. . . Under both plans the day rate, or base wage, was guaranteed." The same authors refer to a guaranteed wage for straight piece work and for group piece work. It is one of the "ten commandments" of Western Electric Co. to pay a living wage.

36. There is much judicial precedent for such cold sympathy. The allegedly confiscatory requirement of full train crews was approved in Chicago, Burlington and Quincy R.R. v. McGuire, 219 U. S. 549, 31 Sup. Ct. 269 (1911). An Oklahoma statute subjecting state banks to assessments for a depositor's guarantee fund was sustained in Noble State Bank v. Haskell, 219 U. S. 104, 31 Sup. Ct. 986 (1911). "This power to fix minimum prices would have been quite useless had the state been compelled to exercise it in such a way as to assure a reasonable return on the investment of every distributor in the milk business." Hegeman Farms v. Baldwin, 293 U. S. 163, 55 Sup. Ct. 7 (1934). See also Mugler v. Kansas, 123 U. S. 623 (1887); Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383 (1898); Northwestern Fertilizer Co. v. Hyde Park, 76 U. S. 659 (1878); Hadacheck v. Sebastian, 239 U. S. 394, 36 Sup. Ct. 143 (1915).
idea by dismissing "commensurateness of the wage with the value of the services rendered" as a mandatory legal standard. It will be recalled that until 1937 the reasoning of the United States Supreme Court as typified in the Adkins case seemed to favor a practically hour-for-hour proportion between wages paid to workers and services rendered by workers. In effect this meant that for the ordinary employee, wages as prescribed by State Minimum Wage agencies had to be based on a ratio of a certain sum of money per hour. The Board of Standards and Appeals in dealing with the Mary Lincoln Candy Co. case argued that the Supreme Court of the United States had definitely overruled and abandoned the rationale of the Adkins case in 1937, and had, by implication, shorn "commensurateness" of value as a shibboleth requiring maintenance of a mathematical ratio between a specified amount of money and the time unit of one hour. Under minimum wage legislation, prior to the Parrish case, it was therefore inevitable that standards should be fixed in terms of such a ratio. But in the light of the Parrish case it was not inevitable or even advisable to limit that ratio's denominator to a time measure of one hour. True the Parrish case was not concerned with a guaranteed wage rate, but the Board of Standards and Appeals of the State of New York discerned in that case approbation by the highest federal court of the living wage rule: "the bare cost of living must be met." De facto, the cost of living is not confined to a merely hourly basis. But the Board went further. Assuming that wages must be commensurate with the value of services rendered according to an hourly rate regardless of the cost of living, it posed the question:

"How can a minimum wage be 'fairly commensurate with the value of services rendered' unless, at the same time, it is at least a living wage? Can a wage which is not a living wage be said to be fairly commensurate with the value of services rendered without considering the cost of living?"37

In fine, the New York State Board of Appeals rejected the argument that only an hourly wage rate could be fixed as a minimum in a wage year issued under the New York State Minimum Wage Law. The Board declared that such a contention ignores completely the legislatively defined public policy of the State and the exigencies of the living wage idea. For the candy industry in the State of New York the Board took the position that the living wage principle could not be effected if wage

37. 1 Selected Decisions of the Board of Standards and Appeals and Related Court Decisions (1941) 144-145.
rates were pinned down to hourly time units by rule of law.  

The petitioning employers had complained that compulsion on employers to pay wages disproportionate to the services rendered, or even when no services were rendered, amounted to confiscation. This objection the Board parried with the question: "Can it be said that the requirement to pay a living wage is confiscatory?" As long ago as 1917 the United States Supreme Court had dealt with similar arguments based on allegations of confiscation, when it dealt with the constitutional questions raised by workmen's compensation legislation. The cost of industrial accidents was to be shouldered directly by the employer and indirectly by the consumer. It was then argued that to force the employer to pay such a cost would leave no fair profit. But the Supreme Court of the United States answered the argument by stating that if any industry involves so great a human wastage as to leave no fair profit beyond the cost of workmen's compensation, the State is at liberty to prohibit such an industry altogether.

The theory of the living wage is in some respects similar to the theory of compensation for the injured industrial worker. The consumer of economic goods should bear all of the expenses incurred in the production of such goods, including pecuniary losses from death and injuries occurring in the regular course of production and the living expenses inexorably incurred for the sake of production. If such losses are to be paid by the worker, he indirectly carries part of the cost of production. Since it is generally agreed that the expense of work accidents should be borne by the employer in the first place, and shifted by him in the form of increased prices upon the consumer, it would seem that a like logic would apply to the added expense, if any, resulting from the payment of a living wage. Notwithstanding its well reasoned opinion, the ruling of the Board of Standards and Appeals was reversed in the New York State Supreme Court and the reversal was sustained by the Appellate Division with no opinion, except that there was a short dissenting opinion which held the guaranteed wage rule was not unreasonable because the statute required the amount fixed to be sufficient to provide a living wage.

The New York State Court of Appeals reversed the Appellate Divi-

38. Id. at 147-148.
40. Mary Lincoln Candies Inc. v. Dep't of Labor, 263 App. Div. 1058 (4th Dep't 1942).
sion, and in effect reinstated the decision of the Board of Standards and Appeals. In doing so the highest court of the State of New York wrote a memorable opinion justifying the principle that the very concept of minimum wage legislation necessarily involves the determination of the cost of living and the fixing of a wage that will reasonably cover or approach that cost. The Court of Appeals referred to the earlier constitutional history of minimum wage legislation and to the rule of the Adkins case that the value of the service is a controlling test. The legislature which in 1937 passed the New York State Minimum Wage Statute must have had in mind this earlier constitutional history when it directed the Wage Board and the Industrial Commissioner to take into account the cost of adequate maintenance and health:

"... the legislature of course realized that a wage sufficient to provide a decent standard of living would sometimes exceed the strict bargain and sale value of the workers' services."\^41

Here is the first clean-cut ruling by a high judicial authority which meets the objection criticizing the guaranteed wage feature because of its failure to regard the value of the services rendered as the paramount test for fixing minimum wages.

Equally decisive was the manner in which the Court of Appeals brushed aside the argument that rates of wages under minimum wage laws ought to be linked with the hour rather than the day, week or month as a unit of time. The clear assumption upon which the plaintiff's argument was based was that the New York State Minimum Wage Law set up only a system of determining hourly rates of wages. The court pointed out that the word "hour" or "hourly" appears nowhere in the statute. If the legislature provided only for minimum hourly wages, it would have stopped far short of the goal of a living wage. The high social purpose of minimum wage legislation would require recognition of the fact that an hourly rate would not produce a living income, unless such a rate was ordered paid for a sufficient minimum number of hours. The guaranteed wage rule requires no employer to hire or to pay anyone. It guaranteed no particular employee work or wages. It simply fixed the minimum amount which an employee was to get in any week wherein her services were requested by the employer. The employer who in any weekly period calls a given employee into service,

\[^41\] Mary Lincoln Candies Inc. v. Dep't of Labor, 289 N. Y. 262, 266, 267, 45 N. E. (2d) 434, 436 (1943).
is by that fact required to pay no less than $10.00 in the peak season, or $7.00 in the slack season, regardless of the time actually worked:

"Plaintiffs say that at times they need less than three (or two) days work per week but that, under this order, they must either pay for services they do not need and cannot use or go without the workers' services entirely. Assuming that this is factually correct as to their industry, we still conclude that the order does not, for that reason, fail to stand the tests of section 555."\(^{42}\)

The untenability of the contrary argument was shown by a *reductio ad absurdum*. It had been conceded by all parties to the litigation that an hourly wage rate, if reasonable, is valid under the law. If an employer is not required to pay for services he does not need and cannot use, even in the interest of establishing a floor to wages, then an order mandating thirty-five cents per hour would be illegal if the employer needed work for only a half hour or ten minutes. Such logic would not only invalidate the particular wage order, but it would wipe the statute off the books for all practical purposes.\(^{43}\)

To the contention that the Wage Board was capricious and arbitrary in failing to pay any attention whatever to the real value of the services, or to the wages currently paid in the industry, the court responded by pointing to the Wage Board's Report. The latter contains a passage to the effect that the wage actually fixed was not high enough for proper maintenance of workers, but economic conditions in the industry made it impossible to fix as a minimum wage a truly adequate "living wage".

Obviously, this judicial support of the guaranteed wage feature does not mean, as the court warned, that wage boards have unlimited authority to make "extraordinary or whimsical requirements as to hours and wages." The provisions of any industrial order must fit into the circumstances of the particular industry and employment. A guaranteed weekly or daily wage might be reasonable in circumstances where a guaranteed monthly or annual wage would be highly unreasonable, if not economically impossible.

Certainly, the assumption that there is something arbitrary in the guaranteed weekly wage, merely because it does not necessarily result in a precise hour for hour equivalence of *wage* and *time devoted to actual work* is not realistic. The concept of the living wage is not indissolubly wedded to the notion of service by the hour. The whole idea of a living wage is flexible. It should not be frozen into rigid mathe-

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\(^{42}\) *Id.* at 268, 45 N. E. (2d) 437.

\(^{43}\) *Ibid.*
matical forms, like equations where one member must equal the other. There is no scientifically indisputable unit of performance, in most industries or employments. Until one has been found it is illusory to seek to introduce mathematical precision by clinging to a single chronometric measure.

An employer who repeatedly rehires given employees after periodical and fairly regular, but short spells of employment is apparently getting from such employees values which new employees would not be in a position to render. It seems only fair that a man, who thinks well enough of a given employee to rehire him after periods of unemployment, should pay to that employee a salary that will tide him over, if possible, the gaps in employment. Cost of living inexorably accrues to the employee during spells of unemployment. The employee is only available because in some way or other he has met that cost during the recurring intervals of unemployment. The value which such an employee represents to the employer is certainly above the value of a new employee.

Thus, the guaranteed weekly wage makes an employer pay, not alone for time worked, but, in addition, for the privilege of calling upon an employee's experience repeatedly, after intervals of unemployment. Living is a prerequisite of employment. He who pays for employment should, where reasonable and feasible, pay for what is prerequisite thereto.

An argument *a fortiori* is presented by ordinary practice respecting beasts of burden. The farmer provides the living for his horse even while fields are not being plowed. He would lose both his farm and his horse if he undertook to pay for the upkeep of his beast of burden only during those precise hours when the animal was doing actual haulage or other work. As a matter of fact, the overall usefulness and value of a horse to a farmer is not computed upon so narrow a basis as the time during which the horse is in harness.

The dissenting opinion in the New York State Court of Appeals written by Judge Finch and concurred in by Judges Conway and Lewis, objects to the guaranteed wage because, in effect, it:

"... outlaws part time employment with the result that the only alternative for an employee or an employer is either for the latter to pay for labor that is not used or for both to be deprived of part time labor that is necessary for both.*

45. *Id.* at 270, 45 N. E. (2d) at 438.
Certainly, part-time employment, as an institution, is not more important than a living wage. Only on the assumption that a living wage should defer to it may we consider the dissenting opinion valid. There is another alternative: that the employer will succeed in stabilizing his employment or rearranging or prearranging his schedules so as to get full use out of the employees whom he hires. In other words, it should be possible, in most businesses, to plan work so as to keep employees busy for the full guaranteed period, instead of using them for one day and paying them for two or three days.

The dissenting opinion adopts a line of reasoning which, if accepted, necessarily nullifies living wage legislation. It seems to take the view that cost of living is a factor which ought to be subordinated to the value of the services rendered. To say that the statute cannot be read as permitting establishment of guaranteed wages for part-time employment, irrespective of the services rendered, is to assert the primacy of the value of the services and is to reaffirm the discarded and unrealistic logic of the Adkins case. Yet the sole basis upon which the validity of a guaranteed wage rule is predicated is in the sound assumption that the employee is entitled to receive a sum of money sufficient to provide for life, health and morals. It is not a question of employment irrespective of the services rendered. It is to be assumed that no reasonable employer will over the long run, at least, hire workers for whom he cannot provide work.

Perhaps the narrowest and least justifiable argument by which the dissenting opinion sought to challenge the guaranteed wage rule was that derived from the "traditional concept" of wages. It is contended that because the order outlaws part-time employment, the traditional concept of wages is changed. In view of the administrative regulation which permits voluntary absence, it is difficult to understand how it can be categorically asserted that part-time employment is outlawed. But even on the assumption that part-time employment is restricted, or even abolished, it is difficult to understand how the traditional concept of wages is thereby significantly altered. Such conceptualism is a meager

46. "The relation of employer and employee does not always depend upon continuity of actual everyday work. In the instant suspension of actual operation the employees of long standing and experience were 'laid off until work is resumed' on account of a condition of fruit... We see no reason for differing with the Board in its holding that the lay-off because of the temporary shutdown did not sever the relation of employer and employee." National Labor Relations Board v. North Whittier Heights Citrus Ass'n, 109 F. (2d) 76 (C. C. A. 9th, 1940); 310 U. S. 632, cert. den.
tool with which to deal with unpleasant social realities like underpayments of wages.

Finally, it would appear that the dissenting opinion is needlessly technical when it bases opposition to the guaranteed wage idea upon a "principle" of statutory construction that such a power is not to be inferred from ambiguous language. Certainly the statutory language does not specifically describe a guaranteed wage standard, nor does it use the words "guaranteed wages". But this failure to describe particular administrative mechanisms for the implementation of the living wage rule is the direct result of the generality of the statute. It speaks of minimum wage "rates" or minimum wage "standards" throughout. Such formulae are not properly called ambiguous. If they can be made to mean many reasonable things—and they can—certainly the legislature must have known at least that much. In other words, all of the things that they can reasonably mean are within the legislative intent when the definitions of the latter are measured by the declaration of legislative purpose. Ambiguity of language is a defect in a statute only when one of the meanings which can be attached to the words used is clearly or probably outside of the legislative intent. The general power to impose guaranteed wages upon industry doubtless requires the exercise of trained and well considered responsibility. Many social statutes allow for wide areas wherein discretion must be reasonably exercised. The dissenting opinion indicates a fear that if wages may be guaranteed on a weekly basis, they may also be guaranteed on a monthly or yearly basis irrespective of the services rendered. It is all a matter of reasonable proportion and of possibility of adjustment in the industry itself.

There is no reason for shying away from the guaranteed monthly or yearly wage, if carefully studied, and if factual data and the deliberations of a well selected wage board reasonably warrant such an order for a given industry. Practically, it is hardly likely that any wage board or industrial commissioner would in the present unstabilized condition of most industries affected by minimum wage legislation, attempt to impose the guarantee for a period longer than a week. But, even a guarantee for so short a period as an hour can be unreasonable, if the hourly wage rate is capriciously high. The same administrative integrity and responsibility which would operate to guard industry and the public from irresponsibly high hourly wage rates should operate to avoid irresponsible monthly or annual guaranteed wage orders. The question of reasonableness is a question of law, and there is a right of appeal (to the Board of Standards and Appeals, and to the court) on such ques-
tions. But apart from resort to appeal, we are here as in many other fields, subject to the "administrative process". That process is in the long run only as good as the good-will, prudence and efficiency of those who manipulate it.

By the case under consideration the Court of Appeals concluded that a guaranteed-wage rule is reasonably related to the declared and proper purposes of the New York State Minimum Wage Law. Two questions were, however, left open, because though they were certified, the Court of Appeals refused to answer them:

(1) "Upon the record... are the minimum weekly wages fixed by Directory Order No. 3 in that portion thereof designated III and entitled 'Guaranteed Wages' valid and reasonable?"

(2) "Are the provisions of the Federal Fair Labor Standards Act of 1938, relating to wages and hours of employment, exclusive and controlling over the provisions enacted of any order, rule or regulation of the Department of Labor indicated pursuant to Article 19 of the New York State Labor Law, in so far as New York State employers, engaged in interstate commerce, are concerned."

There remains for disposition, therefore, the question whether, upon the record, guaranteed-wage rule, in its general operation with respect to the candy industry of New York, is so wholly arbitrary that it is not "... reasonably fit for enforcement of the policy of the statute under the circumstances of the particular employment."

Having found that the guaranteed-wage rule is authorized by and within the scope of the basic legislation, the Court, in effect, remanded the case to the trial court for determination of a question on which the latter made no finding: in view of the facts and circumstances of the particular industry, are the specific stipulations of the guaranteed-wage rule arbitrary or capricious? Perhaps the only available ground upon which a charge of unreasonableness of the New York State Minimum Wage Order for the candy industry could be predicated is its extreme complication. So many factors have to be considered in the computation of the guaranteed wage that intelligent employers acting in good faith can be puzzled about the precise limits of their obligations under the order. An amusing incident occurred on the argument of the case before the Board of Standards and Appeals. The attorney for the candy industry presented a description of the work and time schedule of a given employee and asked for a computation of the applicable wage rate. The employer got

47. 289 N. Y. 262, 263, 45 N. E. (2d) 434.
48. Id. at 269, 45 N. E. (2d) at 437.
one result, the supervising investigator for the Labor Department got another result and a member of the Board of Standards and Appeals got a third result. It cannot be asserted whether any one of the three results is accurate because of the complex character of the order, but the dollar and cent specification of the employer's obligation is necessarily affected by the particular method of computation employed. 49

The second question which was remanded for the consideration of the trial court was whether the regulation of wages in the New York State confectionery manufacturing industries is a valid interference with congressional power over interstate commerce or an improper intrusion within the exclusive jurisdiction of the Fair Labor Standards Act of 1938. Of course, Section 18 of the latter act expressly denies any intention of excusing non-compliance with state laws "establishing a higher standard" than that established thereunder.

It seems clear that the guaranteed wage feature of the New York order is a "higher standard". The recent United States Supreme Court case of Parker v. Brown is significant in this connection. In this case the California "pro-rate program" 50 for the 1940 raisin crop was ruled

49. See, Comment, Determination of Wages under Fair Labor Standards Act (1943) 43 Col. L. Rev. 355 for a discussion of overtime rate rules under the Fair Labor Standards Act. The note considers guarantees of specific weekly wages in the light of the two somewhat inconsistent rulings of the United States Supreme Court in Overnight Transportation Co. v. Missel, 316 U. S. 572, 62 Sup. Ct. 1216 (1942) and Walling v. A. H. Belo Corp., 316 U. S. 624, 62 Sup. Ct. 1223 (1942). Since the federal statute was intended to spread employment (as well as to regulate hours and fix wage minima) it seems to require stipulation of an hourly rate of pay.

50. A program for marketing the 1940 raisin crop in certain areas in California under that state's "Prorate Act". The purpose of this statute was to "conserve the agricultural wealth of the state" by restricting competition among growers and by maintaining prices during the process of distribution to packers. The law is administered by a tribunal of nine persons with the Agricultural Prorate Advisory Commission and the State Director of Agriculture, who is a member of the Commission, ex officio. The Commission formulates a marketing program which is enforced by the Director. The cited case arose under a program which permitted the producer to sell, upon proper authorization and upon the payment of certain fees per ton, only 30% of his standard raisins through ordinary commercial channels. All sub-standard raisins and at least 20% of the total standard and sub-standard raisins produced must be placed in a "surplus pool", and 50% of the crop must, under the statute, be placed in the "stabilization pool". The appellee was a producer and packer of raisins in the State of California, who sought to enjoin the State Director of Agriculture and the Advisory Commission from enforcing the program. Appellee had produced 290 tons of 1940 crop raisins but had contracted to sell 762½ tons; and he had dealt in 2,000 tons of the 1939 crop. He expected to sell 3,000 tons of the 1940 crop at $60.00 a ton, but was prevented from doing so by the prorate program. For that reason
to be a regulation of state industry "... of local concern which in all circumstances of this case ... does not impair national control over the commerce in a manner or to a degree forbidden by the Constitution."

The case is in *pari materia* in view of the alleged conflict with the Federal Agricultural Marketing Agreement Act of 1937. It seems to establish a rule which is apposite, and broad enough to legitimate the Court of Appeals' decision in the *Mary Lincoln Candies Company* case.

he challenged the validity of that program under both the Sherman Act and the Agricultural Marketing Agreement Act. The court held that the state statute was valid despite the fact that it undoubtedly affected commerce by increasing the interstate price of raisins and curtailing interstate shipments to some undetermined extent. Whatever the effect of the operation of the California program on interstate commerce, the program was one which it has been the policy of Congress to favor. Similarly the Federal Fair Labor Standards Act is an expression of a congressional policy to favor state minimum wage legislation; and the *Parker* case along with the *South Carolina Highway* case [303 U. S. 177, 187, 58 Sup. Ct. 510 (1938)] seem to foredoom the criticisms which the candy manufacturers make in this connection.
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