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THE CONSTITUTIONAL ISSUE IN MINIMUM-WAGE LEGISLATION

In the *Minnesota Law Review* for June, Mr. Rome G. Brown argues against the economic wisdom and the constitutional validity of minimum-wage legislation. He recognizes rightly that the question is still an open one so far as the interpretation of the federal constitution is concerned, since the Supreme Court establishes no precedent by affirming by a four to four vote the judgment of the state court in the Oregon Minimum Wage cases. His surmise as to the division of opinion among the members of the bench seems to be well founded. "It seems evident," he says, "that in the final decision Justices McKenna, Holmes, Day and Clarke favored affirmance [of the Oregon decision sustaining the statute] with Chief Justice White, and Justices Van Devanter, Pitney and McReynolds for reversal." Mr. Brown's allocation of the judges coincides approximately with the division in earlier cases when the questions in issue involved legislative interference with freedom of contract for personal service. Such division indicates the extent to which the solution of consti-

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2 During the last term of the Supreme Court, Justices White, Van Devanter, and McReynolds dissented in cases sustaining the Washington Compulsory Insurance Act, Mountain Timber Co. v. Washington, (1917) 243 U.S. 219, 37 S. C. R. 260, and the Oregon ten-hour law,
tutional issues is affected by the general mental outlook of the judges.

This is of course natural in the interpretation of such a clause as the one providing that no person shall be deprived of liberty or property without due process of law. The clause itself sheds no light on the crucial question of what is and what is not due process. It indicates that statutes depriving any one of liberty must pass some test to be constitutional, but the test is left entirely without definition. Nor has the Supreme Court given us any definition which defines. It has said that interference with liberty or property must be reasonable and not arbitrary. But there is as ample room for disagreement as to what is reasonable and what is arbitrary as there is as to what is due process of law. Such vague phrases lend themselves naturally to the conscious or unconscious preconceptions of the persons who use them.

This appears to have happened in a measure to Mr. Brown. His concluding paragraph seems more appropriate to the hustings than to a legal article.

“This sort of legislation is a new expression of the paternalistic and socialistic tendencies of the day. It savors of the division of property between those who have and those who have not, and the leveling of fortunes by division under governmental supervision. It is consistent with the orthodox socialist creed, but it is not consistent with the principles of our government which are based upon the protection of individual rights. After long study and discussion of the subject,

Bunting v. Oregon, (1917) 243 U.S. 426, 37 S.C.R. 435. They were with the majority in declaring unconstitutional a statute forbidding employment agencies from accepting fees from employees. Adams v. Tanner, (1917) 37 S.C.R. 662. Justice Holmes and Clarke took the opposite position in all three cases and also voted to sustain the Adamson Law, Wilson v. New, (1917) 243 U.S. 332, 37 S.C.R. 298. Mr. Justice McKenna differed from Justices Holmes and Clarke only in the decision involving the Washington Compulsory Insurance Act. Justices Pitney and Day agreed with Justices Holmes and Clarke with respect to compulsory insurance and the ten-hour day and differed from them in respect to the Adamson Law and the employment agency case. Though Chief Justice White voted to sustain the Adamson Law his opinion indicated clearly his opposition to statutory wage-fixing in general. This is also true of the opinion of Mr. Justice Pitney in that case. Hence it seems almost certain that Justices White, Van Devanter, Pitney and McReynolds would regard minimum-wage legislation as unconstitutional. In addition to the fact that this would necessitate placing Justices Day and McKenna among the four who upheld the Oregon minimum-wage statute, there is little if anything in their opinions on the Adamson Law to induce the contrary inference. See 65 University of Pennsylvania Law Review 607.
such legislation still seems to the writer to be a long step toward nullifying our constitutional guaranties."

It may be doubted whether fortunes will be greatly leveled as a result of the administration of a statute which compels employers to pay normal employees at least $8.64 a week. It may be doubted whether such a statute is more paternalistic than one providing for compulsory education or compulsory military service. The statute does not go far towards compulsory division of property when all it does is to say to an employer: "If you choose to seek profit from the labor of a woman, you must pay that woman what it costs to keep her in condition to furnish that labor. If it is not to your advantage to pay for labor what it costs to produce it, you need not employ the labor." Such a statute prevents an employer from taking advantage of the support furnished his employee by others than himself. It prevents a division of property which has been taking place in his favor by reason of his superior bargaining power. It puts the burden of meeting the cost of producing the labor on the one who voluntarily seeks to enjoy the fruits of the labor. These observations too are perhaps more appropriate to the hustings than to a legal article. They plead the excuse of the homeopathic pharmacopeia and they claim the merit of approaching more nearly to the concrete than do the phrases "socialistic tendencies" and "principles of our government."

I

Mr. Brown presents some economic objections to minimum-wage legislation, recognizing however that "they are not directly pertinent in a discussion of its constitutionality." The first of these objections is in reality an economic objection to our federal system of government. The complaint is that employers in states having minimum-wage statutes will be at a disadvantage in competing with rivals in other states who are still free to drive as hard bargains with their employees as they can. This cannot be denied. It is equally true of state legislation relating to hours of labor, requiring safe and sanitary factories and prohibiting the employment of children. If the objection were to be given weight in determining questions of constitutionality, it would postpone much of our labor legis-
lation until all the states were ready to take the same step. The remedy for the admitted evil is plain. Congress has already adopted it with respect to the employment of child labor. In the exercise of its power over interstate commerce it has closed the channels of such commerce to the manufacturers who employ children below the designated age. This gives to those who do not employ children the whole of the market fed by interstate transportation. Similar action may be appropriate with respect to employers who pay wages less than the cost of subsistence.

The other economic objections referred to are that the minimum wage will tend to become the maximum wage and that the statutory raising of wages will reduce the number of jobs. Underlying the argument in support of these two objections is the assumption that the value of the contribution of each laborer is susceptible of precise determination. Thus Mr. Brown says:

"The possible wage cost of any particular industry is limited. If a sum which is more than the work-worth of the less efficient employees is fixed as a minimum wage for them, then the unavoidable result is holding the more efficient class more precisely to the limit of their actual worth-work."

This is to say that employers are now paying the more efficient employees more than they earn. If they have to pay less efficient employees more than they earn, they will reduce the wages of the more efficient. It assumes that each individual laborer has a "work-worth," that employers now pay less efficient employees their work-worth and pay more efficient employees more than their work-worth. Two results are to follow the application of minimum-wage legislation. Employers are to dismiss their less efficient employees. Employers are to retain their less efficient employees at higher wages and reduce correspondingly the wages of their more efficient employees.

To be saved from inconsistency Mr. Brown must be taken to mean that some employers will choose one alternative and the rest choose the other. But it is hard to accept these dire results to the laborers which Mr. Brown predicts and at the same time to acquiesce in his complaints that the statutory minimum wage raises the cost of production and savor of the division of property between those who have and those who
have not. The only instance of actual experience which he adduces is of one brush concern in Massachusetts which discharged one hundred of its unskilled employees, apportioned the unskilled labor among the skilled employees and reduced its total wage bill $40,000 a year. Yet "this sort of legislation is a new expression of the paternalistic and socialistic tendencies of the day." And again: "Each wage, when fixed, is only a stepping stone to a higher wage. Each class of employees is constantly seeking an increase, regardless of any basis of computation, and particularly regardless of the worth of the employee to the employer."

It is nowhere made clear why employers are so philanthropic as to pay any employee more than his "work-worth." The only answer would seem to be that employers are unable to compute the "work-worth" of their individual employees. But Mr. Brown does not adopt this explanation. He assumes the contrary, not only in his discussion of economic objections to the legislation, but in his argument against its constitutionality.

II.

The objections to the constitutionality of minimum-wage legislation are stated under four heads. The first is that it "fixes a wage based solely upon the individual needs of the employee—not as a worker, but as an individual." Consideration of this objection will be given later. The fourth objection is that "the statute has, therefore, the effect to deprive both the employer and the employee of their property and of the liberty of contract." This may be conceded. But it does not get us far, since the question is whether the deprivation is with or without due process. All of the statutes which have been sustained as valid exercises of the police power have taken liberty or property. The constitution does not forbid the taking of liberty and property. It forbids only such takings as are without due process of law.

\[\text{MINNESOTA LAW REVIEW at pp. 474-75. Many instances of a contrary tenor might have been found by Mr. Brown in the brief submitted to the Supreme Court in support of the Oregon minimum-wage statute. This brief has been reprinted by the National Consumers' League under the title Oregon Minimum Wage Cases. The material referred to was gathered by Miss Josephine Goldmark and appears on pages 77-763 passim.}\]
The second objection is that the statute "puts the burden on the employer to supply those individual needs to the extent that the money required therefore is in excess of what the employee earns, or can earn, or is worth." One obvious answer to this is that it is false. The employer remains entirely free to say to any employee: "You are not worth to me the statutory minimum wage. Therefore I will not hire you. I will not be so foolish as to hire you if your labor does not yield me what the statute says I must pay you." Moreover, in the Oregon statute which has been sustained, there was a provision for granting special licenses to those "physically defective or crippled by age or otherwise" permitting them to be employed at a wage less than that found by the commission to be the cost of living. It is plain that minimum-wage legislation does not compel employers to make any contract that in their judgment is not remunerative. It may, it is true, disable them from making as remunerative contracts as they might do if left free to bargain to their best advantage. The legislation is opposed to the theory that there is a constitutionally guaranteed right to make the most advantageous bargains which one's economic position permits. So is all usury legislation. So is legislation directed against restraint of trade. So is the recent legislation of Congress relating to the control and distribution of the food supply.

But the fundamental fallacy in Mr. Brown's second objection is its assumption that each employee has an ascertainable "work-worth." This is not true of the simple case of a domestic servant. The difficulty is increased when two labor in co-operation. Mr. Brown's article states that the argument before the Supreme Court against the Oregon minimum-wage statute was made by "Rome G. Brown, of Minneapolis, and C. W. Fulton, of Portland, Oregon." Their appeal failed. How shall we tell the "work-worth" which each contributed to the result? Still more complicated is the situation in a large industrial establishment, where land, buildings, machinery, power, management and labor are all necessary to the creation of the saleable product. Subtract any single factor and there is no product to sell. Who will tell the "work-worth" of each? If profits are unsatisfactory, is it because the location is bad, because the buildings are ill
adapted to their purpose, because the machinery is inferior to that of rivals, because the manager is extravagant or otherwise incompetent, or because the wage-scale is too high? Is it because the various factors have not been combined in the best proportions? Or is it because, in spite of the fact that all the processes of manufacturing have been wisely conducted, the sales force has been stupid, the transportation system has been faulty, credits have been unwisely extended or the whims of consumers have veered? Where one man fails, a rival may pay twice the wage per capita and succeed. Even granting that the proportion which labor contributes to the product could be ascertained, this needs translation into terms of money, and in such translation the price received for the product must be reckoned with. As increase of wages follows increase of prices, so increase of prices will follow increase of wages, if the wages paid in rival plants similarly increase and if the product satisfies a genuine need. If it does not, it is of public importance that the labor be turned to the creation of products which do satisfy a real need. This may be hard on individual manufacturers if they cannot run their business unless others contribute to the support of their employees. But an industry or a particular plant which is not economically self-sustaining can hardly be heard to claim a constitutional right to secure a labor force which it cannot ration, clothe and shelter.

This is what is meant by the statement that the employer who objects to the constitutionality of minimum-wage legislation is claiming a constitutional right to be a parasite. Mr. Brown seeks to escape this conclusion by insisting that “the need to any person of a ‘living’ is an individual need.” “It exists,” he says, “before employment, and during employment, and after employment.” So it does. But during employment the need to the employee of a living is likewise a need to the employer. And the statute deals with the employer only during the employment. Two persons may have a need of the same thing. A living for the employee is a need of the employee, but such living is none the less a need of the employer. One of the requirements of having employees is that those employees be supported in health. Someone must furnish that support if the business is to continue. Support
of employees is the sine qua non of having them. Yet such support Mr. Brown regards as outside the "normal" cost of running the industry.

"What an individual does not earn, so far as necessary to supply the living wage, must come from outside sources. The minimum-wage statute says that this difference must be supplied by the one who happens to have that individual on his pay-roll; and that such employer cannot make a valid contract for employment for any less than such fixed minimum. He must contribute the balance, even if he has to pay it out of profits. If he cannot pay it out of profits then he must pay it out of capital. If his business is such that it cannot continue under such expenditures, beyond those which his business will allow, or which competition from other states will permit, then his business must cease. His business has become a 'parasite' because it cannot finance the normal cost of its existence together with the forced contribution to the individual needs of its employees which are measured by the minimum wage."

Here again is the assumption that what the low-paid employees now receive is the limit of their "work-worth." And what they now receive is taken as the "normal" cost of the existence of the business. Yet if the employees were secured under a régime of slavery and not of free contract, the normal cost of the existence of the business would include the full and not merely the partial support of the labor force.

Mr. Brown nowhere makes clear why he regards the wages now received by low-paid employees as the exact measure of their contribution to the product created jointly by labor and several other factors. This failure piques our curiosity the more when we find him taking the position that the wages of the higher-paid employees are in excess of their contribution, as he does when he says that "if a sum which is more than the work-worth of the less efficient employees is fixed as a minimum wage for them, then the unavoidable result is holding the more efficient class more precisely to the limit of their actual work-worth." If wages measure contribution in one case, why not in the other? If the "normal cost" of the business includes paying the more efficient employees more than their work is worth, why does it not include the same excess in respect to the less efficient? These mysteries are for those who insist that there is some method of determining what a woman's work is worth when other factors in the business are as variable as is the scale of wages. Minimum-wage legislation
proceeds on no such theory. It prescribes a wage based, as Mr. Brown recognizes, on the needs of the worker, on what it costs to keep her a worker. It says that that need is a need of a business and that the owners of the business shall not by superior bargaining power impose on others the costs which are essential to keep the business going. This is not only the theory of the legislation but it is its result. And from the standpoint of this theory and this result the question of constitutionality must be determined.

Mr. Brown’s third objection to the legislation is that “it prohibits the employee from making a binding contract for work at an amount which is measured by efficiency or worth, and renders jobless those whose efficiency does not come up to that properly measured by the minimum wage fixed.” Here, in spite of the repetition of his “work-worth” assumption, he stands on somewhat firmer ground. That employers whose wage rate for low-paid workers is increased will strive to reduce the number of workers is quite possible. They will be spurred to conduct their business at its highest possible efficiency. In some instances they may succeed in creating the same output with a smaller force. Where the number of employees remains the same, the employer will doubtless be able to attract laborers of greater efficiency by the higher wage. With a wider field of choice he will scan the qualifications of his laborers more closely. And some of the less efficient will lose their places. Though it is not possible to determine what portions of the annual excess of income over expenditures are attributable respectively to capital, to profits and to labor, though it is not possible to ascertain the share of the joint product created by each individual laborer, it is certain that some laborers are more efficient than others. If an employer pays a wage sufficient to keep the individual employee alive, he can exercise more discrimination in selecting his employees than if he pays starvation wages.

Let it be granted, then, that through the operation of the statutory minimum-wage some employees who are now partially supported by their wages in industrial establishments will lose their places. Must the legislation fail because of this? No similar argument prevails to defeat statutes raising the standards of admission to the bar or to the practice of
medicine, requiring licenses of locomotive engineers or of chauffeurs. The public purpose of these statutes differs from that of the minimum-wage law. But if there be a public purpose in both cases, the fact that resulting injury to the less efficient is not permitted to defeat the effectuation of that purpose in one line of cases is warrant for dismissing it as a controlling consideration in the other line of cases. This is not to say that it is entitled to no weight whatever. But against it must be balanced the advantages. It is certainly going far to insist that there is a constitutional right to the perpetuation of a labor system which has jobs which take an employee's entire energies and give in return less than enough to maintain those energies.

The resulting loss to individual employees from the operation of a minimum-wage law may be compared with that to would-be borrowers from the operation of usury statutes. Here the public purposes are the same, the prevention of contracts which are deemed coercive and unfair. Some borrowers will fail to get loans as some employees will fail to get jobs. But it is believed that it is the better public policy not to have loans made on a basis that is likely to prove ruinous to the borrower. So is it believed that it is the better public policy not to have industry conducted on a basis that is likely to prove ruinous to employees. Those who do not get the loans and those who do not get the jobs may suffer for a time more than if they could borrow at usurious interest or work for less than it costs to live. But against these regrettable results are to be weighed the advantages which come to those whose loans and jobs are on a basis that the legislature deems essential to a more general social welfare. Standard rates of interest for loans, standard forms of insurance policies, a standard minimum of wages in certain employments — these are all indications of a public interest in the terms of individual bargains which outweighs the interest of individuals to make their bargains on the best or worst terms which they can get under unrestricted legal freedom of contract. They indicate the recognition that abstract legal freedom for each individual is deemed less precious than the adoption of general standards dictated by considerations of a wide social policy.
The objectors to minimum-wage legislation are riding two horses which run in opposite directions. They are concerned that the legislation benefits employees at the expense of employers. They are fearful for the ruin it will bring to employees. They love to choose and see their path so that they find only the losses and never the countervailing gains. Solicitous for the stray individuals who may be harmed by the adoption of social standards, they are unmindful of the social gains from the institution of such standards. They are like those who would view a conscription law wholly from the standpoint of the individual who does not wish to be conscripted. However legitimate it may be for them to urge their point of view before the legislature, it requires more justification to warrant their endeavor to incorporate it into the constitution of the United States.

III

Though neither the doctrine of individualism nor of laissez faire is contained in the language of the constitution, they permeate many judicial opinions interpreting the constitution. From some of such opinions Mr. Brown quotes. The opinions were in cases involving statutes excluding aliens from employment or forbidding employers to discharge employees because of their membership in a labor union or to require of employees as a condition of receiving or remaining in employment an agreement not to become or remain a member of a labor union. These cases are not precedents on the question whether a minimum wage may be imposed by statute. Indeed Mr. Brown does not cite them for this purpose. He is concerned rather with the social philosophy of the judges who wrote the opinions. And that social philosophy is congenial to his objections to minimum-wage legislation. But it indicates nothing more than the personal equation of the particular judge who wrote the particular opinion. Quotations from opinions of other judges indicating personal equations of a

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contrary tenor may be cited to match those adduced by Mr. Brown. The situation is familiar to all students of constitutional law.\(^7\) It is not to be denied that these personal equations are influential factors in the decision of constitutional questions. They may explain the diversities of judicial opinion which are revealed in so many of the important cases. But they are not the law of the constitution. They do not even indicate the theory of the Supreme Court as to the social philosophy which should govern the interpretation of the constitution. For with respect to this social philosophy there is division of opinion among the members of the Supreme Court. If we are to deal with problems of constitutionality as problems of law rather than of judicial psychology we must disregard judicial utterances of general social views and fix our attention on judicial sanction or disapproval of particular social expedients.

Mr. Brown cites no cases decided by the Supreme Court which are authority against the validity of minimum-wage legislation. He tells us that "on principle and on authority the minimum wage statute seems clearly to extend the power of regulation beyond the limits held to be prohibited by the federal constitution." But his only support for this conclusion is the opinions in the cases referred to in the foregoing paragraph and the dissenting opinion in a case holding that it is not a denial of due process to regulate the rates of insurance companies.\(^8\) These are not precedents on the question in issue. They are at best data from which to infer how individual members of the Supreme Court will incline to view minimum-wage legislation. But of this we have better evidence than the social philosophizing in opinions several years old. We have the fact that one member of the present bench had gratuitously devoted much of his time during the last few years of his career at the bar to advocating the constitutionality of this legislation.

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and the further fact that the other members of the bench are divided evenly on the question. We know that so long as the personnel of the Supreme Court remains unchanged, the only decisions that will be rendered against such legislation must be in state tribunals. So that reliance on the individual philosophy of particular Supreme Court judges past or present is not the sound or safe method of dealing with our problem.

IV

Mr. Brown makes no inquiry to discover the extent to which legislatures have already been permitted to deal with the wage relation. Such inquiry would show that in 1901, the Supreme Court sustained a state statute requiring employers who issue scrip or store orders in payment of wages to redeem the same in money when so requested. Such a statute has to do with the rate of wages. The situation which it was passed to remedy is well known. Employees to tide over the necessities of the moment were glad to accept scrip or store orders even though it subjected them to exorbitant prices at the company store. They freely made such binding contracts, if by “freely” we mean that they chose one of two theoretically possible alternatives. The statute says that the contract to accept the store order in lieu of cash shall not be binding. It may be rescinded at the option of the employee. One effect of such a statute is to relieve the employee from the monopoly of the company store and so to increase his real wages. His scrip or store order is convertible into cash on the regular pay day. Rival stores may arrange to take the scrip as security for goods sold by them and count on subsequent redemption in cash. Company stores will have to meet this competition and so increase the purchasing power of the scrip and thereby the real wages of employees. The bearing of this decision on the social philosophy breathed by the opinions which Mr. Brown quotes is apparent when the decision is compared with the denunciatory utterance of the supreme court of Pennsylvania on similar legislation:

"More than this, it is an insulting attempt to put the laborer under a legislative tutelage which is not only degrading

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to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privilege and consequently vicious and void.”

The Supreme Court of the United States with more dignity and more common sense takes the opposite position. The decision is not pertinent from the standpoint of an employee who objects to a minimum-wage statute, but it directly controverts the contention of the employer that he has a constitutionally protected right to use his superior economic position to drive as hard a bargain as he can. It sanctions a statute whose design and effect was to raise the real wages of employees in spite of bargains which made every advance payment of wages conditioned on paying the prices demanded at the company store—bargains which in orthodox legal theory were freely entered into though the freedom was one to delight the metaphysician more than the laborer.

Mr. Brown also neglects a decision of the Supreme Court handed down in 1909 sustaining a state statute requiring mine operators to pay miners by “run of mine” weight rather than by weight after screening. This put an end to the system by which miners received no pay for mining small pieces, although such small pieces had a market value to the mineowners. The result was to raise the wages of the miners, provided the rate of payment remained unchanged. It left the parties free to contract as to the rate, but not as to the application of the rate to the coal mined. It indicated that the wage relation was not immune from legislative interference.

Other cases dealing with the wage relation are ones sustaining a statute forbidding the advance payment of wages to seamen, prohibiting contracts to pay employees less often than semi-monthly, and prohibiting the assignment of wages. These cases all indicate the judicial recognition that the wage relation may be a matter of public concern, that it is

a legitimate subject of legislative regulation and that the particular legislative regulation will be sustained if it is warranted by the public interest. They do not, it is true, involve judicial sanction of the particular public interest involved in the prescription of a minimum wage. But they utterly refute the notion that it is constitutionally impious for a legislature to interfere with the freedom of employer and employee to make whatever contract they may choose or be forced by necessity to make.

A word should be said about Mr. Brown's dismissal of cases sustaining minimum-wage statutes which apply only to public employment. From the standpoint of the employers these have no bearing on the imposition of a minimum wage in private employment. But may they not cause the same suffering to the less efficient employee? Does not such raising of wages as resulted from the Adamson Law have possibility of loss of employment for individual employees? Will not the roads curtail expenses as much as possible? If they cannot economize in rate of wages, will they not seek economy in the number on the pay-roll? Similar considerations may be urged with respect to legislation requiring expenditures for safety appliances, or increasing costs of production by abbreviating the hours of labor or eliminating the employment of children. Whenever a statute makes an employer expend money he might retain if left free to do as he chose, it spurs him to greater economy. And such economy may take the form of curtailing the number of his employees. The argument that minimum-wage legislation interferes with sacred rights of employees is of a piece with complaints that might have been directed against most if not all of the labor legislation that has received judicial sanction. Legislative compulsion always interferes with liberty. It usually imposes pecuniary loss on certain individuals. But such results do not make the legislation wanting in the requirements of due process, unless it cannot reasonably be believed that the

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15 Atkin v. Kansas, (1903) 191 U.S. 207, 48 L.Ed. 148, 24 S.C.R. 124. The statute involved in this case fixed the minimum at "the current rate of per diem wages in the locality where the work is performed."

statute tends to promote a public welfare which outweighs any concomitant individual loss.

V

This, then, is the vital issue raised by the statutory minimum wage. What attention does Mr. Brown give to it? He says that

"such exercise of police-power regulation is based on the claim that the supplying, to an individual who happens to be an employee in any occupation, of the needs of such individual for comfortable living, makes the occupation in question 'affected with a public interest,' and, therefore, subject to the wage regulation in question."

What he means by saying that the occupation is affected with a public interest is not clear. The theory of the legislation is that there is a public interest in having those who give their whole strength to an employer receive enough from that employer to maintain that strength, that there is a public interest in having an industry support itself instead of relying on outside subsidies. Mr. Brown does not say that there is no such public interest. He says in effect that the promotion of such public interest by minimum-wage legislation will cause loss to individual employers and to individual employees. So it may. But individual loss results from the promotion of most if not all public interests. It results from war, from taxation, from discharges in bankruptcy, from exercises of the police power. The question is whether the public interest is sufficient to justify the individual loss. The individuals who suffer loss are part of the public. If they do not share in the public gain which accompanies their individual loss, they share in other public gains which depend for their attainment on the principle that they shall not be defeated by fear of attendant individual loss.

The only specific public interest to which Mr. Brown adverts is the claim that "the statutory minimum wage is a protection of the morals of women workers." "This sensational claim," he says, "has been practically abandoned. Of course if insufficient wages during employment produce immorality, then lack of employment would tend to produce it all the more." Yes, if all women now underpaid shall as a result of the minimum-wage statute lose employment entirely.
But if the greater part of the women now receiving wages less than the cost of subsistence are raised to a standard which will support them, the number of those who must rely on outside subsidies will be greatly diminished. In so far then as immorality is fostered by the necessity of adding to wages some other source of income, the number of those who are in this predicament will be greatly diminished by the minimum wage. And those who receive no wage at all will form a special class for whom some special provision must be made.

What is true of the relation of the minimum wage to immorality is true also of the relation of the minimum wage to ill-health due to insufficient nourishment and improper living conditions. The purpose and result of minimum-wage legislation is to ensure that those who give a day's work receive a day's support in return. The purpose is a public purpose, because the evils which result from poverty and weakness and premature death are public evils. They are the public evils that all our health laws seek to avert. They are the public evils that public charity seeks to avert. Men are compelled to pay money in taxes to prevent those evils. They must pay to provide food and lodging and medical care for those who stand in no relation to them except that of fellow citizens. There can be no dispute that the end sought by minimum-wage legislation is a legitimate public end. The only question is the appropriateness of the means.

The objection of the employer is in substance that he is not his brother's keeper. The statute says that he shall be his employee's keeper, that he shall not have his employee kept for him by others. It leaves him free to decide whether any person shall be his employee. He has a freedom which is not accorded to those who are taxed to support others who do not receive from private sources enough to support themselves. But if the employer chooses to take the daily labor

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17 Felix Frankfurter in his brief submitted to the Supreme Court in support of the Oregon minimum-wage statute calls the statute “a reasonable exercise of the state power to minimize danger of unfair or oppressive contracts.” The cases cited in notes 9, 11, 12, and 13, supra, are instances of the judicial sanction of the legislative promotion of such purpose. So is anti-trust legislation and “blue-sky” legislation. In minimum-wage legislation, however, this public purpose seems ancillary to the public purpose of preventing the evils referred to in the text above, since such evils are the inevitable concomitants of such oppressive contracts.
of a woman he is compelled to pay that woman enough to make that labor possible. He pays only the cost of that from which he chooses to reap the benefits. He pays what the common law makes men pay in judgments in quasi-contract. The obligation which the law imposes on him in respect to wages is similar to that which it imposes on him in respect to injuries arising in the course of employment. Under our modern workmen's compensation statutes the employer pays for injuries to employees, not because his negligence has caused the injuries, but because the injuries were incident to the employment and the employer chose to make the contract that gave rise to the employment. Injuries are only a possible or likely incident of the employment. The support of the worker is a necessary and certain incident of the employment. It is a condition without which the employment cannot exist. The employer must pay for the fuel for his furnaces, as the farmer pays for fodder and shelter for his kine. But when a statute commands an employer to pay enough for clothing, food and shelter to those whose labor he uses in his factory, it is alleged to be a violation of the principles of our government. Yet by common law and by many approved statutes those who accept benefits are made to bear the attendant burdens.

The only employees who can complain of minimum-wage legislation are those whom the employer rejects. It must be recognized that a serious defect in minimum-wage legislation is the absence of specific provision for caring for the unemployables. But a statute is not invalid because it takes only the first step in dealing with a situation and leaves other steps to be adopted as experience shall advise. "Constitutional law, like other mortal contrivances, must take some

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18 For a discussion of the extent to which what is really the imposition of absolute liability for reasons of public policy is attained through actions ex contractu and ex delicto, see Jeremiah Smith "Tort and Absolute Liability—Suggested Changes in Classification," 30 Harvard Law Review 241, 319, 409.


20 "But the federal constitution does not require that all state laws shall be perfect, nor that the entire field of proper legislation shall be covered by a single enactment," Mr. Justice Pitney, in Rosenthal v. New York, (1912) 226 U.S. 260, 33 S. C. R. 27.
chances," Mr. Justice Holmes has reminded us. Minimum-wage statutes will tend to sort out the unemployables. They will remedy the evils due to the fact that industry is not now maintaining the employees whom it requires and must continue to require. Those whom industry does not require must be subjected to special treatment later.

This is not, however, all that may be said in answer to the objection of the employee who loses her chance to work because her employer will not retain her at the wage prescribed by the statute. She must be regarded not as an isolated individual but as a member of a class. The class of women workers as a whole will derive such benefits from the raising of their wages to the cost of subsistence, that the loss to the unemployables is overbalanced by the gain to those whom industry cannot dispense with. As a compulsory vaccination statute cannot be defeated because some will suffer from its enforcement, so a statute raising wages should not be defeated because some laborers will suffer from its enforcement. The class to which they belong will gain. Therefore there is no loss to the class to be weighed against the general public benefits which the statute will promote.

The immateriality of loss to individual employees from the operation of minimum-wage legislation would seem to be sufficiently established by the instances already given in which the courts have sustained legislation establishing standards of fitness, of rates of interest and of pay. Such loss is regrettable, but it does not make the statute unconstitutional. It is however to be hoped that the states which adopt minimum-wage legislation will soon add provisions for dealing with the needs of the unemployed and the unemployable. Such needs are of course provided for in a measure by our systems of public charity and by institutions for the care and training of defectives. To the extent to which public funds are released by the effect of minimum-wage statutes on those who remain in employment, the care of the unemployed will involve no increase of the tax burden. And to the extent to which the statutes operate to sift the defectives from the mass of workers, substantial aid will be given to the movement for

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mental hygiene which has already won recognition as an essential governmental function.

The economic wisdom or folly of minimum-wage legislation can of course be better demonstrated by experience than by theoretical argument. The judicial determination of such questions should not be based on fantastic or at best highly speculative predictions of dire results. And when the results are known, their appraisal will be in large part dependent upon views of social policy. Under the development of our constitutional system such questions of policy are passed upon by the courts. The considerations which influence the judicial decision of such questions are not always susceptible of easy determination. It is apparent, however, that the courts are rapidly abandoning the general notions of individualism and of laissez faire which underlie the arguments of the opponents of minimum-wage legislation. Experience is demonstrating the superior wisdom of legislative prescription of social standards over the anarchic chaos of unfettered individual action.

Legislation compelling employers to pay a wage equal to the cost of subsistence differs in detail from other legislation

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22 See the discussion of this problem in the article by Mr. Kales cited in note 7. Mr. Kales suggests the following test for what is a proper exercise of the police power. "The legislative power is the legitimate means of correcting mistakes of persistent stupidity and shortsighted selfishness on the part of the managers. It is the legitimate means of compelling all to do that which the wiser are ready to do, but the more stupid and the more selfish are unwilling to attempt, and, therefore, not infrequently prevent action by any. The legislative power is the legitimate means of cutting down the rewards of successful management so that they are not out of all proportion to what the successful manager is willing to take." After enumerating some of the statutes which the Supreme Court has sustained, Mr. Kales adds: "All these acts in a degree interfere with the managers' freedom to manage according to their judgment and opportunity. All in a degree tend to substitute the legislative fiat for the will of the managers. They tend to some extent to undermine the managers' chances and motives for successful management. At the same time they tend to counteract the persistent stupidity and short-sightedness of the managers themselves. They tend to compel all alike to do what the more enlightened are willing to concede for the best interests of the business. They tend to compel that co-operation or common action by all the members of a group, which is desirable in the interests of the business itself as well as the general welfare, but which cannot be obtained without the compulsion of law, because some at least would never subscribe to the plan voluntarily."

In applying this test to minimum-wage legislation it seems moderate to say that any sensible manager of a business would choose to pay his employees enough to make them capable of efficient and continuous labor without dependence on other sources of support than their wages.
already sustained as constitutional. But the public ends to be gained by the statutory minimum wage are akin to, if not identical with, the public ends secured by legislation which has already successfully run the gauntlet of judicial consideration. The private detriment which minimum-wage statutes may cause is less serious and more easily justified than are the burdens imposed by statutes which have long been part of our system of legal regulation. A judicial declaration that minimum-wage legislation is a deprivation of property without due process of law would be inconsistent with the necessary implication of the group of decisions on similar statutes and with the social philosophy which those decisions exemplify.

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