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THE DETERMINATION OF PREVAILING MINIMUM WAGES UNDER THE PUBLIC CONTRACTS ACT

THE Walsh-Healey Public Contracts Act¹ was passed by Congress in June 1936 for a double purpose: to improve the conditions of employees engaged in fulfilling Government supply contracts² and to raise general labor standards indirectly through the power of the public purse.³ It limited the work

1. 49 STAT. 2036 (1936), 41 U. S. C. § 35 (Supp. 1937).

2. The province of Government construction contracts is covered by the Bacon-Davis Act, 49 STAT. 1011 (1935), 40 U. S. C. § 276(a) (Supp. 1937).

3. See *Hearings before Subcommittee of House Committee on Judiciary on H. R. 11554*, 74th Cong., 2d Sess. (1936) 222-224 (statement by Secretary of Labor Perkins), 80 CONG. REC. 10002 (1936) (statement by Representative Healey). The invalidation of the N.R.A. wage and hour standards following the decision of the Supreme Court in *Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935) was the prime reason behind the enactment of the Walsh-Healey Act which, in a more limited field, purports to further the same objective. See *Hearings before the House Committee on the Judiciary on S. 3055*, 74th Cong., 1st Sess. (1935) 16 (statement by Senator Walsh). The original Walsh bill provided that the code minimum wages could be set as the minimum wages for Government contracts. 79 CONG. REC. 12718 (1935). The Walsh-Healey Act was even called "The Back-door N.R.A." Editorial, *N. Y. Times*, June 25, 1936, p. 20, col. 3. The experience gathered during the N.R.A. has been of great assistance in the determination of minimum wages under the Walsh-Healey Act. See note 58, *infra*.

day on Government contracts to eight hours and the work week to forty.⁴ It also prohibited child and convict labor, as well as any work performed under hazardous or unsanitary conditions. But perhaps the most important innovation was the provision that the wages paid in work on Government contracts should be "not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality" where the work was to be performed.⁵

This standard of a "prevailing minimum wage" was unprecedented in the annals of minimum wage legislation.⁶ Its application to contracts for supplies and to entire industries went further than the many long-standing statutes⁷ requiring payment of prevailing rates of wages to the various classes of employees engaged in the performance of specific public works construction contracts.⁸ Yet nowhere in the Walsh-Healey Act was the term "prevailing minimum wages" defined. The formidable administrative task of applying this tenuous standard to actual wage conditions in widely differing industries

4. 49 STAT. 2037 (1936), 41 U. S. C. § 35(c) (Supp. 1937). The provisions of the Act cover only contracts in excess of \$10,000 and exclude contracts for supplies which may usually be bought in the open market. Employees of the principal contractor alone are affected. To forestall evasion of the Act through bid-brokerage, the contractor is required to stipulate in his contract that he is the manufacturer of, or a regular dealer in, the supplies purchased. For general discussions of the various provisions of the Walsh-Healey Act, see Legis. (1937) 37 COL. L. REV. 102; Comment (1937) 85 U. OF PA. L. REV. 297.

5. § 1(b), 49 STAT. 2036 (1936), 41 U. S. C. § 35(b) (Supp. 1937). The immediate objective of this provision was the elimination of the "wage-chiseler" from Government contract business. See note 3, *supra*.

6. The origin of the prevailing minimum wage is clouded. In the original Walsh bill a standard of determination was, among others, that of the wage "for the same class of labor in the same trade or industry in the same locality." § 8(b). 79 CONG. REC. 12720 (1935). This standard was evidently regarded as similar to that of the "prevailing wage." *Hearings before the House Committee on the Judiciary on S. 3055*. 74th Cong., 1st Sess. (1935) 16 (statement by Senator Walsh). The subsequent Healey Bill omitted this standard and adopted that of the wage fairly and reasonably commensurate with the value of the service rendered. *Hearings before Subcommittee of the House Committee on the Judiciary on H. R. 11554*, 74th Cong., 2d Sess. (1936) 121-123. Finally the amended Walsh-Healey Bill appeared with the "prevailing minimum wage" standard alone. 80 CONG. REC. 10002 (1936). But statements made by various Congressmen in the final debate on the Walsh-Healey Bill indicate that *they*, at least, considered the standard of the "prevailing minimum wage" to be no different from that of the "prevailing wage." 80 CONG. REC. 9256, 10004, 10023 (1936). Evidently the adjective "minimum" was added to "prevailing wage" while the final Walsh-Healey Bill was still in committee, perhaps to emphasize that the prevailing wage established was to be the minimum wage paid.

7. See notes 45 and 46, *infra*.

8. See page 616, *infra*.

has nevertheless been undertaken,⁹ and to date minimum wages have been set in over twenty industries.¹⁰ The purpose of this Comment is to present a critical analysis of these wage determinations.

The creation of appropriate administrative machinery was naturally the first step in the process of wage determination. The Act itself placed responsibility for the wage determination solely on the Secretary of Labor,¹¹ allowing full discretion as to the manner in which this determination should be made.¹² Presumably, therefore, the Secretary could find prevailing minimum wages in any reasonable manner, wholly without the assistance of other administrative officials or public hearings.¹³ The Statute did provide, however, that others could be appointed in an advisory capacity, and in pursuance of this authority the Secretary chose an Administrator of Public Contracts, who was charged with the general supervision of the Act,¹⁴ and a Public Contracts Board, which was authorized to select and recommend the prevailing minimum wages.¹⁵ A practice of holding public hearings prior to any wage determina-

9. The Walsh-Healey Act went into effect on Sept. 28, 1936; but the prevailing minimum wage provision remains inoperative in respect to a particular industry until an appropriate wage determination for that industry has been made. U. S. Labor Reg. 504, Art. 1101 (1936).

10. As of February 1, 1939, wage determinations had been made in 23 industries. Recommendations had been made in seven more. A partial list of the industries considered reveals considerable diversity: airplanes, envelopes, tobacco, tags, cement, men's work clothing, ammunition, handkerchiefs and steel. For a review of the administration of the Walsh-Healey Act at the close of its second year of operation, see (1938) 3 L. R. R. index pp. 153-154.

11. § 1(b). 49 STAT. 2036 (1936), 41 U. S. C. § 35(b) (Supp. 1937).

12. The Secretary of Labor, prior to the passage of the Act, strongly protested against being given such complete discretion, on the ground that responsibility for deciding controversial questions in the wage determination should not be placed upon a Cabinet officer whose administrative duties made it important to be friendly with both labor and industry. *Hearings before Subcommittee of House Committee on Judiciary on H. R. 11554*, 74th Cong., 2d Sess. (1936) 224. Nor has this discretion gone unchallenged. See 80 CONG. REC. 10006, 10007 (1936).

13. See *Gillioz et al. v. Webb et al.*, No. 8861, 1 W. & H. REP. (Wage and Hour Reporter) index p. 387 (C. C. A. 9th, 1938) (determination by the Secretary of Labor of prevailing wages under the first Bacon-Davis Act). But public hearings may be necessary. *Morgan et al. v. United States*, 304 U. S. 1 (1938).

14. At present the Administrator heads a staff of about a hundred persons who form the Public Contracts Division. Communication to YALE LAW JOURNAL by L. Metcalfe Walling, Administrator of Public Contracts Division, Dec. 29, 1938.

15. See U. S. Dep't. of Labor, Admin. Order, Oct. 6, 1936. Recommendation of a prevailing minimum wage by the Board is virtually tantamount to its acceptance by the Secretary of Labor. In only one instance have the recommendations of the Public Contracts Board as to the prevailing minimum wage been rejected by the Secretary. *In re Determination of Prevailing Minimum Wage in Men's Underwear Industry*, 2 (1937). For the sake of brevity, the recommendations of the Public Contracts Board in respect to a prevailing minimum wage in a particular industry will hereafter be cited in this Comment as Recommendations *in re* . . . Industry (1938). Final determinations of the prevailing minimum wage by the Secretary of Labor will be cited: *In re* . . . Industry (1938).

tion was started by the Secretary and has been regularly continued.¹⁶ All interested parties in the particular industries are invited and given an opportunity to present evidence.¹⁷ As a result, representatives of trade associations, of individual manufacturers and of labor organizations regularly appear at the public hearings to present oral testimony or written briefs.¹⁸ Also initiated was a further practice of calling informal meetings, before the public hearings, of various members of the particular industry under consideration, in order to provide a basis for the collection of wage data and for the definition of the scope of the industry itself.¹⁹

The wage surveys of the particular industry in question are the basic form of data on which every wage determination has been founded.²⁰ In most cases they have been prepared by agencies of the Department of Labor itself,²¹

16. See Prentice-Hall 1937 Lab. Serv. ¶ 13,095.3 (statement by Secretary of Labor).

17. In the ammunition industry, a typical case, notice of the hearing was sent to all known members of the industry, as well as to all known trade associations, labor organizations and trade publications in the field. Recommendations *in re* Small Arms Ammunition Industry, 1 (1938). For a brief account of this hearing, see (1938) 3 L. R. R. index pp. 5-6.

18. The hearings for the steel industry, where Government business is a large factor, were well attended by representatives of twenty-five steel companies, by representatives of several trade associations, and by representatives of both the A. F. of L. and the C.I.O. Many other companies sent in wage data. *Hearings before Public Contracts Board in the Iron and Steel Industry* (1938) 1-10. See (1938) 2 L. R. R. index p. 703. On the other hand, where Government business is less of a factor in an industry, attendance may be rather slim. See Recommendations *in re* Specialty Accounting Supply Mfg. Industry, 1 (1938).

19. These informal conferences, composed of labor and management in the industry being studied, meet with the Administrator of the Public Contracts Division and have come to be known as the "advisory panel." Communication to YALE LAW JOURNAL by L. Metcalfe Walling, Administrator of Public Contracts Division, Oct. 14, 1938.

20. The wage data is collected prior to the public hearing. The main purpose of the hearing is to afford labor and management opportunity to comment on this data. Communication to YALE LAW JOURNAL by L. Metcalfe Walling, Administrator of Public Contracts Division, Oct. 14, 1938. See (1938) 3 L. R. R. index p. 153. In one industry a second public hearing was held after a large number of protests had been lodged by both employers and employees against the prevailing minimum wage originally recommended by the Board. The Board then, in a second recommendation, lowered the minimum wage computed for the industry. *In re* Airplane Industry, 2 (1938).

21. *In re* Men's Neckwear Industry (1937) (special wage study prepared by the Women's Bureau); *In re* Dimension Granite Industry (1937) (special wage study prepared by the Bureau of Labor Statistics). The Research Section of the Public Contracts Division may submit its own wage data. Recommendations *in re* Specialty Accounting Supply Mfg. Industry (1938). Wage data has regularly been submitted also by individual manufacturers, trade associations and labor organizations; but such data has usually not been found adequate to serve as a basis for wage determination, and as a result has been used only supplementarily. However, in several industries the bases for the wage determination were surveys submitted by the respective trade associations. Recommendations *in re* Airplane Industry, 2 (1938) (survey presented by Aeronautical Chamber of Commerce); Recommendations *in re* Tag Industry, 1 (1938) (survey presented by Tag Institute).

based on average hourly or median hourly earnings of workers in the particular industry, classified by state, by plant, or by occupation, and taken from a selected sample of large and small plants picked from different sections of the country during a "normal" payroll period.²² This results in a limited but fairly representative coverage of wage conditions in the industry.²³ It has, however, the disadvantage of rendering the wage determination vulnerable to criticism by the industry concerned on the ground that it does not represent true wage conditions, since the Department of Labor and not the industry has collected the wage data.²⁴ In a few instances the industries themselves cooperated with the Public Contracts Division in submitting their own wage surveys,²⁵ with the result that a more complete coverage of the industry was obtained²⁶ and apparently a more accurate wage determination.²⁷

22. Recommendations *in re* Manufacture of Men's Welt Shoes, 4-7 (1937) (classification of median hourly and average hourly wages of workers by states); Recommendations *in re* Fireworks Industry, 1-4 (1938) (classification of average hourly wages by plants); Recommendations *in re* Dimension Granite Industry, 2-13 (1937) (classification of average hourly wages of plants by states and by regions). The regular use by the Department of Labor of the average or the median wage as the basis for its surveys has been criticized on the ground that, to comply with the Statute, the *minimum* wage should be taken. Communication to YALE LAW JOURNAL by the Underwear Institute, Oct. 28, 1938. But it is customary in making wage studies to obtain average hourly earnings, for any other means of computation are made highly impracticable by the extreme variances in hourly figures, particularly on piece work.

23. See *In re* Men's Work Clothing Industry, 2 (1937); *In re* Cotton Garment and Allied Industries, 3 (1937). In a few industries the coverage was very high. Recommendations *in re* Dimension Granite Industry, 3 (1937) (survey covered an estimated 86.8% of industry); Recommendations *in re* Small Arms Ammunition Industry, 3 (1938) (coverage practically complete).

24. The briefs submitted on behalf of all the members in both the ammunition and explosive industries criticized the wage surveys conducted in these industries by the Bureau of Labor Statistics on the ground that the periods covered in the surveys did not reflect normal employment conditions. Brief for the Ammunition and Related Products Industry, p. 2 (1938); Brief for the Explosive Industry and Blasting and Detonating Caps, p. 2 (1938). Members of the underwear and the seamless hosiery industries find fault in the surveys conducted by the Department of Labor in their industries on the ground that they took *average* wages rather than average minimum wages. Communication to the YALE LAW JOURNAL by the Underwear Institute, Oct. 28, 1938; (1937) Special News Letter of the National Association of Hosiery Manufacturers, Vol. 16, No. 34. The wage data collected for the determination in the men's neckwear industry is reported to have been exceedingly scanty, consisting mostly of facts gathered during the N.R.A., but it was the only material reasonably available at the time. Communication to YALE LAW JOURNAL by the Men's Neckwear Manufacturer's Association, Nov. 4, 1938.

25. Recommendations *in re* Portland Cement Industry, 3-7 (1938); Recommendations *in re* Tobacco Industry, 275 (1938); Recommendations *in re* Iron and Steel Industry, 1-2 (1938).

26. The wage survey in the iron and steel industry covered 313,064 employees as of a period in the summer of 1938—an estimated 85% of the total employees in the industry. Recommendations *in re* Iron and Steel Industry, 2 (1938). Coverages in the

Probably this method of collecting wage data should therefore be utilized wherever possible,²⁸ though the accuracy of the data thus submitted should perhaps be checked by independent wage information gathered by the Public Contracts Division.

As an initial step in the process of wage determination, the industry or industries to which the wage is to be applied must be defined.²⁹ The Statute gives a choice of four standards of definition: wages prevailing in similar work, in the particular industry, in similar industries or in similar groups of industries.³⁰ In practice, however, the only standards used have been those of the particular or similar industries.³¹ In defining the scope of an industry, the Public Contracts Division has been guided in the main by practical considerations. Often attention is centered upon those products of the industry which the Government usually purchases.³² Some industries have been limited by the specialized nature of the products which they produced.³³ Two allied industries have been included in one wage determination when technical similarity and personal interrelationships were found to exist.³⁴ In one case, two distinct branches of an industry were jointly considered because they had been covered by a single NRA code;³⁵ in another, the code definition of the industry, with slight modification, was adopted outright as the basis for

cement and tobacco industries were almost as thorough, considerable achievements in view of the size of the industries involved.

27. See *infra*, note 69.

28. Wage surveys by the Department of Labor may be rendered necessary in industries when the members themselves are not sufficiently interested in Government business to undertake their own surveys. See *In re* Work Glove Industry (1937); Recommendations *in re* Men's Welt Shoe Industry (1937).

29. The definition of a given industry is normally made at a meeting of the advisory panel for that industry, prior to the public hearing. See (1938) 3 L. R. R. index p. 153. The Public Contracts Division has followed a policy of first selecting the so-called "sweated" industries for the purpose of making minimum wage determinations. Communication to YALE LAW JOURNAL by L. Metcalfe Walling, Administrator of Public Contracts Division, Oct. 14, 1938.

30. § 1(b). 49 STAT. 2036 (1936), 41 U. S. C. § 35(b) (Supp. 1937).

31. The standard of similar work seems clearly to envisage occupational wages as provided in the ordinary public works construction statute. But practical considerations preclude their recognition under the Walsh-Healey Act. See note 117, *infra*. The situation embraced by the standard of "similar groups of industries" has not as yet arisen.

32. Thus for purposes of the Walsh-Healey Act the tobacco industry does not include cigars, and the fireworks industry does not include display fireworks, for the plain reason that the Government purchases neither in sufficient quantities. Recommendations *in re* Tobacco Industry, 2 (1938); Recommendations *in re* Fireworks Industry, 3 (1938).

33. *E.g.*, the following industries: leather and sheep-lined jackets, seamless hosiery, handkerchiefs, envelopes.

34. The prevailing minimum wage determination in the men's work clothing industry was later extended to the cotton garments and sports jacket industries and still later to barrack bags and bandoleers, because all these were made in the same type of plant and involved processes of basically the same nature. *In re* Cotton Garment and Allied Industries, 2-3 (1937); *In re* Barrack Bags and Bandoleers (1937).

35. *In re* Men's Underwear Industry, 2 (1937).

the prevailing minimum wage.³⁶ On the other hand, a common wage determination has been held inadvisable between two allied industries, despite recognized basic similarities in personnel and process, where one had a definitely higher minimum wage level than the other.³⁷

With the scope of the wage determination demarked by a definition of the particular industry to which it is to be applied, the Public Contracts Board takes up the more difficult task of computing the prevailing minimum wage. Such a computation presumes some interpretation of the unprecedented term "prevailing minimum wages."³⁸ Many criteria were available. The setting of minimum wages in ordinary minimum wage statutes provided a wide variety of principles such as the living wage,³⁹ the fair value of services rendered,⁴⁰ the ability of the industry to pay,⁴¹ and competitive conditions as affected by transportation, living and production costs.⁴² But the Board is not authorized to take such factors into consideration.⁴³ It must find the minimum wage which *prevails* and this may be quite unrelated to any of these principles.⁴⁴ Nor is the phrase "prevailing rate of wages", as used in public works construction statutes,⁴⁵ of any greater service; for despite its extensive application,⁴⁶ this phrase has not been clearly defined.⁴⁷ It has

36. Recommendations *in re* Iron and Steel Industry (1938). Considerable weight was given to the code definition in the specialty accounting supply manufacturing industry. Recommendations *in re* Specialty Accounting Supply Mfg. Industry (1938).

37. *In re* Leather and Sheep-lined Jackets Industry (1937). A distinct difference in the wage levels between the commercial and the fusee divisions of the fireworks industry made a common wage determination inapplicable. Recommendations *in re* Fireworks Industry (1938).

38. See note 6, *supra*.

39. MINN. STAT. (Mason, 1927) § 4218; ORE. CODE ANN. (1930) c. 49, § 315. The principle of the "living wage" was struck down by the Supreme Court in *Adkins v. Children's Hospital*, 261 U. S. 525 (1923) and later reincarnated in *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937). See Douglas, *The Economic Theory of Wage Regulation* (1938) 5 U. OF CHI. L. REV. 184.

40. ILL. REV. STAT. (1937) c. 48, § 199; N. Y. CONSOL. LAWS (Cahill, Supp. 1931-1935) c. 32, § 551.

41. MASS. GEN. LAWS (Ed. 1932) c. 151, § 3.

42. Fair Labor Standards Act, Public Act No. 718, § 8(c), 75th Cong., 3d Sess. (1938). Text quoted (1938) 2 L. R. R. index pp. 497-501.

43. *In re* Men's Work Clothing Industry, 5 (1937) (interpretation of Solicitor of Labor).

44. The wage which prevails, of course, may be higher or lower than that wage which the Board would set on the basis of the standard of the "living wage" or of a fair return for services rendered. This distinction was recognized by the Secretary of Labor in the first wage determination made under the Walsh-Healey Act. *In re* Men's Work Clothing Industry, 3 (1937).

45. See ARIZ. REV. CODE ANN. (Courtright, Supp. 1934) §§ 2755d, 2755e; IDAHO GEN. LAWS (1933) c. 111, § 1; N. J. REV. STAT. (1937) tit. 34, § 11.1.

46. For thorough discussions of state statutes requiring the payment of "prevailing" rates of wages to laborers employed on public works construction, see Comment (1934) 34 COL. L. REV. 733; Legis. (1937) 37 COL. L. REV. 102, 108-110. The Bacon-Davis Act, note 2, *supra*, authorizes the Secretary of Labor to predetermine prevailing rates

variously been taken to be the rate paid the largest group of employees,⁴⁸ the majority of employees,⁴⁹ the union rate⁵⁰ and the average wage.⁵¹ Where the public works statute requiring it is sufficiently clear to avoid constitutional objections,⁵² the prevailing rate of wages in a given locality has usually been considered a *fact* and its ascertainment merely a matter of investigation.⁵³ A similar attitude was originally taken in some quarters toward the Walsh-Healey Act's prevailing minimum wage,⁵⁴ but actual administration has revealed that it presents a different and more complex problem. This difference between the prevailing wage of the typical public works construction statute and the prevailing minimum wage of the Walsh-Healey Act is fundamental. Under the former, only occupational wages are set—*i.e.*, the wages prevailing for a particular occupation on a particular construction

of wages for the various classes of laborers employed on public works or public buildings of the United States or the District of Columbia. Although there is no further definition of terms in the statute itself, administrative regulations have provided a precise formula for determination. U. S. Labor Reg. 503, § 2 (1935).

47. Only four states give precise formulas for determining the prevailing rate of wages, but they are not identical. KAN. GEN. STAT. ANN. (Corrick, 1935) c. 44, § 201; N. Y. CONSOL. LAWS (Cahill, 1930) c. 32, § 220.5a; W. VA. CODE ANN. (Michie, 1937) § 2357(2); WIS. STAT. (1937) § 103.49.

48. KAN. GEN. STAT. ANN. (Corrick, 1935) c. 44, § 201.

49. W. VA. CODE ANN. (Michie, 1937) § 2357(2). In spite of the words of the statute, the West Virginia Department of Labor regularly accepts the local union rates. Communication to YALE LAW JOURNAL by West Virginia Department of Labor, Nov. 7, 1938.

50. Ohio regularly applies the local union rate. Communication to YALE LAW JOURNAL by the Ohio Department of Industrial Relations, Nov. 8, 1938. Michigan does likewise. Communication to YALE LAW JOURNAL by Michigan Federation of Labor, Nov. 28, 1938.

51. N. Y. CONSOL. LAWS (Cahill, 1930) c. 32, § 220.5a (where no majority can be found). In *Campbell v. City of New York*, 244 N. Y. 317, 155 N. E. 628 (1927), this formula withstood a taxpayer's attempt to enjoin the consummation of a contract under it.

52. In *Connally v. General Construction Co.*, 269 U. S. 385 (1926), not only "current rate of wages" but "locality" in an Oklahoma public works construction statute were held too vague. State courts have held similar state statutes invalid on the same ground. *State v. Jay J. Garfield Bldg. Co.*, 39 Ariz. 45, 3 P. (2d) 983 (1931); *Mayhew v. Nelson*, 346 Ill. 381, 178 N. E. 921 (1931); *Kansas v. Blaser*, 138 Kan. 447, 26 P. (2d) 593 (1933). But the predetermination device in the Walsh-Healey Act avoids these objections by specifying the exact monetary figure which the contractor must pay.

53. See *United States for use of Wylie v. Barstow & Co., Inc.* 79 F. (2d) 496, 497 (C. C. A. 4th, 1935); *Ruark v. International Union of Operating Engineers*, 157 Md. 576, 584, 146 Atl. 797, 800 (1929); *Gilloz et al. v. Webb et al.*, No. 8861, 1 W. & H. REP. index p. 387 (C. C. A. 9th, 1938).

54. The prevailing rate of wages is a fact easily determined. (Statement by Representative Walter) 80 CONG. REC. 10004 (1936). See also statements by Representative Healey (*id.* at 10023) and by President Green of the American Federation of Labor, *Hearings before Subcommittee of House Committee on Judiciary on H. R. 11554*, 74th Cong., 2d Sess. (1936) 373.

job.⁵⁵ Since they are naturally the wages paid within a relatively small and clearly defined area,⁵⁶ it is a fairly simple task to ascertain the prevailing wages for local plumbers, electricians or carpenters.⁵⁷ The Walsh-Healey Act, on the other hand, requires the determination of minimum wages prevailing in *industries*. An individual industry may comprise several hundred distinct occupations, each paid a different wage.⁵⁸ The members of the industry may be scattered all over the United States, with considerable difference in their wage standards. And among various industries, differences in wage structure characteristics are likely to abound.

The ambiguous language of the Walsh-Healey Act has led to other interpretations of *prevailing minimum wage*, wholly different from past experiences with similar terms. Members of industries subject to wage determinations under the Act have regularly maintained that the prevailing minimum wage

55. The Bacon-Davis Act provides that every contract shall contain a provision stating the minimum wage to be paid *various classes* of laborers, 49 STAT. 1011 (1935), 40 U. S. C. § 276a (Supp. 1937). See U. S. Dep't of Labor Reg. 503 (1936) outlining the process of determination under this statute. See also IND. STAT. ANN. (Burns, Supp. 1938) § 53-301; KAN. GEN. STAT. ANN. (Corrick, 1935) c. 44, § 201; N. Y. CONSOL. LAWS (Cahill, 1930) c. 32, § 220(2); OHIO GEN. CODE ANN. (Page, 1937) § 17-4a. As illustrative of how this type of statute is applied, see *Stover v. Winston Bros. Co.*, 185 Wash. 416, 55 P. (2d) 821 (1936), *appeal dismissed*, 299 U. S. 508 (1936); *Hearn v. Ralph Sollitt & Sons Const. Co.*, 93 S. W. (2d) 551 (Tex. Civ. App. 1936).

56. See page 623, *infra*.

57. Communications to YALE LAW JOURNAL by Industrial Commission of Arizona, Nov. 23, 1938, and Ohio Dep't. of Industrial Relations, Nov. 8, 1938. The greatest difficulty appears to be that of determining, in the face of contradictory evidence, which rate most nearly reflects the prevailing one. Communication to YALE LAW JOURNAL by New Jersey Dep't. of Labor, Nov. 9, 1938. There may also be difficulty in defining the various classes of laborers. Communication to YALE LAW JOURNAL by California Dep't. of Public Works, Nov. 23, 1938.

58. To the extent that the minimum wages established are for whole industries, wage determination under the Walsh-Healey Act is similar to the wage-fixing process carried out under the N.R.A. But there, theoretically at least, the similarity between the two processes ends. Under the N.R.A. the objective sought was a general raising of minimum wages so that recovery would be promoted through an increase in current purchasing power. THE ABC OF THE N.R.A. (Brookings Institution, 1934) 30-31. The minimum wage established—the "fair" wage—was in effect the result of bargaining between industry, labor and the N.R.A. authorities. Under the Walsh-Healey Act, the minimum wages to be determined are those which *prevail*, and these might be considerably lower than a minimum which would answer to the definition of "fair". Since the prevailing minimum wage is by definition one particular point on the wage scale of the industry, the element of bargaining between industry, labor and Government is theoretically eliminated. But the tendency of the N.R.A. codes to recognize customary wages in an industry and the fact that the Public Contracts Board has not strictly adhered to its own formula for wage determination but has taken on occasion higher minimums [see note 88, *infra*] indicates that in practice the two processes of wage determination are not so far separated as theory would suggest. See MARSHALL, HOURS AND WAGES PROVISIONS IN N.R.A. CODES (1935) 18-26.

must necessarily be the lowest wage in the industry paid to any considerable number of workers.⁵⁹ This position is based upon the argument that as contrasted with prevailing rate of wages—connoting one specific rate for a given occupation in a given locality⁶⁰—prevailing *minimum* wages seems to indicate the lowest of several prevailing wages.⁶¹ But this definition would in many cases flatly contradict the manifest purposes of the Walsh-Healey Act⁶² by leading to the establishment of very low, if not sub-standard, minimum wages on Government contracts.⁶³

Caught in so many critical cross-currents, the Public Contracts Board has evolved a definition of the prevailing minimum wage which combines a plausible interpretation of the language of the Statute with a lively awareness of its broader objectives. By construing "prevailing" to mean "most outstanding" and "minimum" to mean "low", it has made the standard that wage in the lower part of the wage scale which claims the greatest body of workers.⁶⁴ The prevailing minimum wage thus becomes, by definition, the most outstanding of the lower wages, rather than the lowest wage paid to any considerable number of workers.⁶⁵ Members of industries involved in wage determinations are critical of this definition, as might be expected in view of their own interpretation of the term.⁶⁶ Some justification for the Board's definition may be found in the fact that the word "prevailing", as it is used in construction statutes, carries a clear connotation of "most outstanding."⁶⁷ Its chief merit, however, lies in the fact that it appears to set up the standard most consonant with the purposes of the Act.

According to the Board's definition, the ideal *prevailing minimum wage* should stand out as an overwhelmingly preponderant concentration or modal

59. Communications to YALE LAW JOURNAL by the Hat Institute, Oct. 27, 1938; by the Underwear Institute Oct. 28, 1938; by the National Association of Wool Manufacturers, Oct. 31, 1938; by the Southern States Industrial Council, Nov. 2, 1938; by the National Association of Hosiery Manufacturers, Nov. 10, 1938; and by the Institute of Makers of Explosives, Nov. 21, 1938.

60. See note 53, *supra*.

61. See Legis. (1937) 37 COL. L. REV. 102, 111.

62. See note 3, *supra*.

63. See note 161, *infra*.

64. Recommendations *in re* Men's Welt Shoes Industry, 12 (1937); Recommendations *in re* Tag Industry, 3 (1938).

65. "The Board has confined itself in its consideration of minimum wages to an analysis of the lowest wages received by such a substantial proportion of the workers that in relation to other minimum wages they have superior force, influence, and pre-dominance." Recommendations *in re* Dimension Granite Industry, 13 (1937).

66. See note 59, *supra*. But the criticism is by no means unanimous. Members of some industries fully approve the Board's definition. Communications to YALE LAW JOURNAL by the Tag Manufacturers Institute, Oct. 27, 1938; by the Men's Neckwear Manufacturers Association, Nov. 4, 1938; and by the National Association of Leather Glove Manufacturers, Inc., Nov. 7, 1938.

67. The "prevailing" wage is necessarily the "most outstanding" wage paid in a given occupation. See N. Y. CONSOL. LAWS (Cahill, 1930) c. 32, § 220.5a; TEX. STAT. (Vernon, Supp. 1938) art. 5159a; WIS. STAT. (1937) § 103.49.

point in the lower part of the wage scale. It would be an economic, as well as a statutory, *prevailing minimum wage* and its adoption for Government contracts would cause a minimum of dislocation in the wage structure of the industry. Actually, such a wage has seldom, if ever, been found to exist.⁶⁸ Inevitably the computation of a given prevailing wage embodies, to some extent, a compromise between economic facts and statistical fictions, and the degree of compromise often varies considerably from industry to industry.

The process of computation is relatively clear where a customary and uniform base rate is paid to a large proportion of the unskilled workers in an industry,⁶⁹ or where at least a majority of these workers are paid in accordance with collective bargaining agreements.⁷⁰ In such cases a heavy preponderance of workers appears at a single point in the lower part of the wage scale and its selection as the prevailing minimum wage is virtually automatic.⁷¹ But industries with so compelling a prevailing minimum wage have been decidedly in the minority.⁷² In most of those considered there were no base or union rates generally paid to a considerable body of the workers; as a result the wage determinations inevitably became more involved in statistical calculations and less related to actual wage conditions. The element of artificiality thus introduced into the determination is not the result of any fallacy in the methods of calculation employed by the Board—though in a few cases perhaps such a fallacy can be found⁷³—but instead is the natural consequence of the peculiar wage structure of the industry itself which may reflect no prevailing minimum wage at all⁷⁴ or at best a confused one.⁷⁵ In such a case, the Board has regularly adopted the practical device of dividing the wage scale at the point of the median wage or the

68. The closest approach to the "ideal" prevailing minimum wage is found in the determinations cited in notes 69 and 70, *infra*.

69. "Compared with the next higher wage groupings the base rates stand out as the most frequently paid wages in the lower bracket of the industry's wage scale." Recommendations *in re* Portland Cement Industry, 8 (1938); Recommendations *in re* Iron and Steel Industry (1938).

70. *In re* Men's Hat and Cap Industry (1937) (collective bargaining agreements covered approximately 85% of workers in the industry); *In re* Men's Neckwear Industry (1937) (collective bargaining agreements covered approximately 60% of workers in the industry); *In re* Cotton Garment and Allied Industries (1937) (union rates were the minima for approximately 38,000 out of 55,000 workers in the industry).

71. But see (1938) 1 W. & H. REP. index pp. 393-394, where four steel companies protested the wage recommendation in the steel industry on the ground, among others, that the minimum wages established for both North and South were too high to reflect the real minimum wages prevailing in the industry.

72. Notes 69 and 70, *supra*, include them all.

73. See notes 87 and 89, *infra*.

74. *In re* Men's Work Clothing Industry, 2 (1937). The absence of any ascertainable prevailing minimum wage in this industry was given as the reason for basing the determination on the *average* wage. See note 87, *infra*.

75. *In re* Cotton Garment and Allied Industries (1937); *In re* Men's Welt Shoe Industry (1937).

weighted average wage of the workers in the unskilled and semi-skilled occupations, and selecting this point as the top limit below which the prevailing minimum wage must be found.⁷⁶ The greatest concentration point below the limit—usually the mid-point of the five-cent wage interval claiming the greatest number of all workers—is then chosen as the prevailing minimum wage.⁷⁷

Although the Board has usually adhered strictly to the outstanding mode as the point of selection for the prevailing minimum wage,⁷⁸ considerable variations in the manner of its derivation have occurred in different industries. At the dictates of practical convenience, wage concentration may be based on median hourly wages⁷⁹ or on average hourly wages,⁸⁰ by state,⁸¹ by plant⁸² or by occupation.⁸³ Generally the modal point is selected from the wage scale of the entire industry⁸⁴ but a weighted average of individual state modal points has also been used to reach the wage determination.⁸⁵ Where base rates are paid within an industry but no clear concentration of workers can be found at any particular base rate, the average of all the base rates from each plant may be taken, weighted in accordance with the respective number of workers receiving those rates, and the result set as the prevailing minimum wage.⁸⁶ The Board's methods of computation have not been completely flawless. In a number of early determinations, the prevailing minimum wage

76. Recommendations *in re* Explosives Industry (1938); Recommendations *in re* Airplane Industry (1938); Recommendations *in re* Specialty Accounting Supply Mfg. Industry (1938). The selection of such a relatively high top limit for the area within which the modal point must be found has met with the criticism that the Board, in adopting a claimed practical, statistical device, has actually made it possible to find a higher modal point, and hence set a higher minimum wage, than the Statute authorizes. Brief for the Ammunition and Related Products Industry (1938) 5-6. But the top limit regularly set by the Board would seem to be only a logical extension of its definition of the prevailing minimum wage as the most outstanding wage in the lower part of the wage structure. Recommendations *in re* Tag Industry, 3 (1938).

77. Recommendations *in re* Men's Welt Shoes Industry (1937); Recommendations *in re* Airplane Industry (1938). But, for rather specious reasons, in several instances the Board took the midpoint of the ten-cent wage interval containing the greatest body of adherents. See note 89, *infra*.

78. But see notes 87 and 89, *infra*.

79. Recommendations *in re* Men's Welt Shoes Industry (1937).

80. Recommendations *in re* Dimension Granite Industry (1937).

81. Recommendations *in re* Men's Welt Shoe Industry (1937); Recommendations *in re* Portland Cement Industry (1938).

82. Recommendations *in re* Iron and Steel Industry (1938).

83. Recommendations *in re* Tobacco Industry (1938). Several of these standards may be used together. Thus in tobacco the blended wage scale for the industry was divided up into state groupings; in cement the individual plants were grouped by states; and in dimension granite the wage scale was classified by states, each with its own average wage for the two distinct occupations of quarrying and finishing.

84. *In re* Work Glove Industry (1937); Recommendations *in re* Iron and Steel Industry (1938); Recommendations *in re* Specialty Accounting Supply Mfg. Industry (1938).

85. Recommendations *in re* Men's Welt Shoe Industry (1937).

86. Recommendations *in re* Portland Cement Industry (1938).

established was based to a very considerable extent on the *average* wage for the industry⁸⁷—a wage basis which was neither prevailing nor low—and as a result the determinations were vigorously, and not unjustifiably, criticized.⁸⁸ Again, in several other determinations the Board seems to have misapplied its own definition of the prevailing minimum wage as the greatest concentration of workers in the lower part of the wage scale and selected a wage substantially above this concentration point.⁸⁹ Fortunately, from the point of view of consistent administration, these determinations have not recently been followed; but at the time they antagonized industry unduly and served to confuse definition of the prevailing minimum wage at a period when clarification was most necessary.

The Walsh-Healey Act provides that the minimum wages established shall be such as prevail *in the locality* where the work is to be performed.⁹⁰ Unquestionably, this provision was intended to authorize the fixation of geographic differentials in the prevailing minimum wage.⁹¹ The word "locality", however, is not further defined in the Statute and therefore the extent of the area which it was intended to include remained largely a matter of

87. *In re Men's Work Clothing Industry* (1937); *In re Men's Raincoat Industry* (1937); *In re Work Glove Industry* (1937); *In re Underwear Industry* (1937); *In re Leather and Sheeplined Jackets Industry* (1938). In the granite industry the prevailing minimum wage for a given group of states was found by taking a *simple average* of the minimum wages paid in the two principal occupations of quarrying and finishing in these states. Recommendations *in re* Dimension Granite Industry (1937).

88. See N. Y. Times, Feb. 3, 1937, p. 43, col. 1. A large southern trade association criticized this first determination in a public letter to the Secretary of Labor. (1937) Bulletin of Southern States Industrial Council, No. 5. The determinations have been characterized as being based on "prevailing averages" rather than "prevailing minimums." Communication to the YALE LAW JOURNAL by the Underwear Institute, Oct. 28, 1938. But see (1937) 92 NEW REPUBLIC 74 (method of determination not sound because minimum wages set were too low).

89. By taking the midpoint of the greatest ten-cent interval as the prevailing minimum wage, the Board in one case set a minimum wage of 35 cents per hour when 49.5% of the workers in the industry received less than 34 cents per hour and the greatest concentration of workers occurred in the 30-35 cent area. *In re Seamless Hosiery Industry* (1937). See also *In re Handkerchief Industry* (1938); Recommendations *in re* Fireworks Industry, Fusee Division (1938). The wage determination in the Seamless Hosiery Industry, *supra*, was strongly criticized by the trade association for the industry in a public letter sent to the Secretary of Labor. National Association of Hosiery Manufacturers, Special News Letter, Vol. 16, No. 34 (1937). Organized labor, on the other hand, has criticized the setting of a prevailing minimum wage for a given area which was lower than union rates established at peak points within that area, on the ground that the wage determination tended to undermine the higher union rates. *Hearings before Public Contracts Board in re Portland Cement Industry* (1938) 37-39.

90. 49 STAT. 2036 (1936), 41 U. S. C. § 35(b) (Supp. 1937).

91. See *Hearings before Subcommittee of House Committee on Judiciary on H. R. 11554*, 74th Cong., 2d Sess. (1936) 226 (statement by Secretary of Labor Perkins) and 373 (statement by William Green, President of American Federation of Labor). Even the opponents of the Walsh-Healey Act recognized the authorization of geographic differentials. See 80 CONG. REC. 10004 (1936).

surmise.⁹² In public works construction statutes it has generally been limited to a relatively small area, though the limitations are by no means consistent.⁹³ Thus "locality" may mean the state,⁹⁴ the county,⁹⁵ the county seat,⁹⁶ and the city or the village where the work is to be performed.⁹⁷ But notwithstanding the varied definitions in public works construction statutes, under the Walsh-Healey Act the word "locality" might be expected to bear a broader meaning since the exact place where the work will be performed cannot be ascertained in advance of the wage determination.⁹⁸ The prevailing minimum wage anticipates not one particular piece of work performed in one particular locality, but an indeterminable number of contracts performed by various members of the industry at some future date in various parts of the country.⁹⁹ To divide up each industry into dozens of relatively small geographic areas in preparation for possible Government work to be performed by individual members of the industry at some unascertainable future date would have been a practical administrative impossibility. Sheer necessity dictated that "locality" for purposes of the Walsh-Healey Act should mean great regional divisions, and this in nearly every case has been its regular interpretation.¹⁰⁰

92. It appears, however, that the proponents of the Walsh-Healey Bill intended that the areas should be relatively small, *i.e.*, "communities." See *Hearings before Subcommittee of House Committee on H. R. 11554*, 74th Cong., 2d Sess. (1936) 226, 373.

93. See notes 45 and 46, *supra*.

94. R. I. LAWS (1935-1936) c. 2201, as interpreted and applied by the state department of labor. Communication to YALE LAW JOURNAL by Rhode Island Deputy Director of Labor, Nov. 7, 1938.

95. KAN. GEN. STAT. ANN. (Corrick, 1935) c. 44, § 201.

96. IOWA GEN. LAWS (1933) c. 111, § 1.

97. N. Y. CONSOL. LAWS (Cahill, 1930) c. 32, § 220, 5b, as amended (Supp. 1935) c. 32, § 220b. The statute also provides that when no workmen in an occupation for which a prevailing rate of wages is to be determined are found within the city or village where the work is to be performed, "the locality shall be considered the first larger civil division in which workmen or laborers of a similar trade or occupation are employed." § 220-5b. See also IND. STAT. ANN. (Burns, Supp. 1938) § 53-301 requiring the "immediate locality." The New Jersey statute [N. J. REV. STAT. (1937) tit. 34, § 11.1] is similar to that of New York, but in actual application "locality" embraces several contiguous counties. Communication to YALE LAW JOURNAL by New Jersey Commissioner of Labor, Nov. 9, 1938.

98. While the place where a particular public works is to be constructed is known in advance of the letting of contracts for its building, the place where work under the Walsh-Healey Act will be performed depends on which member of the particular industry is awarded the contract. Naturally this cannot be known before the contract is made.

99. For this reason the wage determinations are based on the wages of *all* known members of the industry, not merely those who happen to be interested in Government business, on the theory that every member of the industry is a potential bidder and has an interest in the proceeding. Communication to YALE LAW JOURNAL by L. Metcalfe Walling, Administrator of Public Contracts Division, Oct. 14, 1938.

100. See note 105, *infra*. In only one instance has the term "locality" been limited to even such a sizeable area as a single state. Recommendations *in re* Tobacco Industry (1938). (Special geographic differential for New Jersey alone).

But even with such an interpretation of "locality", the Board has used geographic differentials sparingly. They have been recognized only in the few instances where they stood out as conspicuous figures in the minimum wage pattern.¹⁰¹ In the great majority of industries they have been rejected entirely.¹⁰² Two general requirements for their recognition appear to be necessary: a distinct homogeneity in the wage structure of plants within a fairly sizeable geographic area and a distinct difference between the minimum wage level in this area and that of contiguous, sizeable areas.¹⁰³ Even if substantial differences in prevailing wage rates exist within a state or even among several states, the wage differential will not be allowed if the rates cannot be separated into ascertainable geographic groupings.¹⁰⁴ In most cases the differential has been recognized, and been based upon, the natural wage cleavage between North and South, or North, South and West,¹⁰⁵ but in one outstanding example—cement—the regional nature of the industry itself dictated the lines of demarcation.¹⁰⁶

The factor of geographic contiguity has frequently been employed to include a state with a lower wage level within the higher prevailing minimum wage area of adjoining states.¹⁰⁷ Tobacco furnishes a striking example. In that

101. *In re Men's Underwear Industry*, 3 (1937). See (1937) 4 U. S. L. WEEK index pp. 1430-1431; Recommendations *in re Dimension Granite Industry*, 18 (1937).

102. Geographic differentials have been recognized so far in only seven industries. See (1938) 3 L. R. R. index pp. 153-154.

103. *In re Men's Underwear Industry* (1937); Recommendations *in re Tobacco Industry* (1938); Recommendations *in re Flour Industry* (1938). "Sizeable area" usually includes several states at the least.

104. A geographic differential was rejected in the airplane industry, in spite of considerable variations between wages in different states, on the ground that there was "no clear pattern from which satisfactory geographical groupings could be made." Recommendations *in re Airplane Industry*, 6 (1938). See also *In re Seamless Hosiery Industry* (1937); *In re Work Glove Industry* (1937); Recommendations *in re Explosives Industry* (1938).

105. Two differentials, for North and South, were established for men's underwear and for luggage and saddlery. Three differentials, for North, West and South, were set for granite. Five were set in the flour industry, based roughly on the North-West-South pattern. See (1938) 3 L. R. R. index pp. 153-154. Similarly, six differentials were fixed for steel. *In re Iron and Steel Industry* (1939). In tobacco a North-South differential was recognized, but, paradoxically, the wage set for the North was lower than that for the South. Recommendations *in re Tobacco Industry* (1938).

106. Eleven regional groupings were recognized in this industry. Recommendations *in re Portland Cement Industry* (1938).

107. *In re Seamless Hosiery Industry* (1937) (Southern differential rejected, even though wages in South lower than in North, on ground that average hourly earnings in largest producing state in South were higher than largest producing state in North); *In re Men's Hat and Cap Industry* (1937) (lower wages paid in Middle Western plants not recognized by an East-West differential on ground that a geographic differential would merely give an undue advantage to certain manufacturers to the prejudice of their competitors, since Government market for hats is distinctly national); Recommendations *in re Portland Cement Industry* (1938) (higher wage level in North Carolina prevails

industry two states, Tennessee and New Jersey, exhibited wage levels substantially below the other tobacco states. Since Tennessee was contiguous to the tobacco states as a whole, its differential was not recognized, on the ground that no wage differential setting off a state from contiguous territory should be based on as small a part of the industry as Tennessee represented. But since New Jersey was not contiguous to the rest of the tobacco states and a substantial number of workers were involved, its lower wage level was recognized with a special geographic differential for New Jersey alone.¹⁰⁸

The policy of the Public Contracts Division with respect to geographic differentials has not gone unchallenged.¹⁰⁹ In general the South has opposed the establishment of any prevailing minimum wage which did not recognize a Southern differential where part of the industry considered was located there.¹¹⁰ A contrary view has been taken by the Northern members of industry. Geographic differentials as such are regarded as unsound, because they give an unfair advantage to the areas with lower differentials¹¹¹ and because the wage should be set low enough anyway to be cognizant of all differences of locale.¹¹² The first contention, however, overlooks the fact that differentials in wages between various geographic areas exist apart from the wage determination, which, in setting a fair minimum wage for a particular area, is guided by pre-existing wage conditions within the area itself.¹¹³

over lower wage level in South Carolina by inclusion, for practical reasons, of the latter within the former's geographic grouping).

108. Recommendations *in re* Tobacco Industry (1938).

109. In part the criticism stems from an interpretation of the word "locality" in the Act different from that adopted by the Public Contracts Board. Representative trade associations construe the word to mean variously: The area from which a mill may reasonably be expected to draw its labor (communication to YALE LAW JOURNAL from the Underwear Institute, Oct. 28, 1938); Country districts and city districts (communication to YALE LAW JOURNAL from the Southern States Industrial Council, Nov. 2, 1938); "Local points" (communication to YALE LAW JOURNAL from the National Association of Hosiery Manufacturers, Nov. 10, 1938). See (1938) 1 W. & H. REP. index pp. 393-394, *id.* at 412 (criticism of geographic differentials in steel industry).

110. The wage determinations in the men's work clothing and the seamless hosiery industries have been strongly criticized on these grounds. Southern States Industrial Council, Bulletin 9 (1937); National Association of Hosiery Manufacturers, Special News Letter, Vol. 16, No. 34 (1937). See N. Y. Times, Feb. 3, 1937, p. 43, col. 1.

111. Communication to YALE LAW JOURNAL by the National Association of Wool Manufacturers, Oct. 31, 1938.

112. Communication to YALE LAW JOURNAL by the Men's Neckwear Manufacturers Association, Nov. 4, 1938. The Tag Manufacturers Institute reports its industry preponderantly against geographic differentials, because the vast majority of its members are located in the North. Communication to YALE LAW JOURNAL, Oct. 27, 1938. But there is also the view that the establishment of only one prevailing minimum wage for an industry will prevent the spread of the industry into undeveloped areas and will confine it to industrial centers unless the wage is set so low as to give no protection to workers in high cost of living communities. Communication to YALE LAW JOURNAL by the Underwear Institute, Oct. 28, 1938.

113. See, as an example, the wage scale of the steel industry. Recommendations *in re* Iron and Steel Industry (1938).

Non-recognition of geographic differentials—the determination of *one* prevailing minimum wage for the whole industry—would result in a higher minimum for the lower wage area, but it might have the undesirable effect of virtually excluding a whole section of an industry from participation in Government contracts. The second contention ignores the very purpose of the geographic differential itself—to provide a minimum wage that is reasonably adapted to wage conditions in each of several different wage areas.¹¹⁴ In such a case, the determination of a single prevailing minimum wage for the entire industry based on the lowest wage area would provide no protection at all for workers in higher wage areas and would render the wage determination relatively ineffective.

With the exception of differentials based on geography, the Walsh-Healey Act has been construed by the Secretary of Labor to allow the establishment of only one prevailing minimum wage for each industry.¹¹⁵ For this reason, recognition cannot be granted to differentials based on either the size of plants¹¹⁶ or on the variety of occupations in the industry.¹¹⁷ This course was frankly dictated by the need for administrative simplicity, for the allowance of such differentials would have vastly complicated the process of determination.¹¹⁸ In one industry alone, for example, several hundred distinct occupational groupings were reported.¹¹⁹ Concededly, the non-recognition of occupational minima has one real disadvantage. It has resulted in prevailing minimum wages based on a fusion of all the wages paid in all the semi-skilled and unskilled occupations within a particular industry,¹²⁰ even though these occupations may differ widely in the character of the work performed, the type of skill required, and the amount of compensation paid. Hence the prevailing minimum wage established may actually prevail in none of them; and invariably it is too high for the lowest occupational groupings

114. See Recommendations *in re* Portland Cement Industry, 11-13 (1938).

115. *In re* Men's Hat and Cap Industry, 2 (1937). See (1937) 4 U. S. L. WEEK index p. 1430.

116. In the soap industry, the wage data showed a distinct differential in wage rates between the large and the small plants, and the Board was strongly urged to recognize it. *Hearings before the Public Contracts Board in re Soap Industry* (1938) 75-77. A similar contention was advanced in the steel industry. *In re* Iron and Steel Industry, 4 (1939).

117. *In re* Men's Hat and Cap Industry (1937). Non-recognition of occupational wages under the Walsh-Healey Act, of course, runs absolutely counter to their distinct recognition under public works construction statutes requiring prevailing wages. See note 55, *supra*.

118. See U. S. DEPT. OF LABOR, REPORT OF WOMEN'S BUREAU ON MEN'S WORK CLOTHING INDUSTRY (1936) 2.

119. *Ibid.*

120. The wage tables are regularly computed on the basis of the average hourly or median hourly earnings of *all* the workers within certain plants or areas. Recommendations *in re* Men's Welt Shoe Industry (1937) (classification of all workers by states); Recommendations *in re* Dimension Granite Industry (1937) (classification of all workers by region).

and too low for the highest.¹²¹ Yet to set the prevailing minimum on the basis of the lowest paid occupational grouping alone—a course which so far has not been adopted—would give no protection to the other occupational groups and, furthermore, would not constitute the determination of a prevailing minimum wage *for the industry*. In view of practical exigencies, therefore, the Board's policy of basing the wage determination on all the wages in the industry appears to be the only workable one. Nevertheless the complete rigidity of the prohibition against recognition of occupational minima is perhaps regrettable in the case of an industry which has only very few occupational groupings, each with a distinctly different wage level and each claiming a substantial body of workers.¹²² The special tolerance provision in the Act, which authorizes a wage determination lower than the prevailing minimum wage for a certain proportion of learners, superannuated and handicapped workers in an industry,¹²³ has been put forward as a means of circumventing this prohibition.¹²⁴ Although in one instance it appears to have been used for this purpose,¹²⁵ on the whole it has been rather strictly limited to the end for which it was designed.¹²⁶

It is extremely doubtful whether a prevailing minimum wage determination may be successfully assailed in the courts.¹²⁷ Since it is now well established that the Government may prescribe conditions for laborers on its own con-

121. Thus in the granite industry forty-seven distinct occupations were listed in the quarrying and finishing divisions. Average hourly wages within the New England area ranged from a top of \$1.04 for surfacers to a bottom of 40c. for cutters' apprentices. The prevailing minimum wage determined for this area, based on a weighted average of all the wages paid, was 57.5c. an hour. Recommendations *in re* Dimension Granite Industry (1937).

122. Recommendations *in re* Tobacco Industry, 3 (1938). Here there were but three occupations listed, their median wages were substantially different, and large numbers of workers were employed in each.

123. 49 STAT. 2039 (1936), 41 U. S. C. § 40 (Supp. 1937).

124. *Hearings before Public Contracts Board in re Tobacco Industry* (1938) 62; Brief for the Institute of Explosive Workers in the matter of the Determination of the Prevailing Minimum Wage in the Explosives Industry (1938) 26-27; Recommendations *in re* Specialty Accounting Supply Mfg. Industry, 7 (1938).

125. *In re* Men's Neckwear Industry, 4 (1937). (Special tolerance established for "boxers and trimmers".)

126. In fully half of the determinations no tolerance at all was granted. The highest tolerance granted in any one industry was 20 per cent of the workers engaged at any one time in any one plant on the Government contract. *In re* Reconsideration of the Minimum Wage Determination of July 28, 1937, for the Men's Hat and Cap Industry (1938). But this tolerance is unusually high. In most industries tolerances have been restricted to 5 or 10 per cent of the workers.

127. As yet no attempt has been made to attack judicially either the constitutionality of the Walsh-Healey Act or the validity of any wage determination made under it. This Comment, however, is not concerned with the question of the constitutionality of the Act. For a brief discussion of the issue, see Legis. (1937) 37 COL. L. REV. 102, 119-120.

tracts,¹²⁸ the only ground of attack would appear to be the method of determination employed by the Secretary of Labor.¹²⁹ Yet it is not clear how a complaining manufacturer would have sufficient standing in court to lodge a legal protest. If he is a successful bidder, he has had to agree to pay his employees wages no lower than the wage determined by the Secretary of Labor to be the prevailing minimum wage in his industry.¹³⁰ As the recipient of benefits by reason of administrative action, he would be estopped, in defending a Government suit against him for liquidated damages or cancellation,¹³¹ from challenging its validity.¹³² If he is an unsuccessful bidder, his status as a taxpayer gives him no grounds for attack¹³³ and he would be hard put to establish any other cause of action.¹³⁴ Whether or not he bids for Government contracts, he might contend as a member of the industry that the prevailing minimum wage requirement has forced up all wages in the industry,¹³⁵ thereby injuring him directly and particularly. But this would seem to be *damnum absque injuria*; what the Government chooses to insert in its own contracts yields no cause of action to a private person who is free to take or leave those contracts as he pleases.¹³⁶ An unsuccessful, lowest

128. *Atkin v. Kansas*, 191 U. S. 207 (1903); *Ellis v. United States*, 206 U. S. 246 (1907); *Heim v. McCall*, 239 U. S. 175 (1915); *United States for use of Wylie v. Barstow & Co.*, 79 F. (2d) 496 (C. C. A. 4th, 1935).

129. The method actually in use at present would seem to afford no real grounds for complaint. The regular holding of public hearings, the privilege given all interested parties to appear and submit evidence and the care with which determinations are made would most probably persuade any court that the requirements of "due process" had been met. See *Gillioz et al. v. Webb et al.*, No. 8861, (1938) 1 W. & H. REP. index p. 387 (C. C. A. 9th, 1938).

130. The contract which the contractor signs with the Government must carry an express stipulation that he will pay his employees not less than the monetary figure which the Secretary of Labor has determined to be the prevailing minimum wage in his industry. 49 STAT. 2036 (1936), 41 U. S. C. § 35 (Supp. 1937).

131. § 2 of the Walsh-Healey Act provides that violation of any stipulation in a contract made under § 1 shall render the party responsible therefor liable to the United States in liquidated damages, and shall furnish as well grounds for cancellation of the contract. 49 STAT. 2037 (1936), 41 U. S. C. § 36 (Supp. 1937).

132. *Stover v. Winston Bros. Co.*, 185 Wash. 416, 55 P. (2d) 821 (1936), *appeal dismissed*, 299 U. S. 508 (1936); *cf. Pierce Oil Co. v. Phoenix Refining Co.*, 259 U. S. 125 (1922); *St. Louis Malleable Casting Co. v. Prendergast Const. Co.*, 260 U. S. 469 (1923); *Booth Fisheries Co. v. Industrial Comm.*, 271 U. S. 208 (1926). See Comment (1934) 34 COL. L. REV. 1496.

133. *Massachusetts v. Mellon*, 262 U. S. 447 (1923); *Wheless v. Mellon*, 10 F. (2d) 893 (App. D. C., 1926); *Elliott v. White*, 23 F. (2d) 997 (App. D. C., 1928).

134. "It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the State". *Atkin v. Kansas*, 191 U. S. 207, 222-223 (1903). See also *Stephenson et al. v. Binford et al.*, 287 U. S. 251, 274-276 (1932).

135. This has undoubtedly occurred in certain industries. See notes 141 and 142, *infra*.

136. *American Bank & Trust Co. v. Federal Reserve Bank of Atlanta*, 262 U. S. 643 (1923); *Alabama Power Co. v. Ickes*, 302 U. S. 464 (1938); see Comment (1938) 51 HARV. L. REV. 897. Lack of sufficient legal interest would probably prevent a

bidder, whose bid has been rejected because of his refusal to agree to pay the minimum wage prescribed by the Secretary of Labor, may contend that he does pay the prevailing minimum wage for the industry in his plant; that the minimum wage determined by the Secretary to be the prevailing minimum wage for his industry is not the *real* prevailing minimum wage; and that the Secretary in this determination has so far exceeded the authority granted under the Statute that it amounts to an abuse of discretion. But the term "prevailing minimum wage" is not defined in the Statute and its interpretation is therefore so obviously a matter of full administrative discretion that a court would be loath to substitute its own definition for that of the Secretary of Labor.¹³⁷ And even if this contention could prevail, relief probably would be denied the complainant on the general ground that the selection of the lowest responsible bidder by an agency of the Government is in itself an exercise of discretion with which the courts will not interfere.¹³⁸

The general effect of the prevailing minimum wage determinations on the industries to which they have been applied is still for the most part a matter of speculation.¹³⁹ There is little doubt that in many cases the standard tends to become the minimum wage for the entire industry.¹⁴⁰ Conspicuous examples

manufacturer from bringing a proceeding for a declaratory judgment to determine whether the wage determined by the Secretary of Labor was *the* prevailing minimum wage. *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, 240-241 (1937). See BORCHARD, *DECLARATORY JUDGMENTS* (1934) 378, 606. *Mandamus* also probably would not be available. *Interstate Commerce Commission v. New York, N. H. & H. R. R.*, 287 U. S. 178 (1932); *United States ex rel. Girard Trust Co. v. Helvering*, 301 U. S. 540 (1937). But *cf. Miguel v. McCarl*, 291 U. S. 442 (1934).

137. *United States for use of Wylie v. Barstow & Co., Inc.*, 79 F. (2d) 496 (C. C. A. 4th, 1935); *Gillioz et al. v. Webb et al.*, No. 8861 (1938) 1 W. & H. REP. index p. 387 (C. C. A. 9th, 1938). In both these cases determinations by the Secretary of Labor of prevailing wages under the Heard Act were unsuccessfully assailed. The court in the latter said, "The function of the Secretary in thus ascertaining and declaring the prevailing rate of wages is not arbitral, and in the nature of a judicial inquiry . . . It is that of an appraiser or valuer . . . subject to the impeachment of his determination only for fraud, dishonesty or bad faith."

138. See (1938) 47 YALE L. J. 832; *Colorado Paving Co. v. Murphy*, 78 Fed. 28 (C. C. A. 8th, 1897); *O'Brien v. Carney*, 6 F. Supp. 761 (D. Mass. 1934); see *United States v. New York & P. R. S. S. Co.*, 239 U. S. 88, 93 (1915) (requirement that lowest responsible bid be accepted is for benefit of the United States and not for the bidder).

139. In many of the industries the wage determinations are still on recommendation and have not as yet been put into effect. Experience in others has been as yet too short-lived to gauge results. In only a few, therefore, can the measure of effect be taken.

140. Maintenance of employee morale and administrative efficiency make it difficult to operate a plant when part of the workers are paid wages for work on Government contracts which are higher than their fellow workers receive for exactly similar work on private contracts. The same problem, to a lesser degree, affects the various plants within the industry. See (1938) 2 L. R. R. index p. 703. The influence of the prevailing minimum wage determination is further extended by the requirement that an individual engaged in the performance of a Government contract subject to the Walsh-Healey Act is entitled to the stipulated minimum wage for the week in which any

are the airplane industry, where Government orders take a high percentage of the total production,¹⁴¹ and the steel industry, where Government orders are placed through many different plants.¹⁴² On the other hand, the effect is probably negligible in such industries as the shoe¹⁴³ and the specialty accounting supply industries¹⁴⁴ where the amount of Government purchases in relation to total output is small and where only a few plants bid for the orders offered. In a few industries the prevailing minimum wage requirement seems to have decreased the number of firms ready to bid for Government contracts;¹⁴⁵ but in other industries this decrease has been counterbalanced by an increase in firms able to bid, since the plant paying higher wages is no longer kept out of the Government contract market by firms paying sub-standard wages.¹⁴⁶ In any event, the reluctance of certain industries to bid for Government contracts in the early days of the Walsh-Healey Act, which resulted in an actual scarcity of bidders for several large orders,¹⁴⁷ has now disappeared. The reason may probably be found in the gradual acceptance of the Act as a permanent part of Government policy¹⁴⁸ and in the preoccupation of industry with other recent federal statutes dealing with the regulation of labor conditions.¹⁴⁹

Government work was performed by him, even though he has been assigned to commercial work during part of that period. Ruling of Public Contracts Division, July 6, 1937, p. 9, quoted from Prentice-Hall 1937 Lab. Serv. ¶ 13,095.4-A.

141. Recommendations *in re* Airplane Industry, 9 (1938).

142. *Hearings before Public Contracts Board in re Iron and Steel Industry* (1938) 364-365. See (1938) 2 L. R. R. index p. 703.

143. The National Boot and Shoe Manufacturers Association reports that the shoe industry is very slightly affected by the Walsh-Healey Act, since a very small percentage of its output is sold to the Government. Communication to YALE LAW JOURNAL, Nov. 1, 1938. A similar report is furnished by the work glove industry. Communication to YALE LAW JOURNAL by the Work Glove Institute, Oct. 28, 1938.

144. *Hearings before Public Contracts Board in re Specialty Accounting Supply Manufacturing Industry* (1938) 35-37 (statement by Mr. O. L. Moore of the Specialty Accounting Supply Manufacturers Association).

145. The Hat Institute reports a decrease in the number of firms bidding for Government orders in the hat industry partly because of the Walsh-Healey Act. Communication to YALE LAW JOURNAL, Oct. 27, 1938. A somewhat similar report has been submitted from the underwear industry. Communication to YALE LAW JOURNAL by the Underwear Institute, Oct. 28, 1938.

146. Communications to YALE LAW JOURNAL from the Men's Neckwear Manufacturers Association, Nov. 4, 1938, and from the National Association of Leather Glove Manufacturers, Inc., Nov. 7, 1938. This result is in full accord with the immediate objective of the Walsh-Healey Act, namely, to eliminate the sub-standard firm from the Government contract market. See note 3, *supra*.

147. See N. Y. Times, Dec. 23, 1936, p. 22, col. 2 (steel and copper orders for the Navy Department receive no bids); March 5, 1937, p. 1, col. 3 (statement of Representative Vinson). See (1936) BUSINESS WEEK, October 24, 11-12.

148. See (1937) BUSINESS WEEK Aug. 7, p. 48.

149. *E.g.*, NATIONAL LABOR RELATIONS ACT, 49 STAT. 453 (1935), 29 U. S. C. § 151 (Supp. 1937) and the FAIR LABOR STANDARDS ACT, Public Act No. 718, 75th Cong., 3d Sess. (1938).

Various amendments to the Walsh-Healey Act have been proposed with the general purpose of broadening its scope.¹⁵⁰ Of these the most important in their effect on the prevailing minimum wage are amendments to extend the provisions of the Act to subcontractors¹⁵¹ and to lower the present exemption limit to contracts under \$10,000.¹⁵² As it now stands, the Act applies only to principal contractors,¹⁵³ with the result that the owner of an integrated plant who deals directly with the Government must pay the prevailing minimum wage, whereas the owner of a non-integrated plant, dealing through a converter, is free to pay lower wages.¹⁵⁴ The extension of the Act to subcontractors would have the beneficial effect of equalizing wage conditions throughout different plants working on Government contracts and of considerably expanding the coverage of the prevailing minimum wage. Perhaps less necessary is the proposal to lower the \$10,000 exemption limit, if only for the reason that the Public Contracts Division is still faced with the tremendous task of determining prevailing minimum wages for industries within the present terms of the Statute which have not as yet had wage determinations.¹⁵⁵ There would perhaps be more merit in a proposal to increase the size of the staff of the Division itself to make possible a more complete administration of the Statute as it now stands. Other proposals aim to connect the Walsh-

150. See 83 CONG. REC. 1489 (1938) (amendments proposed by Senator Wagner); 83 CONG. REC. 8297-8298 (1938) (amendments proposed by Senator Walsh); (1938) 2 L. R. R. index p. 493 (amendments proposed by Representative Healey); N. Y. Times, July 24, 1938, p. 5, col. 4 (amendments proposed by the C.I.O.).

151. 83 CONG. REC. 8297-8298 (1938); (1938) 2 L. R. R. index p. 458 (amendment proposed by Senator Walsh); N. Y. Times, June 28, 1938, p. 4, col. 2 (Healey amendment vetoed by the President on the ground that it would not stop bid-shopping). The original Walsh bill applied to all subcontractors. 79 CONG. REC. 12718 (1935).

152. The Walsh amendment lowered the exemption limit to \$2000. 83 CONG. REC. 8297 (1938). It was passed by the Senate. 83 CONG. REC. 8299 (1938). A similar exemption limit was advocated by Representative Healey. (1938) 2 L. R. R. index p. 493. But another bill which set the exemption at \$5000 and which had been passed by Congress was vetoed by the President on the ground that it might delay the public works program. N. Y. Times, June 28, 1938, p. 4, col. 2. The original Healey Bill placed the exemption limit at \$2000. *Hearings before Subcommittee of House Committee on the Judiciary on H. R. 11554*, 74th Cong., 2d Sess. (1936) 121. Why the limit was raised to \$10,000 in the final Walsh-Healey Bill is not clear. It may have been for the purpose of removing "red tape" from small purchases.

153. See note 4, *supra*.

154. See Prentice-Hall 1937 Lab. Serv. ¶13,085.3(2) (ruling of Public Contracts Division).

155. No exact forecast can be made of the number of wage determinations yet to be considered, for the number of commodities which may be included within a particular wage determination cannot be known until after the scope of the industry to which it is to be applied has been defined. But since the Government regularly purchases approximately one thousand distinct commodities, the number of determinations still to be made is obviously large. Communication to YALE LAW JOURNAL by L. Metcalfe Walling, Administrator of Public Contracts Division, Dec. 29, 1938.

Healey Act with the National Labor Relations Act¹⁵⁶ by requiring, as a condition precedent to securing a Government contract, that a contractor has complied with all orders and decisions of the National Labor Relations Board.¹⁵⁷ Though such an amendment would affect the scope of the prevailing minimum wage only collaterally, it would at least end the anomalous situation in which the continued refusal of a manufacturer to comply with the decisions of one agency of the Government is no ground for refusing him benefits from another.¹⁵⁸

The Fair Labor Standards Act¹⁵⁹ has considerably decreased the extent of the task involved in determining prevailing minimum wages. Since the Act provides for a universal minimum wage of 40 cents an hour within six years in all industries engaged in interstate commerce,¹⁶⁰ the Public Contracts Division is, for all practical purposes, relieved of having to consider henceforth a wage determination in any industry where the prevailing minimum wage is less than 40 cents an hour. Moreover, the Division has been rescued from the embarrassing possibility of a wage determination in an industry or section of an industry where the preponderant concentration of workers were paid an exceedingly low or even sub-standard rate of wages.¹⁶¹

The contention is made in some quarters that the universal minimum wage requirement of the Fair Labor Standards Act has altogether eliminated the necessity for special minimum wages on Government contracts.¹⁶² There is, indeed, a distinct possibility that the administration of the Walsh-Healey Act may be merged, for the sake of administrative efficiency, with that of the Fair Labor Standards Act, since the functions of each overlap.¹⁶³ But the complete liquidation of the Walsh-Healey Act appears highly improbable for some time to come, if only for the reason that organized labor is too strongly

156. 49 STAT. 449 (1935), 29 U. S. C. § 151 (Supp. 1937).

157. 83 CONG. REC. 8297-8298 (1938) (Walsh amendments); 83 CONG. REC. 1489 (1938) (Wagner amendments); (1938) 2 L. R. R. index p. 493 (Healey proposals); N. Y. Times, July 24, 1938, p. 5, col. 4 (proposals of C.I.O.). But see (1938) 2 L. R. R. index p. 171 (vigorous opposition to Wagner amendments expressed by National Association of Manufacturers).

158. See 83 CONG. REC. 1489 (1938) (statement by Senator Wagner).

159. Public Act No. 718, 75th Cong. 3d Sess. (1938). Text quoted (1938) 2 L. R. R. index pp. 497-501.

160. Public Act No. 718, § 6(a), 75th Cong., 3d Sess. (1938).

161. The lumber industry in the South and sections of the textile industry are ready illustrations.

162. Communications to the YALE LAW JOURNAL from the National Association of Leather Glove Manufacturers, Inc., Nov. 7, 1938 and from the Institute of Makers of Explosives, Nov. 21, 1938.

163. At present the two acts are separately administered, and no definite steps have been taken to combine them. But the wage determining functions of both are similar enough so that their joint administration should not be impractical. Moreover, their consolidation might increase the present relatively slow process involved in determining prevailing minimum wages by making available a larger staff and field force.