Action on a national scale seems necessary in order to remedy a situation already nation-wide in scope.[26] The grant-in-aid method or a system of interstate compacts might be used to induce the states to adopt uniform requirements for relief. Under the provisions adopted no residence of more than one year should be required, and no settlement should be lost until a new one is obtained. Moreover, acceptance of federal assistance should not be permitted to disqualify a migrant from acquiring a settlement, since relief may be necessary until the migrant family establishes itself in the community. In order to make migration intelligent, information bureaus are necessary to make knowledge of employment opportunities more readily available and to prevent the dissemination of inaccurate information.

If, on the other hand, a system of direct federal relief for non-settled migrants is instituted, care should be taken to avoid two standards of relief, federal and state, in the same jurisdiction. Either direct federal relief or grants-in-aid and interstate compacts would probably not prevent variations in relief levels among the states and the effect of such variations in influencing migration.

Constitutional Law—Fair Labor Standards Act—Industry Committee Procedure in Recommending Minimum Wages—[Federal].—The petitioner, a small cotton textile manufacturer subject to the Fair Labor Standards Act, sued in the Circuit Court of Appeals for the Fifth Circuit to set aside the administrator's order fixing a $32\frac{1}{2}$ cent hourly minimum wage for the textile industry. The petitioner argued first, that the act was unconstitutional, and second, that even if it were constitutional, the administrator had not complied with the statute. On writ of certiorari from the Supreme Court to the circuit court, which had dismissed the petitioner's complaint, *held*, that Congress had power to regulate wages and hours in industries engaged in production for interstate commerce, that the administrator had complied with the act in appointing the industry committee and in upholding its findings, and that the administrative procedure set up in the act did not deny petitioner his right to a fair hearing nor involve an unconstitutional delegation of legislative power. Judgment affirmed. *Opp Cotton Mills, Inc. v. Adm'r of the Wage and Hour Division of the Dept. of Labor.*[1]

Since the Supreme Court in *United States v. Darby Lumber Co.*[2] held that under the commerce power Congress could prohibit employment of workmen engaged in the production of goods for interstate commerce and the shipment of the goods in such commerce when the men worked under substandard conditions,[3] the statutory pro-

[26] For a discussion of possible remedies see Ohio State Transient Committee, Summary of Conditions in Ohio in regard to Interstate Migration of Destitute Citizens 11–14 (1940); Council of State Governments, A Survey of the Present Status of the Problem of the Transient and State Settlement Laws (1938); Ryan, Migration and Social Welfare c. 7 (1940); Jacoby, An Analysis of Relief and Migration in Illinois 11, 25–26 (pamphlet, 1940).

[1] 61 S. Ct. 524 (1941). [2] 61 S. Ct. 451 (1941).

[3] The Supreme Court expressly overruled Hammer v. Dagenhart, 247 U.S. 251 (1918), which invalidated the Child Labor Act of 1916. For a discussion on the constitutionality of the Fair Labor Standards Act see, Constitutional Aspects of the Fair Labor Standards Act of 1938, 87 U. of Pa. L. Rev. 91 (1938); The Fair Labor Standards Act: The Evils and Burdens in Interstate Commerce, 25 Va. L. Rev. 341 (1939); The Fair Labor Standards Act, 16 N.Y. U. L. Q. 454 (1939); Stern and Smethurst, How the Supreme Court May View the Fair Labor Standards Act, 6 Law & Contemp. Prob. 431 (1939).

cedure for setting standards becomes important. The labor standards act provides that the administrator appoint a committee for each industry which shall consist of an equal number of representatives of employers, employees, and the public, and which shall recommend to the administrator a minimum wage for the industry.[4] On receiving the industry committee's recommendation, the administrator must hold a public hearing. If the committee's recommendation accords with the law and is supported by the evidence at the hearing, the administrator "shall" (must?) approve the recommendation.[5]

The petitioner objected to the textile wage order on the ground that the administrator had not given, as was required by the act, "due regard to the geographical regions"[6] in appointing the committee. Since southern mills produced over half of the national textile output and employed over half the workers in the industry, the plaintiff maintained that the nine southern representatives on the committee of twenty-one should have been increased to at least a majority. The Court held that "due regard" to geographical areas did not require strict geographical apportionment of members, but that the administrator in his discretion could select committee members in order to effectuate the act's purposes. Since the administrator could have concluded that a committee with a southern majority representing low wage-scale mills would defeat the act's purpose, it was not arbitrary to deny the South majority representation on the committee.

The legislative history of this provision supports the Court's interpretation that Congress did not intend to require strict geographical apportionment.[7] Where Congress has desired to limit an administrator's power to appoint committees, it has clearly stated such limitations.[8] Furthermore, earlier decisions hold that when an administrator is required to give "due consideration" to a factor he can in his discretion determine the weight to be given this factor.[9] Had the Court required strict geographical apportionment, the administrator still could have effectuated the policy of the act by care-

[4] 52 Stat. 1062, 1064 (1938), 29 U.S.C.A. §§ 205, 208 (Supp. 1940).

[5] 52 Stat. 1064 (1938), 29 U.S.C.A. § 208(d) (Supp. 1940).

[6] 52 Stat. 1062 (1938), 29 U.S.C.A. § 205(b) (Supp. 1940).

[7] At various times it was suggested in Congress that the administrator be required to make an exact apportionment of committee members among geographic areas, but in the final draft of the statute this provision was omitted. Forsythe, Legislative History of the Fair Labor Standards Act, 6 Law & Contemp. Prob. 464 (1939).

[8] In most instances the President or administrator is given complete discretion in the appointment of committee members who have functions similar to those of an industry committee. Federal Communications Commission, 48 Stat. 1066, 1067 (1934), 47 U.S.C.A. § 154 (Supp. 1940); Interstate Commerce Commission, 41 Stat. 497 (1920), 49 U.S.C.A. § 11 (1929); Federal Power Commission, 46 Stat. 797 (1930), 16 U.S.C.A. §§ 792, 793 (Supp. 1940); Federal Trade Commission, 38 Stat. 717, 718 (1914), 15 U.S.C.A. § 41 (Supp. 1940); Agricultural Adjustment Act, 48 Stat. 37 (1933), 7 U.S.C.A. § 610 (1939). The Bituminous Coal Conservation Act of 1937, 50 Stat. 72, 76 (1937), 15 U.S.C.A. § 829 (Supp. 1940), provided, however, that not more than one commissioner shall be a resident of any one state, and not more than one commissioner shall be a resident of any one coal district.

[9] United States ex rel. Maine Potato Growers and Shippers Ass'n v. ICC, 88 F. (2d) 780 (App. D.C. 1937); Black River Valley Broadcast Co. v. McNinch, 101 F. (2d) 235 (App. D.C. 1938), cert. den. 307 U.S. 623 (1938).

fully selecting the southern committee members. And even had the South been given a majority of the employer, employee and public representatives, this majority might in effect have been changed to a minority by the tendency of southern labor representatives to vote with the northern mills for a high minimum wage.

The Court's determination that the statute did not give members of an "industry" the right to appear before the committee and introduce evidence seems justified. The act merely provides that the committee "*may*[10] hear such witnesses and receive such evidence as may be necessary."[11] The petitioner contended, however, that procedural due process required that industry members be given the "right" to appear. But due process does not require that interested parties be given an opportunity to present evidence before a government advisor or investigator,[12] or even before a body with quasi-judicial powers,[13] if some provision is made for a hearing before the administrative determination becomes final. Since the act provides for a hearing before the final order is issued, requirements of procedural due process seem to be satisfied.

The act provides that the industry committee can exempt a class of employers from the industry minimum wage if necessary to prevent substantial curtailment of employment or remedy a competitive disadvantage. In determining whether an exemption should be granted, the committee is to consider competitive conditions in the industry as affected by transportation and production costs, wages established for similar work in collective labor agreements, and wages paid for similar work by employers voluntarily complying with the act.[14] The petitioner objected that the failure to specify in the act the weight to be given these factors involved an unconstitutional delegation of legislative power. But provision for granting exemptions when necessary to prevent curtailment of employment or unfair competitive advantage does not give the Wage and Hour Administrator or the industry committee broader discretion than that granted in numerous other statutes.[15] Mere statement of the factors to be considered in applying these standards should not make the act invalid.

A more real objection is that the industry committee, under the guise of giving varying weight to the factors set out in the statute, might grant an arbitrary exemption. Employers on the committee might attempt to secure exemptions for themselves. Conflicting evidence on issues arising under the statute would serve to conceal such

[10] Italics added. [11] 52 Stat. 1064 (1938), 29 U.S.C.A. § 208(b) (Supp. 1940).

[12] Compare the procedure of the investigatory branch as provided in the Packers and Stockyards Act, 42 Stat. 161 (1921), 7 U.S.C.A. § 193 (1939), and the Interstate Commerce Commission Act, 52 Stat. 1028 (1938), 15 U.S.C.A. § 45 (Supp. 1940).

[13] See United States v. Illinois Central R. Co., 291 U.S. 457, 463 (1933); American Security Co. v. Baldwin, 287 U.S. 156, 168 (1932) (due process requires that there be an opportunity to be heard and to present every available defense; but it need not be before the entry of judgment); Phillips v. Com'r, 283 U.S. 589, 596–97 (1931); Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928).

[14] 52 Stat. 1064 (1938), 29 U.S.C.A. § 208(c) (Supp. 1940).

[15] Packers and Stockyards Act, 42 Stat. 166 (1921), 7 U.S.C.A. § 211 (Supp. 1940) (administrator required to set rates that were "just and reasonable"), upheld in Tagg Bros. v. United States, 280 U.S. 420 (1930); Agricultural Adjustment Act, 52 Stat. 45, 46 (1938), 7 U.S.C.A. §§ 1312, 1313 (Supp. 1940) (administrator required to set marketing quotas), upheld in Mulford v. Smith, 307 U.S. 38, 48–49 (1939); Bituminous Coal Conservation Act, 50 Stat. 72, 76 (1937), 15 U.S.C.A. § 829 (Supp. 1940) (administrator required to "fix the prices" of coal), upheld in Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 397 (1940).

action.[16] This concealment would make it difficult for an employer who did not participate in committee proceedings to prove that an exception was arbitrary. Thus the act would seem to create circumstances similar to those existing under the NRA and the first Bituminous Coal Act.[17] The Court held these acts unconstitutional because they gave to an interested majority power to oppress a minority group.[18] Sufficient check on such activity exists, however, under the Fair Labor Standards Act. A member of the industry is not automatically a member of the wage-setting committee; instead the administrator has power to select the committee and can prevent participation by undesirable members. The small size of the committees lends itself to more effective investigation and reduces the likelihood of "horse trading."[19] Furthermore, opposing the employer representatives are an equal number of employee representatives; thus, the deciding vote on many important issues is placed in the hands of disinterested representatives of the public. The public nature of the industry committee proceedings and the threat of an administrative hearing at a later time also tends to check arbitrary action. The pressure to secure exemption from the act, moreover, is lessened by the fact that the present exemptions end in 1945; after that any exemption from the act's wage provisions must be supported by a "preponderance of the evidence" before the committee and the administrator.

In view of the difficult economic and sectional issues likely to arise under the act, Congress perhaps should have avoided placing power to make initial findings of fact and recommendations as to wages in a committee where economic and sectional interests are represented. Instead, Congress could have provided an administrative procedure similar to that under the Interstate Commerce Commission Act.[20] There, initial fact finding and recommendation are done by an impartial department investigator, and a hearing is held before disinterested commissioners. But the ICC type of procedure does not allow employer and employee participation in setting wage standards. Participation was desired under the wage-hour statute in order to secure the cooperation and compliance of those affected.[21] Besides, even under the Fair Labor Standards Act, the Department of Labor statisticians do much of the fact finding and investigatory work. As for preventing sectional and economic interests from influencing administrative decisions, even under the ICC procedure these pressures may become effective through political control over the appointment of commissioners.[22]

[16] Opp Cotton Mills, Inc. v. Adm'r of the Wage and Hour Division of the Dept. of Labor, 111 F. (2d) 23, 26–27 (C.C.A. 5th 1940).

[17] National Industrial Recovery Act, 48 Stat. 196 (1933), 15 U.S.C.A. § 702 (1934); Bituminous Coal Conservation Act of 1935, 49 Stat. 994 (1935), 15 U.S.C.A. § 803 (1939).

[18] Schechter Poultry Co. v. United States, 295 U.S. 495 (1935); Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[19] An attempt has been made to keep the committees as small as possible. The hosiery, wool, hat, and millinery committees were composed of but fifteen members, textile twenty-one, and the railroad committee twelve. Rep. of Att'y Gen'l, Administration of the Fair Labor Standards Act of 1938, at 27 n. 31 (1940).

[20] 41 Stat. 497 (1920), 49 U.S.C.A. § 11 (1929); Rep. of Att'y Gen'l, Administrative Procedure of the Interstate Commerce Commission, at 19–90 (1940).

[21] Rep. of Att'y Gen'l, Administration of the Fair Labor Standards Act of 1938, at 37–44 (1940).

[22] Mansfield, The Lake Cargo Coal Rate Controversy 141, 191 (1932).