

**The Minimum Wage in Historical Perspective:
Progressive Reformers and the Constitutional Jurisprudence
of “Liberty of Contract”**

by

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Abstract

During the Progressive period of American history the debate over the minimum wage was often between those who clung to traditional economic theory as a reason for not having a minimum wage and those who saw the efficiency-wage benefits of adopting one. Although the latter argument proved quite effective in swaying many state legislatures, it may have also been a strategic argument for circumventing the Supreme Court's particular understanding of "liberty of contract." Under this doctrine, states could not pass any type of legislation that would interfere with the liberty of contract unless a compelling case could be made that such a wage would definitely serve the larger public interest. This paper argues that as much as efficiency-wage arguments might have been appealing, which no doubt appealed some reformers' sense of justice, they were ultimately employed as a disingenuous means by which "liberty of contract" arguments could be circumvented.

Today the debate over the minimum wage is often between those who argue that higher minimum wages produce disemployment effects among youths and those who argue the potential benefits of minimum wage hikes to those in poverty. During the progressive period of American history (1912-1923), however, the debate was between those who clung to traditional economic theory as a reason for not establishing a minimum wage and those who saw the efficiency-wage benefits to adopting one. Indeed, it was the latter argument that progressive reformers relied upon as a basis for persuading state legislators to adopt minimum wage legislation (Prasch 1998).

Efficiency-wage arguments, however, weren't always empirically tested, and it is possible that their greatest appeal may not have been their strength as economic arguments per se, but their appeal to questions of the larger public interest that would circumvent the federal courts' narrow construction of the public interest. There were many compelling arguments advanced in favor of the minimum wage having to do with the justness of paying a liveable wage to those in "sweated" industries, but it was always against the backdrop of the prevailing constitutional limitation of the time; namely that it was considered to be an infringement of an individual's liberty of contract. Liberty of contract was a doctrine used by the courts to invalidate regulation on employment relations on the grounds that both employers and employees, as free and equal individuals before the law, were at liberty to enter into a contractual relationship with one another over wages, hours and other relevant working conditions. Moreover, it was because of how the courts viewed the matter that state legislatures needed to proceed cautiously, making the first minimum wage laws only applicable to women.

Prior to the Federal Labor Standards Act of 1938 when states were adopting their own, minimum wages only applied to women in the form of "protective labor legislation." This legislation initially served to justify maximum hours laws on the face that biological differences between men and women, which would warrant such laws for the latter but not the former. But the same arguments could not easily be applied to the minimum wage. Rather to legitimize their application to women, it had to be shown that 1) women were earning considerably less than what was necessary for subsistence, and 2) that were they to be paid more they would in turn become better workers (Baer 1978).

Minimum wages did not apply to men because imposing them would infringe upon their liberty of contract deemed to be protected by the Fourteenth Amendment to the Constitution. Women, however, because of their weaker position and their natural susceptibility to be exploited needed a greater level of protection. As they did not enjoy the same liberty of contract as men, it was thought that such laws would present no infringement of their rights to adopt any such legislation on their behalf. On the contrary, it was society's obligation to protect them. Shortly after the Constitution was amended in 1920 to give women the right to vote, the United States Supreme Court began to strike down state minimum wage laws on the grounds that they were now a violation of women's liberty of contract. Whatever differences existed between men and women prior to women's suffrage were no longer. But when the Court finally began to uphold the constitutionality of minimum wage laws during the late 1930s, it was on the basis that they were essential to the maintenance of economic stability (*West Coast Hotel v. Parrish* 1936). That minimum wages came to be viewed as essential to the maintenance of economic stability was partly a result of the Great Depression that saw wages bottom out. Nevertheless, it is also interesting to note that these arguments is that they were often couched as part of a broader theory of attaining a living wage, which was often conceived of as an efficiency-wage, a concept we do not hear much about today. Although the term may have a variety of meanings today, it had a specific meaning during the Progressive period. When reformers used the term, they usually meant a wage that would enable workers to better maintain themselves physically, which in turn would enable them to work more diligently and produce more effectively. Consequently, productivity would rise naturally. In this paper I argue that as much as the efficiency-wage arguments might have been appealing, and no doubt appealed to some's sense of justice, they were also ultimately employed as a disingenuous means by which "liberty of contract" arguments could be circumvented.

The Efficiency Argument

The efficiency argument centers on the notion of a legal minimum as a basis of achieving greater efficiency (Webb 1912). People who are paid better are able to work harder because they have greater energy, due in large measure to their ability to better sustain themselves. Moreover,

the greater morale among employees deriving from higher wage rates also leads to greater loyalty to their employers. In what has come to be known as the “Webb” effect, Sidney Webb argued that because a legal minimum wage would have the positive effect of increasing productivity, a wage floor would be beneficial to employees and employers alike. Employers would most appreciate the security a minimum wage would provide them against being undercut by dishonest or disloyal competition.

There was, in fact, a distinction to be drawn between fixing and enforcing (guaranteeing) a minimum wage and the fixing and enforcing a wage. By fixing a minimum wage, the state was merely establishing a floor, below which wages could not drop. So long as the floor was adhered to, employers and employees were still free to negotiate particular wages. Fixing a minimum wage, then, was not considered the same as compelling an employer to pay anything specific above that floor. From the standpoint of economic theory, Webb reasoned that there was nothing in a legal minimum wage that would be calculated to diminish productivity. On the contrary, it would actually increase productivity. Universal enforcement of a minimum wage would in no way eliminate competition for employment; rather it would transfer pressure from one element in the bargain (employers) to the other (employees). Unregulated employment (in that there are no legal restrictions placed on wages) leads employers to select the cheapest labor, but not necessarily the best labor. Preference might therefore be given the incompetent, the weak and those with just plain bad character. As a result of this, productivity will naturally tend to be lower and so will efficiency. The aggregate efficiency of the nation’s industry would be promoted as the best available candidates are hired. A legal minimum wage, then, would positively increase the productivity of the nation’s industry by ensuring that those who are left unemployed would be the least productive members of the workforce. Not only would employers be forced to look for the best workers so as to increase their overall productivity, employees would be forced to develop their skills so that they could be counted among the better class of workers (Webb 1912).

Webb based his conclusions on his observations of the effects of the minimum wage in Australia, where the first minimum wage laws took effect during the 1890s. The first minimum wage law in the U.S. was not adopted until 1912 in Massachusetts. A year later, eight states

followed suit. Although the FLSA of 1938 applied to men and women alike and fixed wages through legislative statute, the early laws only applied to women and were fixed either through wage boards or commissions. The primary components of the first law, for instance, included a commission to administer the program and tripartite wage boards to make recommendations with regards to wage rates. Recommendations were based on the principle of maintaining an adequate cost of living, with general consideration given to the financial health of those industries and occupations involved. Enforcement was to be through “public opinion” as opposed to legal sanction.

Although it did establish the principle of minimum wage legislation in the U.S., the Massachusetts law was relatively weak (Nordlund 1997). Wage boards considered the subsistence needs of women, particularly in the sweated industries, but also took into account the health of the industries to which these laws would apply. In determining wage rates, these wage boards would weigh an employer’s ability to pay higher wages against the needs of women for subsistence wages. In terms of political language — that language which would be acceptable to employers and lawyers who might have to argue these matters later in court — it would not suffice to compare the health of employees with that of the industries for which they worked. Rather it would have to be clear that there would indeed be reciprocal benefits to the employers.

On this side of the Atlantic many economists were already offering similar arguments of efficiency. John Bates Clark (1913) was among the early economists to favor a legal minimum wage because, he argued, the absence of one essentially triggered a process whereby employers chose from the ranks of the most necessitous men and women. Trade unions would, of course, go a long way toward removing this evil, but in the absence of unions, the law might remove it. As Clark observed:

Mere need and helplessness give citizens a certain valid claim on the state, even though it has done nothing to cause their troubles. Privation that is traceable to social defects makes a more cogent claim. This, in fact, is the basis of the demand for minimum wage laws, since the ill-paid workers are regarded as victims of social arrangements (Clark 1913, p. 294).

Although many in the American business community were opposed to the imposition of a legal minimum wage on the grounds that it would represent some type of abridgement of their property rights (R. Brown 1917; McSweeney 1913), there were those very supportive of it again because it would lead to greater overall productivity. One of the most notable supporters of it in the business community was Edward Filene. In the pages of the *American Economic Review*, Filene (1923) wrote that one way of increasing efficiency was for employers to pay wages that would command higher quality employees. A higher wage would be more cost effective because employers would not have to spend as much time providing direction and correcting the errors of those who were less well trained. Filene's response to the traditional argument that minimum wages would simply drive certain businesses out of the state was to let the business go. From his standpoint, any business that could not pay a living wage — a wage sufficient to sustain a base of consumers who would be in a position to patronize other businesses because they would have purchasing power — was not good for the state and therefore had no right to be in it. Low wages simply resulted in employers having cheap standards, which only produced inefficient employees. These workers wouldn't be productive because they wouldn't earn enough to maintain themselves properly. Employers would not be able to get effective organization out of those who were unintelligent, and they could not be intelligent if they did not have enough to live on properly. A legal minimum wage would then help employer as well as employees, by enabling employers to compete on an even playing field with other employers, and preventing employers from paying employees insufficiently to be consumers of their business. Moreover, employers would be more likely to take an interest in their employees by educating them to a level that would make them worth the wage. And minimum wage laws would force employers to be interested in community affairs. But even if the minimum wage would result in some people losing their jobs, the wage would still benefit the community at large because it would force the state to provide education and training to future workers. Employers would have new incentive to train workers, but as more employers would demand more skilled workers the state would might find it more efficient to provide education and training for workers as a way of meeting those demands. To this extent, the minimum wage would serve to enhance public efficiency (Filene 1923). Reformers further argued that those firms that paid less than what was necessary to

support their labor, were essentially parasites on the community because the difference would ultimately have to come from someplace (Lehrer 1987). Or as H. LaRue Brown (1913) noted, nothing would make for greater inefficiency than hunger, worry, and discontent. Employees able to maintain themselves would surely be better workers, and minimum wages, then, had to be seen as part of a great social advance. Indeed, only a few years after the initial minimum wage laws took effect, Arthur Holcombe (1917) of Harvard observed that the minimum wage neither led to the replacement of women by men nor in any decrease in efficiency. On the contrary, the benefits originally anticipated by the early advocates were indeed being secured.

In this regard, the arguments in favor of a legal minimum were not too dissimilar from the moral notion of “the right thing to do.” To make the claim that the low wages being paid at the time — primarily to young girls — were substandard, advocates relied heavily on the burgeoning field of statistics to buttress their arguments that wage levels were inadequate. Advocates would attempt to estimate how much money a girl would have to earn to maintain herself, not only in body, but in morals too. Charles Persons, for instance, reasoned that \$7.00 per week represented the cost of maintaining subsistence for an individual (Parsons 1919), even though the general consensus among experts by 1915 was that the wage needed for subsistence in an urban area was roughly \$8.00 per week. But as many as 75 percent of women were being paid below that level; indeed, 50 percent were earning less than \$6.00 per week (Baer 1978). The issue, however, was more than merely economic; there was a moral dimension as well. Emile Hutchinson made the point that the low (absolute) level women’s wages, which already were low relative to men’s, was of particular concern because it affected a woman’s ability to live a “moral lifestyle.” “It decides the girl’s companionships, her amusements, her ability to gratify without danger her natural and reasonable tastes, her very capacity for resistance to temptation. Its physical effects open the way to moral dangers (Hutchinson 1919, p. 50).”

Those who advocated increases in the minimum wage were by no means so naive as to think that a legal minimum wage in and of itself would solve the exploitation and other social pathologies (poverty and immorality) resultant from industrial production. Rather, the wage, alongside other programs, most notably education, would serve as a solid foundation for a general program of social reform. Among the prominent economists of the day to take this

position, Henry Rogers Seagers (1913a), argued that the society that establishes a legal minimum wage standard must also take steps to find ways to make inefficient workers and employers efficient, the unskilled skilled, the shiftless and standardless capable and ambitious enough to command higher wages. Therefore, social insurance would be an important reform to accompany minimum wage regulation. The next most important reform to accompany minimum wage regulations would be comprehensive provision for industrial and trade education and for vocational guidance. But the minimum wage would serve to make those other social reform measures more effective. Still, Seager (1913b) was by no means unaware of the problems and various objections to the minimum wage. The problem as he saw it in accordance with economic theory was that the workings of the labor market, were driving down the wages of workers, especially those in industrial production. The problem with industrial production was that much of the work performed usually did not require any great degree of intelligence or special training. And most of those earning so-called starvation wages — young girls — were members of larger households. Although the great majority of industries in the U.S. did pay living wages to the great majority of their workers, starvation wages, when they were paid, were due to exceptional circumstances that would justify extraordinary remedies. In other words, these starvation wages weren't the norm, but when they were paid to women it was assumed that they didn't need to earn any more because as members of larger households they weren't the sole means of support.

For some, minimum wage laws were viewed as part of a larger effort to strengthen labor legislation and boost to the development of labor unions (Lindsay 1913). This view was actually quite ironic, because even though the American Federation of Labor supported minimum wages for women, they opposed them for men. As Rudolf Brodha noted in the late 1920s, the AFL feared that state protections might replace the need for unions (Brodha 1928). In an effort to build a labor union movement, the AFL did not want to support legislative solutions that would give workers reason not to join voluntary associations. The AFL was initially opposed to all legislation that might improve working conditions out of a fear that it would undermine the impulse to organize. The principal goal of labor unions was to make men's wages adequate to support a family(Lehrer 1987). The labor movement under the leadership of Samuel Gompers shied away from using legislation as a tool to improve wages and other working conditions.

Rather, the AFL adopted a position of voluntarism, reflecting the classical laissez-faire tradition that working conditions and wages could best be obtained through firm level negotiations with trade unions (Hattam 1993). Since women were not admitted, establishing a minimum wage for them would not be that much of an issue, because that was not opposed by the unions (Kessler-Harris 1988).

It might also be argued that labor unions initially chose a more cautious approach to the establishment of a legal minimum because of the unions' experience with the courts and their use of the conspiracy doctrine (Hattam 1993). Establishing a legal minimum wage was, in many respects, analogous to the organization and purpose of labor unions. The immediate object of an "anti-sweating wage," observed Theodor Brauer (1925), was the protection of the wage earner from excessive financial and physical exploitation. The wage level was determined by an agreement, employers who would pay as little as possible, and would choose those workers who would accept the lowest wage. As a consequence, the worker only received what could be described as a starvation wage. The general tendency of the minimum wage, then, was to encourage industrial organization as a whole, both among employers' associations and trade unions. But then labor legislation as a whole was designed to bring the worst employers up to an equivalent level with the best with respect to income levels, hours, and other working conditions (Commons and Anderson 1916, p. 447).

In her study of wages of industrial women, Emile Hutchinson argued that the minimum wage legislation:

establishes a basic wage which must be paid to safeguard the welfare of the community and makes this a condition of employment. Any higher wage than this basic one may be a matter of bargaining, but at least a living wage becomes a charge upon industry. If an industry can maintain itself only by paying its workers less than a living wage, it is socially an unprofitable enterprise (Hutchinson 1919, p. 83).

Fixing a minimum wage, then, is a familiar feature of trade-union policy. There is reason to believe that the worker who is paid enough to secure physical efficiency (physical energy due to

better nutrition) will be a better worker for precisely that reason. Minimum wage legislation thus establishes a wage that ought to be a basic wage — a wage that enables workers to purchase food and shelter. It does not fix wages beyond determining the lower bound on the wage scale. And were it to be enforced it would considerably raise the lower limits of the wage scale and provide great benefit to thousands of workers. Moreover, employers would no longer be able to exploit the most vulnerable workers (Hutchinson 1919, pp. 88-89, 175). And even though people like Hutchinson believed the minimum wage to be necessary to provide women a measure of subsistence, it still was not to be considered a substitute for labor organization. On the contrary, it would be most unfortunate were it be allowed to obscure the value and necessity of voluntary action (Hutchinson 1919, pp. 177-178).

Not all economists, however, favored a legal minimum wage. Frank Taussig (1916), in particular, was generally of the mind that it would not at all be beneficial. Although greater efficiency might result from higher wages, it was still questionable as to how this efficiency was to come about. The efficiency argument, after all, was theoretical and thus could not be assured with certainty. There was no question in his mind that economic theory was not static, but was provisional in the sense that it was determined by a specific context. That is, there were no absolute truths contained in economic theory that could not ultimately be disproved in the real world. And he surely was aware that those being paid substandard wages were in a vulnerable position. But it was not clear that a minimum wage would be an effective measure for increasing efficiency.

Of course, there were those who clung to the prevailing economic theory — that an increase in wages would raise the cost of production, thereby resulting in higher levels of unemployment. Employers might simply reduce the number of apprentices they take on. But as the rise in wages was likely to be secured at the expense of profit, employers were more likely to substitute capital in its place so as to maintain higher levels of productivity (Smith 1907).

For others, however, the conventional economic theory either was not terribly convincing or it was a theory whose value was subordinate to other, perhaps larger social purposes. Matthew Hammond (1913) had observed that there was little doubt that a legal minimum wage would force a certain number of people, particularly the old, infirm, and those who were naturally slow.

Nevertheless, it was “easy to exaggerate the working of the minimum wage in this respect (Hammond 1913, p. 33).” Generally supporters retorted with the claim that higher pay, through whatever means they were achieved, would mean more efficient workers. Minimum wages would bolster both morale and productivity to such a degree that employers could afford higher wages for all employees. In addition, the need for private charities would decrease accordingly. And once women received a living wage, they would be spared the immorality induced by poverty (Patterson 1964).

Although some familiar arguments were launched in opposition to the legal minimum, there still was no developed concept that the starvation wages being paid were natural — that there constituted a market clearing wage. This was a point noted by Scott Nearing (1915) as he pondered the question of what it was that determined workers’ wages. His final conclusion was that the wage received by labor for its share in production was determined by its monopoly power or by its scarcity. Although this conclusion implicitly recognized the law of supply and demand in determining wages, it also recognized that the ability of workers to band together in order to constrict the supply of labor was just as powerful as the ability of employers to band together to constrict the demand for it. Many were cognizant that there was nothing natural per se in the new industrial production economy and, therefore, there would be nothing unnatural in inflating wages on the basis of statute or commission. The question was whether it was as efficient as proponents believed. The other question was whether inflating wages was considered constitutional.

Although arguments about the minimum wage today center on technical questions about how much of an increase in unemployment — and among whom — can be expected given a certain percentage increase in the wage, the question then was primarily over the appropriateness of governmental interference into what otherwise were regarded as private wage agreements freely arrived at between employers and their employees. Then the principal question was how did the minimum wage impinge upon the bundle of property rights as they were understood at the time.

It may also be argued, however, that the concept of a living wage had greater appeal precisely because of the uncertainty of the industrial system. The industrial revolution was

indeed producing a two class society. Those who were at the bottom earned starvation wages. Moreover, there was not an array of social programs to prevent hunger as there are today. The only way to alleviate hunger would be to boost the family income. That employees might be better workers would have had a logic that today might appear illusive.

Constitutional Issues

Today the minimum wage is generally viewed as an economic policy issue; then it was a constitutional issue. There were essentially two questions, neither of which were mutually exclusive. One was whether a minimum wage violated the property rights of employers to regulate the way they ran their business. Could government legitimately interfere with a business in the name of improving working conditions? The other question was whether it violated the liberty of individuals to freely negotiate contracts? Prior to the 1930s, views concerning regulatory activity were intimately connected to a particular conception of private property rights. This conception was, in general, grounded in a classical conception of property — that one who owned property was generally free to do with it as one pleased. The origins of this notion lay in a particular reading of Lockean liberalism, a view that private property rights were sacred and that any infringement upon them would be considered a legitimate basis for resistance. Although this view of Locke's position has perhaps been greatly misunderstood (Levin-Waldman 1996a; 1996b), it nonetheless had a profound effect on constitutional jurisprudence, which found its clearest expression in the 1905 case of *Lochner v. New York*.

Lochner involved New York's passage of a law that placed limitations on the hours of employment in bakeries. The statute imposed a maximum of ten hours daily up to a maximum of 60 hours weekly. The Supreme Court ruled that New York's statute violated the rights of contract between employer and employee, which were considered to be basic to individual liberty (25 Supreme Court Reporter 1904, p. 564). *Lochner* was a case specifically addressing a particular statute regulating the hours of a specific class of workers, but in a larger sense it symbolized a particular conception of what was the appropriate role of government. Moreover, it represented a clear statement vis a vis property rights.

In *Lochner* the Court essentially reasserted the principle established in *Holden v. Hardy*,

an occupational safety case decided in 1898. In *Holden*, the Court upheld a Utah statute regulating the hours of miners to ten hours daily on the grounds that their health was at stake. And to a large extent, the Court echoed a notion of harm best expressed in the philosophy of John Stuart Mill — that property could not be used in such a way that it would be injurious either to one's self or to others (*Holden v. Hardy* 1897). But to the extent that these two seemingly different cases rested on a common thread, it was that both rested on a very narrow definition of what constituted harm. Both relied on a physical conception. Whereas it was clear in the former that the absence of regulations could result in physical harm to miners, it wasn't nearly as clear in the latter that the absence of regulations would result in physical harm to bakers.

In a larger sense, however, *Lochner* epitomized a period of judicial activism in constitutional history predicated on “substantive due process,” or what Laurence Tribe (1988) has called the model of “implied limitations,” which involved a close scrutiny of the means-ends relationship. “In its analysis of legislative means, the Court required a 'real and substantial' relationship between a statute and its objectives.” The Court would not allow the invalidation of those statutes interfering with private economic affairs unless it could be shown through evolving common law concepts that there existed a “proper fit between the legislation and its asserted objectives (Tribe 1988, pp. 568-569).” Governmental regulation was not impermissible per se, rather state authority had its limitations. Regulation extending beyond those limitations would be impermissible, for it was one thing for a state to use its authority to help one group at the expense of another, and quite another to use it for the public at large (Tribe 1988, p. 564). In other words, whatever the benefit was it could not be based on theoretical speculation, but had to be demonstrable. This, of course, implied a need for rigorous empirical analysis as a basis for legitimizing any new limitations on what otherwise were understood to be fundamental liberties. Otherwise, there would have to be a presumption in favor of those rights traditionally understood to be at the core of the American constitutional tradition.

This point is actually critical and has bearing on the whole efficacy of the minimum wage as a tool for assisting those at the low end of the wage distribution. Implied limitations, after all, make it clear that unless the exercise of state authority is genuinely for the public interest, it is not a legitimate exercise of authority. In this case, the question becomes whether the minimum

wage will confer a benefit on one group at the expense of others, or benefit the public at large? There would need to be a “larger community” that would derive benefit in order to justify the action. By applying this model of “implied limitations” the Court was establishing a role for future economists and other students of public policy, to become more empirical and less theoretical. The empirical coin, of course, would have two sides to it, for it would also have to be clear that regulation designed to ensure the well-being of a specific subgroup, would not end up jeopardizing the well-being of the larger community in the process. By asserting that New York's regulation was unconstitutional, the Court effectively said that regulation aimed at protecting one group did not have any discernable public benefit. Or that it wasn't compelling enough to justify the imposition of limitations on an individual's liberty of contract. This point had been made clear in the 1875 case of *Loan Association v. Topeka* where the Court ruled that it was not a valid exercise of state power to levy a tax on an entire community for the immediate subsidy of a particular economic class without any discernable “public” purpose (87 U.S. (20 Wall.) 1874; Fairman 1971, pp. 1101-1112). Rather the “larger community” would have to be a factor in the close scrutiny between ends and means.

The general implication, then, was that the state could regulate only if there was a discernable public interest that would not result in greater damage in the long-term. Still, the question remained as to how labor legislation of this type violated liberty of contract. Whose liberty of contract was in question here: employers or employees? The *Lochner* Court assumed that employees were limited in their ability to work in excess of sixty hours per week. The state, however, saw it as a limitation on the employer for the sake of protecting the employees from exploitation. Was the Court now suggesting that employees now had the liberty to be exploited if they in fact voluntarily chose to do so? What the Court did not seem to understand was the power dynamics characteristic of most employer/employee relationships. It didn't understand that in most instances there was little opportunity for employers to negotiate their wages, hours and other working conditions. Rather the only real liberty they had was to either accept or reject, which was tantamount to opting to starve or not. But then, this was besides the point. The critical point was what evidence was there that work in excess of ten hours per day was indeed harmful?

In *Lochner*, the Court claimed that “The state... has power to prevent the individual from

making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection (25 Supreme Court Reporter, p. 541).” The criterion upon which the Court would allow for regulation would be the “safety, health, morals and general welfare of the public” — the state's traditional police power. This was the standard for determining the conditions under which regulation could occur, and would ultimately become a litmus test for the erosion of the artificial distinction between public and private. Only if private property in some way encroached upon the public welfare could regulation be justified. The question, of course, was whether employers, as property owners, were using their property — their control over the employment situation — in such a way that interference by the state would be justified. In *Munn v. Illinois* the Court ruled that private property may be regulated when it is “affected with the public interest (94 U.S. 1876, p. 126).” Cloaked in the language of the state’s police power, the Court asserted:

Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control (94 U.S. 1876, p. 126).

The problem, however, was just what it meant to be “affected with the public interest.” *Lochner* did offer the clarification that property was “affected with the public interest” if it in any way interfered with the community's health and welfare. Still, the Court’s construction was narrow, for it could not see that the regulation of bakers' hours would provide any appreciable benefit to society that would justify an infringement of freedom of contract. As such, the New York statute was not considered to be a health law, but “an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts (25 Supreme Court Reporter 1904, pp. 544-545).” In a very narrow sense, *Lochner* made it clear that general working conditions were not subject to public control because they could presumably be

negotiated on an individual basis. What, then, could be the basis for interfering in the market's wage setting system? But then again, was there something in the nature of wages that would make it easier to demonstrate the harmful effects of paying below a certain level?

Nevertheless, *Lochner* established a tone, a climate for what was acceptable — and indeed possible — and what was not. It was well grounded in a classical liberal conception of America. During the *Lochner* era, judges drew heavily on natural law and, in part, on the economic and social theories of Herbert Spencer. The underlying philosophy held that the only legitimate goals of government were the protection of individual rights and the otherwise enhancement of the general public good. If regulation was to be justified, it would have to promote “the general welfare” and not be “purely for the promotion of private interests.” Subsequently, any regulation which might benefit some at the expense of others, “would extend beyond the implicit boundaries of legislative authority. Such a law would thus violate natural rights of property and contract, rights lying at the very core of the private domain (Tribe 1988, p. 571).” What the *Lochner* decision asserted was that, given America's grounding in natural law, the state's police power was to only be considered legitimate if it could be shown that the ends truly justified the means. If not, legislative authority would have to defer to basic principles grounded in natural law, but codified in the traditions surrounding interpretation of the American Constitution (Tribe 1988; Smith 1985).

Given this judicial climate, then, the question about where minimum wage laws could fit was a natural one to ask. Were minimum wage laws designed to serve the interests of a specific subgroup? Or could the argument be made, as many earlier economists had, that there were overall efficiency gains to be obtained? Even so, were these efficiency gains sufficient to justify infringement on the traditional bundle of property rights and individuals' liberty of contract?

Among those offering a constitutional argument in favor of the minimum wage was Thomas Reed Powell of the Columbia Law School. Powell (1917) noted the following constitutional objections to the passage of a minimum wage statute: 1) It fixes wages solely on the basis of the employee's individual needs as an individual and not as a worker; 2) it places a burden on the employer to supply those individual needs to the extent that the money required exceeds what the employee earns, or can earn or is worth; and 3) it has the ill effect of depriving

both the employer and employee of their property and liberty of contract. In response to these objections, Powell argued that the Constitution did not prohibit the taking of liberty or property; only the taking without due process of law. Although the wage would create a minimum floor, it in no way would compel the employer to make any contract that in his judgement would not be remunerative. Moreover, neither the doctrine of individualism nor laissez-faire were contained in the language of the Constitution, even though they did permeate many of the judicial opinions interpretive of the constitution.

The problem, of course, was proof, for the meaning of *Lochner* was abundantly clear: In order to justify abridgements of basic rights, there needed to be overwhelming evidence that it was a matter of the public interest that it should take priority over the collectivity of individual interests. Insofar as constitutional jurisprudence may represent a measure in practical terms of what liberalism as a public philosophy will allow and what it will not, this burden of proof was clearly flowing from the neutrality principle (Smith 1985; Harris 1993). While there was evidence that women in sweated industries were being exploited, it was still questionable that there would be overwhelming societal benefit. Public policy, after all, involved the construction of a calculus in which the benefits of a policy were measured against all potential costs. It is actually quite telling that the first minimum wage laws were adopted after *Lochner* and not before. For even though it only dealt with maximum hours, the case did establish a set of parameters that would ultimately serve to confine minimum wage laws both in terms of restricting their passage and to whom they would apply. Within the context of *Lochner* the efficiency argument offered by early twentieth century economists would appear to take on new meaning. Arguments of overall efficiency might, after all, appeal to a bench likely to view minimum wage laws as a regulation aimed at helping one subgroup at the expense of others, if in fact that subgroup was in a particularly vulnerable position. The question, of course, was about the circumstances that could place such a group in a vulnerable enough position to make them worthy of more protection than others, and whether by protecting this group a larger social purpose would be served.

Protective Labor Legislation for Women

It has often been assumed that when it came to reform the courts were serious obstacles to an otherwise progressive legislative process. In his review of state courts during the period, Urofsky (1985) notes that recent studies reveal that the U.S. Supreme Court, in fact upheld the vast majority of protective statutes it reviewed during the progressive period. And although many state courts did indeed erect barriers to reform, state courts, in general, moved consistently toward approval of a wide range of reform legislation. The real obstacle was the laissez-faire rationalism that dominated much of the economic, political, and legal thinking during the nineteenth century, and that found expression in the creation and sanctification of freedom of contract. Could minimum wage legislation, which would involve no less than the state engaging in wage setting, find legitimacy in a constitutional jurisprudence that required a clear connection between means and ends? Hart (1994), too, suggests that the courts were not reactionary as much as they were attempting to accommodate the reigning philosophy of the day. For Hart, minimum wage history is an example of a process of interaction; not subordination to the law. As a consequence of these constraints, the first laws were limited to women and were defended on the basis of the differences between men and women that resulted in women receiving much lower wages.

Baer argues that much of the early legislation was justified not so much on the basis of physical differences between the sexes, “but by temporary social, political, economic, and technological conditions that made women’s working conditions worse than men’s and intensified the impact of permanent differences (Baer 1978, p. 10). There is, of course, the view that men also fought for protective labor legislation for women as a means of protecting themselves from female competition. If women were singled out as targets for lower wages, it was because of obvious physical differences from men, but as bad as working conditions were for men they were far worse for women. Men worked primarily as carpenters, printers, mechanics, or shoemakers, either for themselves or for others in uncrowded shops, or they worked outdoors in the building trades. Women, however, generally worked in sweated industries, and in many cases under brutal conditions that were a threat to their physical safety.

Baer suggests that there were two incidents that drove home the point about women’s

particularly harsh conditions. One was a U. S. Senate report on the conditions of women and children in factories (U.S. Senate 1910-1915). The other was the Triangle Shirtwaist company fire in New York City in 1911. When the fire broke out on the eighth floor women were unable to escape because their employers had locked the doors. Following the fire, the state drew the lesson that special restrictions on women's employment were needed as well as general safety regulations. After all, when men had to work under conditions of comparable danger, such as underground mines, it was not uncommon for special laws to be passed for their protection. The most obvious example of this was the coal regulation that resulted in *Holden v. Hardy*.

One of the reasons why women's industries lagged so far behind men's when it came to safety regulations was that the only permanent female members of the labor force usually were the poorest women, who also had a disproportionate share of the worst jobs (Baer 1978). Moreover, as Commons, Anderson, and Hutchinson often pointed out, it was precisely because this group lacked strong labor organizations and the benefits of collective bargaining that they received wages in the low end of the wage scale (Commons and Anderson 1916, pp. 169-170; Hutchinson 1919).

Social reformers in the vanguard of the movement to achieve more equitable pay were women, who also firmly believed that the ideal — though it would not necessarily apply to them — was for women to be paid at a rate equal to men. If this were to become the norm, women would be effectively excluded from the labor market, and thus would stay home with their children (Kirkby 1987). These ideas therefore represented the great paradox. Social reformers, then fully cognizant of the constitutional limitations of enacting a minimum wage, embarked on an incremental strategy of establishing legal precedents that later could be built upon. Even favorable treatment for specific subgroups could be justified on the grounds that it might advance some social groups. The strategy of choice focused on the obvious physical differences between men and women.

The test case that would set the course for women's protective labor legislation came in 1908 in *Muller v. Oregon*. *Muller* involved the state of Oregon's passage of a statute limiting the working hours of women to ten per day. At issue was whether women working in excess of the limit might constitute a threat to the community's health and welfare. If there was a threat, it was

not because of the nature of their work per se, but because of their socially and sexually defined roles, specifically, their roles as mothers. Although the Court did not reject *Lochner*, it did acknowledge there to be differences which would justify regulation in this case, whereas it had rejected it in the past. Biological differences between men and women required state interference with liberty of contract to protect them from exploitation (28 Supreme Court Reporter 1907, p. 326).

The *Muller* decision could have been interpreted with much wider ranging implications. When the Court said that limitations could be imposed on women's contractual powers, it was perhaps suggesting that property could be regulated for the sake of the public interest. The *Muller* decision essentially opened the door for regulation on behalf of special interests. Here is where the *Muller* decision shared something in common with that of *Holden*. For if groups were considered to be in dependent and otherwise vulnerable positions, regulation on their behalf would by no means be viewed as overstepping the bounds of legitimate police power. And yet, as social and economic conditions were changing, could this precedent not serve to protect industrial laborers in general on similar premises (Tribe 1988, p. 574). Could it not serve as a critical precedent for the establishment of minimum wage laws on the grounds that women, the most vulnerable group in society, needed to be protected from exploitation?

Muller, however, was important for reasons other than the legal precedent it created, for with it also came the introduction of empiricism through what has been termed the Brandeis brief, which detailed extensively the working conditions of women in a variety of industries. It was perhaps the first time the Court was presented with statistics or “proof” detailing the detrimental impact of long hours on the lives of women. This was a crucial development, for in the absence of empirical evidence, all the Court had to rely on were theoretical presuppositions of what types of arrangements were conducive to the public interest.

This was an exciting time for those who were developing statistical methodologies, as it would enable them to put their findings to social use (Wilcox 1913). If the Court was looking for a causal relation between means and ends that could truly justify government interference, it certainly found it in the Brandeis brief. For social reformers during the Progressive era, there now was a group that warranted special protection, namely, in the sweated industries (women).

But in terms of what was permissible given the scope of constitutional jurisprudence during this period, it was perhaps the only basis upon which the foundations for future precedents could be established. Nevertheless, there was no clear consensus among social reformers as to which direction labor legislation ought to go. Should labor legislation apply only to women because they were viewed as sociologically and biologically different, or should it apply to all workers because the health of humanity rested on it? What is clear is that although modern day feminists would find much to decry in *Muller*, it, and other cases like it, were generally supported by feminists of the time. Feminists during the Progressive period did not see their advancement of women's causes in the work force as at odds with a general concept of a living family wage. In fact, many feminists viewed protective labor legislation as a means of ultimately protecting the family.

Lehrer makes the argument that social reformers during the Progressive era did not challenge the sex segregated labor market or its underpinning assumption that a women's primary place was in the home (Lehrer 1987). But protective labor legislation played an important role in the process of defining the position of working women in industrial capitalism. Social reformers viewed protective labor legislation as one means of limiting the initial exploitation and orientation of women workers. At the same time, these laws also contributed to increasing productivity of labor by making employers use labor more "effectively." The courts applied basic property law to wage labor. The notion of property, of course, consisted of two parts: the rights of property owners to control all circumstances surrounding their property, and the respective rights of workers to control their labor as an expression of their property. In as much as these notions represented competing claims on property, and neither party (employers or employees) could function without the other, the only basis upon which agreement could be reached was through contractual agreement.

The language often used during this period in support for minimum wages for women was that of a "women's" wage, but it was intricately tied up with the concept of a living wage that men would earn. As Kessler-Harris has written, the women's wage reflected what ought to be.

That men ought to be able to support wives and daughters implied that women need not engage in such support. They ought to be performing home duties. Thus if women earned wages, the normal expectation was that she did so to supplement those of other family wage earners (Kessler-Harris 1988, p. 8).

The judicial decisions about the minimum wage were grounded in legal precedents about labor and others about women. The AFL believed that hiring women would effectively impoverish whole families. Women were thus urged to adopt strategies that would enable them to remain at home as wives and mothers. Therefore, it was often argued that the cost of women's low wages was not borne by women, but by society as a whole. As Hart suggests, many of those who argued for a minimum wage "often did so with a heartfelt preference for the idealized family wage and gendered welfare state (Hart 1994, p. 16). From the standpoint of the labor movement, a minimum wage restricted to women would in no way undermine men's ability to bargain, particularly since women were not able to join. But a legal minimum wage at least would establish a constitutional precedent for such regulation in the future, thereby laying down the foundations for a more encompassing role.

The Need for a More Encompassing Argument

If, as Baer suggests, protective labor legislation was defended on the grounds that women's positions were defined by economic, political, and social circumstances, any change in those conditions would have an impact on the limits of constitutional acceptability. That women achieved some measure of protection following *Muller* in no way meant that the liberty of contract idea was beginning to break down. On the contrary, it was reaffirmed in the *Adkins v. Children Hospital* case of 1923, but with a new twist. What had been clear under *Muller* was that men and women, largely because of political and social constructions of gender differences were not equal. Because they were not the equals of men they could achieve a level of protection that men could not. The problem with social construction, however, is that it is not static. New understandings invariably result in new interpretations.

In 1918, Congress had established a minimum wage for women who worked in the District of Columbia. At issue for the Court was whether minimum wage legislation would be

constitutive of a valid exercise of police power intended to preserve and protect the public's health and welfare. Or to turn it around, would payment of wages below the minimum constitute a threat to the public's health and welfare?

Also at issue was the criteria used for determining what was constitutive of public health and welfare and, hence, threats to it. There was a distinction to be made between minimum wage laws and "hours-of-service" laws. The latter took into account physical differences between men and women and hence such laws might be said to in some way be constitutive of health laws. Whereas physical differences might result in differential effects from the length of time working, on what basis could these differences have any relation to minimum wages? Either a woman was paid subsistence wages or she was not. That one gender was paid less than the other was more a function of social differences and the assumptions made with regards to women versus men work.

Because women had achieved the legal right to vote, they too were now entitled to full liberty of contract as though physical differences between the sexes never existed. While the Court reasserted the non-absoluteness of freedom of contract, the Court went on to argue that due to the changes since the *Muller* decision in terms of women's contractual, political and civil status, the principles in *Muller* were no longer valid. It could no longer be accepted that women required any special protection that men did not receive, which would justify an infringement of women's liberty of contract. The Court seemed to be suggesting that women's gains in terms of equality automatically absolved them of the biological differences that the Court used to justify special treatment in *Muller* (261 U.S. 1922, p. 553). The Court was essentially interpreting the significance of the nineteenth amendment to be that women had now achieved a measure of equality which no longer afforded them special status worthy of special protection. If there were biological differences, as there had been in *Muller*, their new legal status no longer permitted those differences to justify special treatment. In the *Adkins* case, the Court did not consider the statute to be a law dealing with any business effected with a public interest. It prescribed neither the hours nor the conditions of labor, but sought to fix prices for those who were legally capable of contracting for themselves. Moreover, there was no evidence showing that "well paid women safeguard their morals more carefully than those who are poorly paid (261 U.S. 1922, p. 556)"

Although the law would require employers to pay equally, it made no requirements that employees return services of an equivalent value. Hence the statute was assumed to impose a hardship on the employer. Though the Court did acknowledge the ethical right of every worker to a liveable wage, securing such a wage for workers was the purpose of a trade organization. In his dissent, Justice Holmes asked: if minimum wages should be deemed to be an interference with liberty, is not maximum hours also an interference? There is no difference in either the kind or the degree of interference with liberty. Moreover, the statute did not compel anyone to pay anything, rather it only established a minimum floor. Though the Holmes dissent was to have no bearing in this case, it would later serve as a justification for the demise of the *Lochner* era.

Perhaps more revealing was the fact that if nothing else, the *Adkins* case effectively dismissed as irrelevant all the statistics critical to earlier cases. The central point made in the ruling was that even though women's working conditions may have been especially harsh, they could potentially achieve improvement through the liberty of contract. Their new political status, suggested at least, that they could now negotiate on much the same terms as men. That they needed protective labor legislation in the past was not necessarily a testament to the reality of their harsh working conditions, but the absence of a fundamental right shared by men — again the liberty of contract. The argument for higher wages and labor protections was based on special interest needs was no longer valid; rather the argument would have to be made on more general terms.

General arguments of federalism hold the states to be testing grounds and precedent setters for those actions the U.S. Congress might want to adopt nationally (Osborne 1988; Elazar 1984). But if the power of Congress to pass this type of legislation was held to be unconstitutional in the District of Columbia, where Congress did have primary jurisdiction, it would be very difficult for Congress to adopt minimum wage legislation nationally as a New Deal measure without running afoul of the Court. The Court would then have to overturn the *Adkins* decision within a different context. Such legislation would have to be tested in another arena. The opportunity came when New York passed a minimum wage act for women and minors for the ostensible purpose of promoting the public good. The test came in *Morehead, Warden v. New York Ex Rel. Tipaldo*, decided in 1936.

This case was unique in two respects. First, the Solicitor General tried to separate this case from *Adkins* by claiming a commensurate relationship between minimum wages and the value of services exchanged. Secondly, he tried to couch the state's justification for the legislation in terms of economic stability by arguing that employers who paid less than fair wages possessed unfair advantage over the competition. Moreover, women were also more likely to be exploited. But the Solicitor General also argued that because of the lack of union organization among women, the minimum wage law was promotional rather than restrictive of freedom of contract. The Court, however, did not consider minimum wages in this instance to be a matter of emergency legislation. That is, the Court did not view the circumstances to be constitutive of an emergency, where in the absence of this legislation, some severe economic consequences would result. Since the statute only related to wages of adult women and minors, as opposed to hours regulation that would affect employees' safety, it could not be considered an emergency law. Also men were just as susceptible to exploitation as women and the effect of this legislation would be to restrain women in their competition with men. Thus the Court affirmed the precedent in the *Adkins* case, and struck down the New York state minimum wage legislation (298 U.S. 1935). While *Tilpaldo* represented a final vestige of *Lochner*, *Lochner* was nonetheless beginning to crumble.

It was only a year later that the Court overturned the *Adkins* case in *West Coast Hotel Co. v. Parrish*. This case involved a minimum wage statute in Washington State that had been on the books since 1913. The arguments for the plaintiffs were similar to the plaintiffs' arguments in the preceding cases. The state of Washington argued that minimum wages were necessary to preclude the possibility of wage disputes which would result in a disruption of normal business activity, hence presenting an inconvenience to all concerned. What was particularly interesting about this case was that the decision came within a month of a plan by President Roosevelt to pack the Court. Frustrated with the Court's invalidation of early New Deal measures, Roosevelt introduced a bill to add a new justice to the Court for every one who failed to retire upon attaining the age of 70 up to a maximum of 15 justices. Although the plan failed, the Justices did understand that such a plan might not fail in the future and began to reassess some of their earlier positions. Ultimately, these events would have an influence on the *Tilpaldo* decision (Burns

1956).

Speaking for the Court, Chief Justice Hughes asserted from the outset that this case warranted a reexamination of the *Adkins* case. The Constitution does not mention freedom of contract; rather, it prohibits the deprivation of liberty. At the same time, however, the Constitution does not recognize an “absolute and uncontrollable liberty (300 U.S. 1936, p. 391).¹ But, the Court asserted, liberty only implies the absence of arbitrary restraint — not immunity from “reasonable” regulation. The Court was thus unable to conclude that the minimum wage law necessarily extended beyond the state's broad protective power. Now, the Court appealed to Holmes's dissent in *Adkins* as being vitally relevant:

This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short the law in its character and operation is like hundreds of so-called police laws that have been upheld (300 U.S. 1936, p. 391).

What could be a greater approximation of the public interest “than the health of women and their protection from unscrupulous and overreaching employers” (300 U.S. 1936, p. 398). Moreover, the Court concluded that recent economic experience shed a new perspective on this very issue. Unlike the *Adkins* case, this case was against the reality of the Great Depression where the problem was specifically deflated prices and wages. As policy makers understood it, economic stability required measures intended to inflate both prices and wages (Nordlund 1997). In language similar to the recently passed National Labor Relations Act, Hughes asserted that “The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are relatively defenseless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community” (300 U.S. 1936, p 399).

Conclusion

The road from *Lochner* to *Tilpado* does suggest that more was needed than a moral

argument for why a minimum wage floor would be needed. To put it bluntly, given the Court's commitment to the liberty of contract principle and the need to show a clear relationship between means and ends, broader arguments were necessary. The earlier studies demonstrated empirically that women indeed were disproportionately employed in low-wage sweated industries. The argument that women should continue to receive special treatment was becoming less convincing in the face of growing evidence that men also were considerably underpaid and just as susceptible to exploitation . To get around the liberty of contract interpretation, as well as the concern that protective labor legislation effectively gave preferential treatment to one group over another, it had to be made clear why minimum wages would confirm a large enough social benefit that would justify the imposition of costs on others. The efficiency argument of greater productivity was one, but it was largely an untested theory. The claim of industrial peace was another, and the severity of the Great Depression only reinforced the notion that policies intended to shore up economic stability were essential to the public interest.

Ultimately, it was the crisis of the Great Depression that provided the strongest argument for minimum wage laws. Hart suggests that the FLSA of 1938 actually represented a constitutional preemptive strike. Instead of finding authority in some grand argument designed to circumvent liberty of contract, it found constitutional authority in the federal power to regulate commerce between several states. The FLSA was not just another piece of labor legislation, but a "deliberate challenge by the administration to centers of resistance to the New Deal program (Hart 1994, pp. 153-154). More importantly, it applied to workers. Perhaps, but like so many other progressive measures it needed to be forged out of a sense of crisis.

Note

1. Freedom of contract refers to the ability of employers and employees to negotiate the terms of an employment relationship. This freedom of contract was traditionally inferred by the courts on the basis that the penumbra of constitution protects individual liberty. This is the idea that liberty is the reason for the existence of our constitutional republic. By denying that the Constitution explicitly protects freedom of contract, the Court was now acknowledging that perhaps that principle was implicit in the Constitution's prohibition to deprive liberty. By shifting the emphasis from "freedom of contract" to "deprivation of liberty" the Court was paving the way for a broader construction of what that liberty would include. The Court was essentially shifting

its focus from the specific to the general, and in so doing was paving the way for regulatory activity. Regulation in the name of the public interest need not presuppose an infringement of individual liberties. By asserting that it wasn't absolute or "uncontrollable," the Court was making it clear that certain liberties could be regulated for the public interest.

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