problem de novo. The doctrine of *stare decisis* does not require that the court worship *ex post facto* rationalization.

If it is the settled rule that underlying facts of past conditions determine the constitutionality of legislation[27] then the *Adkins* case should not have been considered as binding precedent in any regard.[28] The march of events dictates the desirability of minimum wage legislation.

There is nothing explicit in the Constitution which denies to the states the right to protect women from the exploitation of employers: the concept of due process is purely "judge-made".[29] Admitting that the support of women employees who do not earn subsistence cannot be transferred to employers who pay the reasonable value of the service obtained, the Act invalidated in the principal case does not seem an unreasonable measure on the part of a government which is compelled to deal with problems of poverty, subsistence, and morals. W. F. '37.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — GUFFEY ACT. — Once again the Supreme Court has declared that national economic needs cannot be attained through legislative enactments which exceed constitutional limitations. In the most recent decision[1] the Court has declared invalid the Guffey Act[2] which was a statutory plan to regulate the Bituminous Coal Industry throughout the country. *Inter alia* the act provided for the regulation of working conditions of the miners and for protection to collective bargaining. The majority of the court rejected the theory that interstate commerce is "directly" affected by strike and lockouts resulting in curtailment of production or by resultant changes in the sale price. It was held on the contrary that the evil incidents of strikes, etc., are local in their nature and that their effect upon commerce is merely secondary and indirect. The dissenting opinion upholds more particularly the "price-fixing" provision of the Act, which were invalidated in the eyes of the majority by their connection with labor control, but intimates that the labor provisions might be sustained through similar reasoning.

The Court has been fairly consistent in holding that production is not commerce but merely a step in the preparation for commerce.[3] The possibility or certainty of the exportation of articles into another state does not impart to their production the character of interstate commerce.[4] Hence

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[27] O'Gorman & Young v. Hartford Fire Ins. Co. (1931) 282 U. S. 251; Abie State Bank v. Bryan (1931) 282 U. S. 765, 776.

[28] The Permanence of Constitutionality (1931) 40 Yale L. J. 1101.

[29] Thomas Reed Powell, Judiciality of Minimum Wage Legislation (1924) 37 Harv. L. Rev. 545. This article also points out that minimum wage laws would probably had been sustained had the issue been presented to the court at some other time.

[1] Carter v. Carter Coal Co. (May 18, 1936) 56 S. Ct. 855.

[2] (1935) 49 Stat. 991.

[3] Chassaniol v. Greenwood (1934) 291 U. S. 584, 587; U. S. v. E. C. Knight Co. (1895) 156 U. S. 1; Kidd v. Pearson (1888) 128 U. S. 1.

[4] Heisler v. Thomas Colliery Co. (1922) 260 U. S. 245, 259; Coe v. Errol (1886) 116 U. S. 517.

industries such as manufacturing,[5] refining,[6] and mining[7] are considered local businesses and therefore not subject to federal regulatory measures enacted under the authority of the Commerce Clause.[8] This distinction between interestate and intrastate commerce is predicated upon the supposed necessity of preserving the autonomy of the states as required by our dual system of sovereignty.[9]

The court has, however, sustained the power of Congress to regulate transactions so interwined with interstate commerce as to become an integral part of the "flow" of such commerce.[10] So too the "commerce clause" has been construed to permit federal regulation of intrastate commerce which adversely affects interstate commerce[11] and those transactions which are aimed at curtailing such commerce.[12] The standard question has come to be, Does the local activity affect interstate commerce "directly" or "indirectly"?[13] While the court has said that the distinction between "direct" and "indirect" is clear in principle,[14] a survey of the cases shows that it has been interpreted with suppleness of adaptation and flexibility of meaning[15] so that, despite the warning of some of the justices,[16] it has ben often employed as a "device"[17] to reach the conclusion desired.

The employment of men, fixing of wages, etc., are admittedly intercourse for the purposes of production and not of trade; but the wages of coal miners in one state affect the wages of miners elsewhere, since the coal which they produce compete in the "interstate market." Any state which would undertake to raise the miners' wages would ruin its domestic coal business. In holding that the regulation of wages and hours of employes engaged in producing comomdities for the "interstate market" is beyond the power of the Federal Government the court is simply saying that there may be no effective regulation of them at all. Should the court desire to sustain such legislation it might justifiably find precedent in the labor

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[5] Kidd v. Pearson (1888) 128 U. S. 1.

[6] U. S. v. E. C. Knight Co. (1895) 156 U. S. 1 (sugar refining); Champlain Rfg. Co. v. Commission (1932) 286 U. S. 210 (oil refining).

[7] Oliver Iron Co. v. Lord (1923) 262 U. S. 172, 178.

[8] U. S. Const. Art. 1, sec. 8.

[9] U. S. v. E. C. Knight Co. (1895) 156 U. S. 1; Hammer v. Dagenhart (1918) 247 U. S. 251. There is some reason to feel that even under a broader concept of "commerce" there is not a great danger of the complete nationalization of industry. Stern, That Commerce Which Affects More States than One (1934) 47 Harv. L. Rev. 1335, 1363.

[10] Swift & Co. v. U. S. (1905) 196 U. S. 375; Stafford v. Wallace (1922) 258 U. S. 495; Tagg Bros. & Moorhead v. U. S. (1930) 280 U. S. 420; Board of Trade v. Olsen (1923) 262 U. S. 1.

[11] Southern Ry. Co. v. U. S. (1911) 222 U. S. 20.

[12] Local 167, etc. v. U. S. (1934) 291 U. S. 293.

[13] Shreveport Case (1914) 234 U. S. 342; R. R. Commission of Wisconsin v. Chicago, B. & Q. R. R. (1922) 257 U. S. 563.

[14] A. L. A. Schechter Poultry Corp. v. U. S. (1935) 295 U. S. 495, 546.

[15] Cardozo, J., dissenting in the principal case.

[16] Stone J., dissenting in Di Santo v. Pennsylvania (1927) 273 U. S. 34, 44.

[17] Corwin, The Schechter Case—Landmark, or What? (1936) 13 N. Y. L. Q. Rev. 151, 171.

injunction cases. At the outset the court was prone to consider strikes as purely local matters affecting interstate commerce only remotely,[18] while holding that secondary boycotts substantially affected interstate trade.[19] Apparently realizing that boycotts could have no greater effect upon shipments from factories than strikes which closed the plants altogether, the Court departed from its original holdings and in a case where the evidence clearly showed that the purpose of the strike was to restrain interstate trade, the federal power was held applicable.[20] If, as the Court has said, local incidents (railroad rates) lead to secondary consequences affecting interstate commerce,[21] then there seems to be a like immediacy here in regard to miners' wages.

Particular issue must be taken with the Court's statement that whether a commodity has come to rest after its interstate transportation (as in the *Schechter* case) or whether the commodity has not yet entered the channels of interstate commerce (as in the instant case) is a difference without significance. This is a misstatement of fact which will probably bind the Court for some years to come. In fact, where the establishment is one whose product enters interstate commerce and competes elsewhere with local products, the cost at which the product can be sold is the important factor in the survival of producers and in the direction of the "flow" of commerce. The need of a uniform level of competition furnishes the justification for Federal control. This same need is not necessarily present in regard to establishments which handle a product after it has left the producer's hands.[22]

It is to be regretted that the Court refused to apply its language of an earlier case[23] and that the Court has no hesitancy to construe the Commerce Clause restrictively at the very time the Federal power is most needed to cope with the naitonal problems.[24] Circumstances now make it necessary that we no longer regard interstate commerce as simple journies across state boundaries. We must conceive of it as a stream of business feeding and entering an "interstate market" which knows no state lines. With this mental picture formed, regulatory measures by Congress will not be open to the charge of an ulterior motive to usurp the powers of the states, because then Congress will be dealing with the very subject-matter

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[18] United Mine Workers v. Coronado Coal Co. (1922) 259 U. S. 344; United Leather Workers v. Herkert & Meisel Trunk Co. (1934) 265 U. S. 457.

[19] Loewe v. Lawlor (1908) 208 U. S. 274; Duplex Printing Press v. Deering (1921) 254 U. S. 443; Bedford Cut Stone Co. v. Journeymen Stone Cutter's Ass'n (1927) 274 U. S. 37.

[20] Coronado Coal Co. v. United Mine Workers (1925) 268 U. S. 295. This case is popularly known as the "Second Coronado Case."

[21] Atlantic Coast Line R. R. v. Florida (1935) 295 U. S. 301, 306.

[22] Fuchs, A Postscript—The Schechter Case (1935) 20 ST. LOUIS L. REV. 297, 299-300.

[23] Swift & Co. v. U. S. (1905) 196 U. S. 375, 398: "Commerce among the states is not a technical legal conception but a practical one, drawn from the course of business."

[24] Supra, note 22, at p. 303.

entrusted to it—or at least the local incidents thereof.[25] Until then the Constitution will not only still *stand*, but also it will stand *still*.[26]

W. F. '37.

Editor's Note: The instant case was relied on by the Fifth Circuit Court of Appeals in declaring invalid the National Labor Relations Board Act (29 U. S. C. A. sec. 151) insofar as the Act authorized the Board to interfere with the relationships of employers and employees in steel mills, etc., which the court regarded as a "local" business. National Labor Relations Board v. Jones & Laughlin Steel Co. (C. C. A. 5, June 15, 1936) 3 U. S. Law Week. 1084.

DECEIT—AUTOMOBILES—SPEEDOMETERS.—In the case of *Jones v. West Side Buick Auto Co.*,[1] which was decided by the St. Louis, Missouri, Court of Appeals, the plaintiff alleged that he purchased a used automobile from the defendant. The defendant company had reconditioned the car for resale by making certain improvements and repairs which added to the car's appearance and value. The defendant charged a total of $84.52 against his records for this reconditioning. Following this reconditioning, the defendant had the speedometer set back over 26,000 miles. The plaintiff looked at the car before he bought it and noticed the speedometer reading. Not until after the plaintiff bought the car did he discover the discrepancy between the speedometer reading and the true mileage.

The defendant maintained "that the mere turning back of the speedometer could not have constituted a representation. . . ."[2] *Held*, that a representation as to the mileage of a car is a representation as to a material fact and is just as effective a representation, when made by turning back the speedometer, as it would be if made by word of mouth or written guaranty.

This case does not present any innovation in the law.[3] The only novelty presented by this case is that the court held a speedometer reading to be a representation.

Only in Mississippi and Washington have similar cases arisen in the appellate courts. The leading Mississippi case is that of *Nash Mississippi Valley Motor Co. v. Childress*[4] in which case the plaintiff alleged that the

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[25] Corwin, Congress's Power to Prohibit Commerce—A Crucial Constitutional Issue (1933) 18 Cornell L. Q. 477, 503.

[26] Supra, note 17.

[1] (May 5, 1936) 93 S. W. (2d) 1083.

[2] In this case the defendant also tried to defend his action by maintaining that setting back speedometers was a trade custom. The court refused to recognize the defense in the absence of proof of plaintiff's actual knowledge of the custom or that the custom was so well known as to impute knowledge of it to him. This point is well settled in Missouri: Brown v. Strimple (1886) 21 Mo. App. 338; Hyde v. St. Louis Book & News Co. (1888) 32 Mo. App. 298; Fellows v. Dorsey (1913) 171 Mo. App. 289, 157 S. W. 995; International Shoe Co. v. Lipschitz (1934) 72 S. W. (2d) 122.

[3] Harper *On Torts*, sec. 216 et seq.

[4] (1930) 156 Miss. 157, 125 So. 708; Lizana v. Edward Motor Sales Co. (1932) 163 Miss. 266, 141 So. 295.