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ARTICLES

CONCEPTIONS OF FAIRNESS AND THE FAIR LABOR STANDARDS ACT

Seth D. Harris*

I. INTRODUCTION

Few observers would dispute the axiom that wealthier interests have greater bargaining power in the political market than poorer, unorganized interests. Given this disparity in political bargaining power, an objective observer would not expect statutes to be enacted that seem to benefit less powerful interests at the apparent expense of the more powerful. Yet, such statutes have been enacted. The Fair Labor Standards Act ("FLSA"), the nation’s minimum wage, maximum hours, and child labor law, is one such statute. This article uses the history of the debate over fairness in wages that culminated in enactment of the Fair Labor Standards Act as a case study that offers useful, if only preliminary, insights into this apparent power paradox.

The Civil War's close signaled an end to an alliance of Northern laborers and their employers against the common enemy of slavery. After abolition, a strong belief rose among American workers and labor observers that fairness for workers meant more than the absence of slavery.2 The artisan who was the common "worker" from colonial

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2. See Lawrence B. Glickman, A Living Wage: American Workers and the Making
times until the Civil War controlled his means of production and reaped
the full products of his labors. His earnings reflected the quantity and
quality of his products. Beginning from 1815 to 1850, however, one task
after another was taken out of the home or artisan's shop and placed in
the factory. Goods and services formerly produced by the family or
independent artisans were moved into mass production. The wage
laborer who replaced the artisan after the Civil War sold his time and
yielded near-absolute control over his work to his employer. Earnings
were the product of a wage deal imposed by the employer that set an
hourly wage and multiplied it by work hours.

From the demise of slavery through the passage of the Fair Labor
Standards Act in 1938, participants in the debate over fairness in wages
increasingly accepted the premise that individual workers had
significantly less bargaining power in the labor market than employers.
They also acknowledged the empirical evidence that, in some
circumstances, employers used their superior bargaining power to drive
workers' wages below the level of subsistence. Nonetheless,
disagreements persisted over the normative question of what, if
anything, should be done to remedy the subsistence wages that resulted
from unequal bargaining power in the labor market. Accordingly, the
question remains, how did it come to pass that government intervened to
remedy exploitative wage deals that resulted from superior employer
controlling power in the labor market when employers' bargaining
power in the political market exceeded that of low-wage, unskilled
workers.

The history of the debate over fairness in wages offers two
answers. First, bargaining power is dynamic, not static. Both socio-
economic crises and effective political advocacy by living wage
proponents during the first two decades of the twentieth century
sufficiently empowered the living wage movement to permit, first,
passage of state minimum wage laws and, later, federal living wage
regulations applicable to World War I's war industries.

The living wage movement propounded two normative answers—
that is, conceptions of fairness—that would remedy the ill effects of
employers' superior bargaining power in the labor market. "Fairness is a
Living Wage" ("Absolute Fairness"), would have dictated a substantive
result. Government would require employers to pay each worker at least

3. See id. at 18.
4. See id. at 18-22.
5. See infra Part III.
a wage sufficient to support a family. "Fairness is Equality of Bargaining Power" ("Bargaining Fairness"), would have imposed a procedural remedy. Government would equalize workers' and employers' bargaining power and then provide a forum for "public bargaining" over wages and hours in hopes that subsistence wages would result.

The goal of Absolute Fairness—a living wage—became the moral lodestar of the movement for minimum wage laws in the United States, although its means for achieving the goal never succeeded in the political market. But several states enacted "public bargaining" laws based on the conception of Bargaining Fairness prior to the enactment of the FLSA. These public bargaining laws sought to redress unequal bargaining power in the labor market by removing minimum-wage-setting from the labor market and putting it in a public administrative forum. These laws assured that workers and employers had equal power and an equal opportunity to be heard in the setting of minimum wages. Also, public bargaining laws removed minimum-wage-setting from the political market and effectively immunized it from the influence of comparatively more powerful interest groups.

The history of the debate over fairness in wages suggests a second answer to the question of how statutes seemingly designed to benefit disempowered interests become law. Laws that appear to be intended for the benefit of workers may principally operate by conferring a benefit on employers or, perhaps more likely, one group of employers at the expense of another.

The crisis wrought by the Great Depression of 1929 appeared to swing sufficient bargaining power to workers and their representatives to create the opportunity for national legislation premised on Bargaining Fairness. In some respects, the National Industrial Recovery Act was a bargaining fairness law. But the failure of that law, along with sharp divisions in the movements that purported to speak for working families, kept Congress from enacting a "public bargaining" statute that would survive. Rather, the FLSA ultimately enacted in 1938 sought to redress substandard wages as a means to remedy the underconsumption which President Franklin D. Roosevelt and his allies believed sparked and prolonged the Depression. Fixing a uniform, national wage floor and maximum work week limited employers' ability to use labor cost-

6. See infra Part III.B.
7. See infra Part V.B.
cutting as a means to gain a price advantage in increasingly national product markets.

Regulating labor markets through the FLSA became a device for assuring fair competition in product markets and a hedge against the Depression. “Fairness is Fair Competition” (“Competitive Fairness”), would prohibit some low wages and excessive hours as a means to fairness between employers, not as a means to fairness for workers disadvantaged in the labor market by inferior bargaining power. The FLSA codified this conception of Competitive Fairness. While workers benefited and continue to benefit from the FLSA’s protection, the FLSA was principally designed to preserve capitalism by protecting employers from themselves and each other.

Congress enacted a FLSA premised on Competitive Fairness rather than Bargaining Fairness, at least in part, because the political bargaining power that worker advocates wielded as a result of the Depression was impaired by a long-standing split between the living wage movement and the labor movement. The living wage movement was a middle-class assemblage of academics, social workers, Catholic theologians, and other reformers who trusted in government intervention to strengthen workers’ position in labor markets. Because the living wage movement depended on the political process for its success, it had no choice but to appeal to the forces that dominated the economy. As a result, they argued that a living wage best served society’s larger economic goals, not workers alone. But the American Federation of Labor (“AFL”) and important forces within the Committee on Industrial Organizations (“CIO”) had been thwarted and harassed by the government such that they could not reconcile themselves to the idea that government would be a neutral mechanism for assuring fairness to workers. Organized labor held vigorously to the superiority of private collective bargaining over “public bargaining” as the remedy for unequal bargaining power in the labor market.

8. Gender roles and complicated politics within the early feminist movement formed another important dividing line in the debate over fairness in wages. Although this article will touch on this debate only briefly, there is an excellent body of literature that discusses at greater length the differing views of gender that helped shape the debate over fairness in wages. See, e.g., Judith A. Baer, The Chains of Protection: The Judicial Response to Women's Labor Legislation 23 (1978); Vivien Hart, Bound by Our Constitution: Women, Workers, and the Minimum Wage (1994); Sybil Lipschultz, Workers, Wives and Mothers: The Problem of Minimum Wage Laws for Women in Early Twentieth-Century America (1986) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with author).

9. See infra Part V.
The struggle between interest groups over a piece of legislation cannot be fully understood absent consideration of courts' interpretation of the legislation. In the case of the FLSA, courts intervened in the debate over fairness in wages before the FLSA became law and played a central role in the political struggle for minimum wage legislation. A vigorous Spencerist majority on the Supreme Court used its own conception of fairness in wages, "Fairness is the Economic Hierarchy" ("Hierarchic Fairness"), to block state laws codifying the conception of bargaining fairness. While acknowledging that labor market hierarchies placed employers in a superior position, proponents of Hierarchic Fairness opposed any remedy for this condition. Rather, Hierarchic Fairness sought to preserve the economic status quo, except when societal imperatives dictated limited strategic retreats. The pre-FLSA debate over fairness in wages was largely a struggle between Bargaining Fairness and Hierarchic Fairness. With the emergence of Hierarchic Fairness as the Supreme Court's governing economic philosophy, Bargaining Fairness would prevail only when a social or economic crisis radically shifted the political bargaining power calculus.

In a short-lived judicial oddity, the Spencerists on the Supreme Court undercut the economic hierarchy by adopting a second conception that "Fairness is Commutative Justice" ("Commutative Fairness"). This canonization of a bastardized Theory of Marginal Productivity held that a minimum wage law could pass constitutional muster only if workers receive the wages that equaled the value of their production. But this anomalous conception of fairness survived through only one Supreme Court decision. The dominance of Hierarchic Fairness also ended with the arrival of the Great Depression and the New Deal.

Since passage of the FLSA, the courts have reentered the debate over fairness in wages. In essence, they have abandoned the conception of Competitive Fairness embodied in the FLSA. With no support in the legislative text or history, courts have concluded that only those workers who are "dependent" on their employers are entitled to the minimum wage protections guaranteed by the FLSA. This artificial threshold amounts to a rejection of the long-standing consensus that workers in the low-wage labor market lack sufficient individual bargaining power to protect themselves against employers' wage demands. It effectively requires workers to prove that they individually lack sufficient


bargaining power before they will be permitted to benefit from the FLSA’s protections. This judicial construct reflects a sixth conception of fairness extant, but hidden, in the current judicial interpretation of the FLSA’s definition of “employee.” “Fairness is an Implied Contract” is wholly inconsistent not only with the entire history of the American debate over fairness in wages that preceded the FLSA, but with the purpose and structure of the FLSA itself.

This Article organizes the history of the American debate over fairness in wages around the competing normative conceptions of fairness propounded in the political arena from the demise of slavery through the modern conflict over which workers should be protected by the FLSA’s minimum wage and maximum hours guarantees. Economic thought influenced, but did not determine, the path of legislation relating to minimum wages. It is a necessary element in this story. Classical economics and its Wages Fund Theory essentially posited that all workers drew wages from a single, fixed source; thus, any wage increase for one worker came out of the pocket of another. When the Wages Fund Theory was replaced by the Theory of Marginal Productivity, an intellectual justification for increasing workers’ wages was born. Section II describes this evolution in classical economic theory. Section II also introduces the socio-economic school of thought pioneered by Sidney and Beatrice Webb and Richard Ely, and further developed by John Commons. In an effort to preserve capitalism from the Marxist challenge spawned by its excesses, the socio-economists supplied intellectual justification and empirical evidence that supported the living wage movement’s advocacy for a statutory minimum wage. The socio-economists’ research helped to sway American public opinion towards the view that workers’ wages could be and had been driven below subsistence.

Section III discusses the conceptions of Absolute Fairness and Bargaining Fairness advocated by the living wage movement. It also discusses the disabling split between the living wage movement and the labor movement that helped produce the outcome of the legislative debate over the FLSA. Section IV discusses the conception of Hierarchic Fairness produced during the Spencerist period in the Supreme Court’s history, often referred to as the Lochner era. It will explain how Hierarchic Fairness prevailed over Bargaining Fairness, and how its judicial purveyors sustained its victory by yielding ground in societal crises. Section V discusses the Great Depression and how the opportunity for success presented by the resulting drastic shift in political power relationships turned into Bargaining Fairness’ final
Conceptions of Fairness

defeat. Section V also explains the conception of Competitive Fairness and how it is codified in the FLSA.

Finally, Section VI addresses the modern controversy over which workers are “employees” under the FLSA and places it in the context of the history of the debate over fairness in wages. The judicially constructed conception that “Fairness is an Implied Contract,” which this article infers from judicial decisions interpreting the FSLA marks a further substantial retreat from an effort to remedy the wage and hour consequences of unequal bargaining power in the labor market.

II. REFORMING ECONOMIC THOUGHT

A. Classical Economics Re-Thinks Wage Determination

There were essentially two periods in the history of wage theory during the industrial era extending from the demise of slavery through the passage of the FLSA. The classical period during which the Wages Fund Theory prevailed ended around 1875. The Wages Fund Theory was challenged and eventually abandoned in favor of Marginal Productivity Theory which prevailed through the Great Depression of 1929 and still holds significant sway today.

Classical economics viewed the issue of wage determination principally as a problem of distribution; that is, how did society divide the national dividend among factors of production in the form of rents, profits, and wages. The first answer was the Wages Fund Theory, propounded around 1823 by J.R. M'Culloch. The Wages Fund Theory held that there exists a single pool of capital derived from savings from past national product. This capital pool is divided among the factors of production, including labor, with first priority given to plants and materials. Hence, the amount in the wages fund at any particular moment was predetermined, partly by the action of the community in the past and partly by the technical character of the industries in the present.
The wage bargain's bottom line flows therefrom. Average wages equal the amount of the wages fund divided by the number of workers. More capital available for wages meant higher wages for workers, assuming a fixed labor supply. But labor supply would adjust, in the long run, as workers reproduced at a rate determined by their economic circumstances. As a result, wages would tend to be fixed at the minimum subsistence level.

The Wages Fund Theory posited that wages are a zero-sum game. Assuming a fixed supply of workers, any increase in wages for one worker reduced another worker's share of the wages fund. Workers could increase their wages only by reducing the supply of labor relative to the supply of capital. The options were few: reducing the birth rate, or hoping "some pestilence, earthquake, or other natural catastrophe, or even war itself" would thin the labor's ranks. In reality, the Wages Fund Theory left workers and their advocates without recourse to appeals for higher wages absent responses that set workers against one another.

The Wages Fund Theory was abandoned by classical economists largely because it did not explain how individual wages were actually determined. In its strict formulation, the theory assumed that a subsistence wage would result from long-run shifts in population. But the theory also recognized that subsistence was a customary or social standard. Workers received wages sufficient to enable them, on the average, just to sustain their habitual standard of life. Thus, wages were not determined within the system as the theory described it, but according to social convention.

Further, even the briefest inquiry into the real-world operation of firms threatened the theory's integrity. As Sidney and Beatrice Webb wrote years after the demise of the Wages Fund Theory:

Whatever may be the tasks on which the workmen are engaged, they are, as a matter of fact, fed, week by week, by products just brought to market, exactly in the same way as the employer and his household are fed. They are paid their wages, week by week, out of the current cash balances of their employers, these cash balances being daily

17. See Dunlop, supra note 12, at 4-6.
18. See id.; see also Webb & Webb, supra note 16, at 604-06, 615.
20. See Dunlop, supra note 12, at 6.
21. See id.
22. See id.
Conceptions of Fairness

replenished by sales of the current product. The weekly drawings of
the several partners in a firm come from precisely the same fund as the
wages of their workpeople. Whether or not any assignable limits can
be set to the possible expansion of this source of current income, it will
be at once evident that there is no arithmetical impossibility in the
workmen obtaining a larger, and the employers a smaller, proportion
of the total drawings for any particular week. 23

Thus, the Wages Fund Theory was abandoned as being inadequate to the
central task of describing how wages are determined.

Early theories of wage determination tended to be the products of
practitioners and political or moral philosophers. The economics field
began to professionalize only in the 1870s as the first university
professors of economics were hired. 24 At the same time, the strong
challenge of Karl Marx's critique of capitalism highlighted the problem
of determining how the benefits of the new industrial era would be
distributed. 25 It was in this context that the Marginal Productivity Theory
was born.

Marginal Productivity Theory begins with labor supply and
employer demand curves, and the premise that the production of
everything is continued up to that limit or margin at which there is
equilibrium between supply and demand. 26 Supply and demand curves
assume that as wages increase, the amount of labor workers are willing
to supply increases and the amount of labor employers are willing to
purchase decreases. 27 The downward slope of the demand curve is a
consequence of the assumption that the marginal productivity of each
additional worker declines. 28 Since capitalism properly assumes that
every employer seeks to maximize profits, the Marginal Productivity
Theory deduces that an employer will not hire a worker at a wage that
exceeds the equivalent of that worker’s productivity. 29 Thus, the point at
which employers’ downward sloping demand curve intersects with
workers’ upward sloping supply curve is called “equilibrium.” 30

Equilibrium is expected to mark the wage at which workers and

24. See RICHARD T. ELY, GROUND UNDER OUR FEET 123-24 (1938) [hereinafter ELY,
GROUND UNDER] (stating that the first chair in economics was created at Harvard in 1871).
25. See Dunlop, supra note 12, at 7.
27. Dunlop, supra note 12, at 5-6.
28. See id.
29. See id. at 9.
30. See id.
employers will strike a deal in the labor market.\textsuperscript{31} It is also expected to mark the point at which the marginal worker’s wage is equivalent to his productivity.\textsuperscript{32} This has been said to be “true of any factor of production . . . and holds regardless of the character of competition.”\textsuperscript{33}

Marginal Productivity Theory also failed to describe how individual wages are determined. The prices of factors (e.g., the wages of labor) are not determined by marginal productivity. Marginal productivity establishes employers’ demand schedules. Factor pricing also requires supply schedules.\textsuperscript{34} The rational choice of the employer—to hire workers only as long as their productivity is equal to or greater than its cost—does not apply equally to workers’ supply curve.\textsuperscript{35} Various explanations of how workers decide how much labor to supply at a given wage have been attempted. For example, a “pain-cost explanation,” in which the amount of labor offered would be set at the point where the marginal utility equaled the marginal disutility; and individual choices between income and leisure at varying wage rates. But these explanations have invariably been found wanting and, in any event, bear little relation to productivity analysis. Marginal Productivity Theory is a statement of the demand side rather than a complete model of wage determination.

As with the Wages Fund Theory, inquiry into the actual operation of labor markets suggested imperfections in the Marginal Productivity Theory. For example, it is frequently impossible to determine an individual worker’s marginal productivity.\textsuperscript{36} Similarly, while marginal productivity may help describe the marginal worker’s wage, it offers little help in describing the wages of infra-marginal workers.\textsuperscript{37} Assuming a downward slope to the employer demand curve, infra-marginal workers’ productivity always exceeds their wages.\textsuperscript{38} Finally, traditional Marginal Productivity Theory does not take into account the possibility that an employer might have sufficient power in the labor market to drive a worker’s wage below the value of that worker’s

\textsuperscript{31} See id.
\textsuperscript{32} See Dunlop, supra note 12, at 9.
\textsuperscript{33} Id.
\textsuperscript{34} See id.
\textsuperscript{35} See id.
\textsuperscript{37} See Dunlop, supra note 12, at 9-10.
\textsuperscript{38} See id.
productivity. Many analysts concluded that wages were determined outside Marginal Productivity Theory and that the theory merely described how much labor would be employed at a particular wage.

Nonetheless, Marginal Productivity Theory was an important precursor to the debate over the FLSA. It offered a way around the zero-sum choices posed by the Wages Fund Theory. Every worker’s wages could rise along with productivity. During an industrial revolution with new technologies and work organization, rising productivity was a smaller obstacle to overcome than a fixed and pre-determined wages fund. Thus, the shift in classical economic thinking from the Wages Fund Theory to the Marginal Productivity Theory opened the possibility, within the capitalist framework, that workers’ wages could be increased through social reform.

B. Socio-Economists Re-Think Classical Economics

Karl Marx’s revolutionary challenge to classical economics, particularly his critique of the relationship between subsistence and labor, contributed to a fundamental reconsideration of theories of wage determination among economists who sought to preserve capitalism. Marx’s challenge was taken up by a generation of economists who agreed with, or perhaps co-opted, significant portions of his diagnosis, while rejecting his prognosis. Their answer to revolution was to seek reforms that would leave capitalism standing.

39. See id.
40. See id. at 9.
42. Richard Ely conceded that his purpose in constructing socio-economics was, in part, to protect against a turn towards socialism. See ELY, GROUNd UNDER supra note 24, at 152-53; see also RICHARD T. ELY, AN INTRODUCTION TO POLITICAL ECONOMY 248-56 (Kraus Reprint Co. 1969) (hereinafter ELY, POLITICAL ECONOMY) (discussing various aspects of socialism); Henry Rogers Seager, The Theory of the Minimum Wage, 3 AM. LAB. LEGIS. REV. 88-89 (1912) (stating that the goal is to make socialism unnecessary and undesirable). Marx’s critique of capitalist production challenged not only classical and neoclassical economists, but also defenders of capitalism among the clergy, social reformers, and trade unionists, to re-shape the capitalist framework entirely or lose a struggle for the hearts and minds of the world’s growing working class.
1. Repairing the Flaws in Classical Economics

These reformers identified two fundamental flaws in classical economics. The first flaw was methodological. Classical economics held that natural laws established for all times and places, certain fundamental principles to govern economic behavior. All theories of classical economics began with fundamental premises from other sciences or certain general traits of human nature and familiar observations. All of these premises were already known. Facts from the outside world were not necessary to the inquiry. Instead, a classical economist would deduce an economic system from the fundamental premises. Since all the premises were known and the necessary deductions made, classical economics was a finished product by the end of the nineteenth century, said the socio-economists. Richard Ely noted sardonically that it required only one text—“Mrs. Fawcett’s Political Economy for Beginners”—to capture the complete body of classical economic theory.

This methodological flaw brought with it an ethical flaw, according to the socio-economists. Classical economists and their deductive method were at once blind to the real world and the moral implications of their work. Ely referred again to Mrs. Fawcett, citing the definition of political economy from her text as the “science which investigates the nature of wealth and the laws which govern its production, exchange, and distribution.” Ely retorted that:

[man was not mentioned in this definition; it was implied that man is simply an instrument by which wealth is created and not the end for which it exists. In this volume free competition plays the part of the deus ex machina, which, if left well alone, will regulate and bring ]

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43. See ELY, GROUND UNDER, supra note 24, at 126.
45. See ELY, GROUND UNDER, supra note 24, at 128; Ely, AEA History, supra note 44, at 145.
46. See ELY, GROUND UNDER, supra note 24, at 125.
47. See LAFAYETTE G. HARTER, JR., JOHN R. COMMONS: HIS ASSAULT ON LAISSEZ-FAIRE 32-33 (1962); ELY, GROUND UNDER, supra note 24, at 144.
48. See HARTER, JR., supra note 47, at 32-33; ELY, GROUND UNDER, supra note 24, at 144.
49. ELY, GROUND UNDER, supra note 24, at 125.
harmony all the relations that arise among men in their efforts to make a living.\textsuperscript{50}

Thus, Ely viewed classical political economy as refusing to recognize any ethical element in economic life.\textsuperscript{51} Classical political economy "opposed all social reforms for social uplift as futile... [and] exalted into a principle of economic righteousness the individual... look[ing] upon laissez faire" as the optimal philosophy for economics.\textsuperscript{52}

In fact, classical economics and the laissez-faire philosophy it embodied did advance a vision of morality well-articulated by Herbert Spencer.\textsuperscript{53} But the socio-economists rejected this morality. Richard Ely captured the motivation of the young reformers who challenged classical economics in the midst of industrialization: "[a] new world was coming into existence and if this world was to be a better world, we believed we must have a new economics to go along with it."\textsuperscript{54} The reformers sought to remedy the flaws of classical economics by reconnecting political economy to a socially progressive ethic and real-life experiences in the American economy. Ely and a group of colleagues returned from Germany in 1885 conscious that "[they] were human beings as well as economists and that [they] were engaged in the task of furthering a science which is first and foremost a science of human relationships."\textsuperscript{55} They substituted morality for pure economic analysis, in many ways returning to the political economy of Mill and Ricardo.

The socio-economists rejected the effort in classical economics to make their field into a positive science.\textsuperscript{56} Ely and his compatriots viewed economics as a division of sociology, broadly defined as everything that concerns people living together and having necessary, desirable, and agreeable relations.\textsuperscript{57} Within sociology, political economy addressed that portion of these relations associated with men and women earning a living.\textsuperscript{58} But political economy could never decide a societal question alone.\textsuperscript{59} Final judgments must come from the synthesis of economic, moral, and political considerations, among others. The economist speaks

\textsuperscript{50} Id.
\textsuperscript{51} Id. at 144.
\textsuperscript{52} Id.; see also Ely, AEA History, supra note 44, at 143 (discussing laissez-faire).
\textsuperscript{53} See infra Part IV.
\textsuperscript{54} Ely, AEA History, supra note 44, at 144-45.
\textsuperscript{55} ELY, GROUND UNDER, supra note 24, at 121.
\textsuperscript{56} See GLICKMAN, supra note 2, at 57-58.
\textsuperscript{57} See ELY, POLITICAL ECONOMY, supra note 42, at 9, 12.
\textsuperscript{58} See id. at 8.
\textsuperscript{59} See id.
with no special authority on moral and political questions, said the socio-economists.60

The American Economic Association ("AEA") was founded in 1885 as a gathering place for those who protested against laissez-faire.61 Ely proposed a platform for the AEA that directly challenged the governing theory of classical economics:

We regard the state as an educational and ethical agency whose positive aid is an indispensable condition of human progress. While we recognize the necessity of individual initiative in industrial life, we hold that the doctrine of laissez faire is unsafe in politics and unsound in morals; and that it suggests an inadequate explanation of the relations between the state and the citizens.62

In an apparent compromise to broaden the organization's base, the platform as adopted was somewhat less direct: "We regard the state as an agency whose positive assistance is one of the indispensable condition of human progress."63 Nonetheless, Ely expanded upon the reformers' moral agenda in a textbook he co-authored roughly during the same period:

the persistent hope [is] that by systematic study we may eventually abolish the material poverty which deadens and dwarfs the lives of million of our fellows. Economics is a science, but something more than a science; a science shot through with the infinite variety of human life, calling not only for systematic, ordered thinking, but for human sympathy, imagination, and in an unusual degree for the saving grace of common sense ... Satisfaction of social need, and not individual profit, is the objective point of the science.64

Ely and his protégé John Commons based their moral agenda on religious teachings as well as their economic analyses.65

60. See Richard T. ElY et al., Outlines of Economics 3-4, 9-10 (3d ed. 1918) [hereinafter ElY et al., Outlines of Economics]; ElY, Political Economy, supra note 42, at 12-16. "Political economy takes what ethics has to offer as a guide for the development of economic life. Ethical conceptions have always governed all social life more or less perfectly." Id. at 118.


62. Id. at 136.

63. Id. at 140; see also ElY, AEA History, supra note 44, at 144.

64. ElY et al., Outlines of Economics, supra note 60, at 4; see also ElY, Political Economy, supra note 42, at 116 ("It is the business of the political economist to guard the interests of the masses, and to suggest measures to promote their welfare.").

65. Both Ely and Commons became involved with the Social Gospel movement, a theological social reformist movement. See Harter, Jr., supra note 47, at 39-40; see also
The reformers’ critique of classical economics consisted of more than spraying a patina of politically progressive morality on deductively reasoned conclusions. It was inextricably bound up with their methodology. They rejected the idea that natural laws and the purportedly neutral principles deduced therefrom were the fount of political economy.66 Instead, they adopted a view consistent with Henry George’s observation that political economy is “the science which the ordinary man may most easily study. It requires no tools, no apparatus, no special learning. The phenomena which it investigates need not be sought for in laboratories or libraries; they lie about us and are constantly thrust upon us."67

Where classical economics was deductive, the socio-economists used an inductive approach which Ely dubbed the “look and see” method.68 Political economy has to do with society, they posited, so knowledge about society should be acquired by systematic empirical study. Rather than relying on a set of fixed premises, the “look and see” method would gain new premises and new generalizations through the study of life. Facts would be gathered in accordance with a hypothesis, common factors associated with the hypothesis would be found, and generalizations from these common factors would be launched.69 Any generalizations would be tested against external facts both to judge the accuracy of the reasoning and to determine whether the initial generalization was supported by sufficient evidence.70 These conclusions would be arranged in a way to gain new knowledge in order to tell the story of economic life.71

RICHARD T. ELY, SOCIAL ASPECTS OF CHRISTIANITY 123-24, 128-29 (1889) (discussing the relationship between the Christian doctrine of talents and the goal of political economy to help establish a system for production and distribution that elicits the best from each individual).

66. See Ely, AEA History, supra note 44, at 149.
67. GLICKMAN, supra note 2, at 59.
68. Ely, AEA History, supra note 44, at 149; ELY, GROUND UNDER, supra note 24, at 161, 185-89.
69. See HARTER, JR., supra note 47, at 32.
70. See id.; ELY, GROUND UNDER, supra note 24, at 189.
71. See Ely, GROUND UNDER, supra note 24, at 154-55, 189; HARTER, JR., supra note 47, at 32; see also Ely, AEA History, supra note 44, at 149 (stating that all members of the AEA used the “look and see” method). The teacher-student relationship between Richard Ely and John Commons offers a good illustration of their methodology and its intellectual underpinnings. Commons attended Johns Hopkins University in 1888 largely because of his admiration for Ely. Ely’s economics courses required field work and research experience, and included the study of sociology and political science. Ely’s approach was, to a large extent, an anti-theoretical method. The focus of every study was the finding of facts. As part of the course work, he sent Commons on extensive projects as a caseworker for charitable organizations while also encouraging him to do historical research. Commons followed Ely to the University of Wisconsin beginning in 1904,
But the work of the socio-economists did not end with teaching, study, and reason. From Ely's and Commons's perspectives, knowledge should be the precursor to action. Political economy and law are closely linked, according to the socio-economists, and many live questions from political economy necessarily become legislative questions. Specifically, Ely and Commons promoted new laws that governed economic life. Like Ely and the AEA, Commons helped to organize the American Association for Labor Legislation ("AALL") which consisted of academics, social workers, and state and federal officials dealing with labor problems. The AALL was intended to develop plans for labor legislation. Among the leading examples of these efforts was the campaign to enact a minimum wage.

2. Socio-Economics and the Way Labor Markets Work

The British socio-economists Sidney and Beatrice Webb offered perhaps the clearest exposition of the socio-economic diagnosis of the labor market. They rejected the Wages Fund Theory and the premise that wages are determined by natural law. Instead, they concluded that wages are a matter of human arrangement that can be altered, effectively and permanently, to the advantage of one class or another by appropriate action.

where Ely chaired the economics department, and advanced the same teaching philosophy he had experienced at Hopkins. See HARTE, JR., supra note 47, at 17-19, 24, 32, 38.

72. See HARTE, JR., supra note 47, at 34-40.

73. See id. at 72.

74. See id.; ELY, POLITICAL ECONOMY, supra note 42, at 135. Commons served as President of the AEA in 1917 and President of the National Consumers League ("NCL") in 1923. From the beginning, however, Commons was a leading force in the AALL and his student and future co-author, John Andrews, served as the group's Executive Secretary. See HARTE, JR., supra note 47, at 72-74.

Although a full discussion of the subject is beyond the scope of this article, it is worth noting that a similar reform of jurisprudence occurred at roughly the same time the socio-economists sought to reform economics. Sociological jurisprudence, named by Roscoe Pound, promoted a legal order informed by social and economic conditions, and guided by ethical considerations, rather than a priori legal rules. Roscoe Pound's seminal works on sociological jurisprudence were published around the same time that a national campaign to establish statutory minimum wages in the states began. See Roscoe Pound, The Scope and Purpose of Sociological Jurisprudence, Part I, 24 HARV. L. REV. 591, 593 (1911); Roscoe Pound, The Scope and Purpose of Sociological Jurisprudence, Part II, 25 HARV. L. REV. 140 (1911); Roscoe Pound, The Scope and Purpose of Sociological Jurisprudence, Part III, 25 HARV. L. REV. 489 (1912); see also G. Edward White, From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth Century America, 58 VA. L. REV. 999 (1972).

75. See WEBB & WEBB, supra note 16, at 560-61.
In the absence of a "Common Rule," such as a standard rate of pay or a fixed work day imposed through legislation or collective bargaining, working conditions are the product of individual bargaining between the employer and the worker in the labor market. One important factor in the comparative bargaining positions of workers and employers is a difference of alternative. The employer can refrain from making a deal with the worker with the knowledge that it will suffer only the inconvenience of rearranging the work of its establishment and, perhaps, temporarily reduced profit. The worker, if the deal is delayed, loses an entire day's subsistence. He faces starvation in the worst case or the deprivation of savings in the best case if he doesn't accept the employer's offer.

The worker frequently has no opportunity to bargain at all when he is forced to compete against numerous other workers willing to accept an employer's offer in order to feed themselves and their families. Henry Rogers Seager, an AALL President, explained that this destructive competition between workers in the low-wage labor market resulted from a chronic oversupply of workers. Low-wage work was so simple in character that it could be sought by people of all ages and both genders, without a threshold for intelligence or special training. As a result, employers have a sufficiently superior bargaining position to drive these workers' wages below bare subsistence. This result is possible even accepting Marginal Productivity Theory's conclusion that there is a tendency toward equality of supply and demand at the margin. Infra-marginal workers do not have the bargaining power to assure wages equal to their marginal productivity which, even if it could be measured, is typically assumed to be higher than that of the marginal worker. Their wages are, therefore, reduced to the value assigned to the productivity of the marginal, or lowest paid worker. But even this most salutary view of labor markets assumes the perfectly free and unrestrained competition which the socio-economists' empirical research found did not exist. The Webbs considered perfectly

76. See id. The socio-economists were strongly influenced by the Webbs' work. See Harter, Jr., supra note 47, at 169.
78. See Seager, supra note 42, at 82.
79. See id.; Ely et al., Outlines of Economics, supra note 60, at 674.
80. See Webb & Webb, supra note 16, at 644-49; see also id. at 560-61 (explaining that the employer-worker bargain tends towards the worst possible conditions for labor while even the exceptional few do not gain as much as they otherwise would); Sidney Webb, The Economic Theory of a Legal Minimum Wage, 20 J. Pol. Econ. 973, 990 (1912) [hereinafter Webb, Legal Minimum Wage] (stating that the fact that the employer pays less than subsistence does not prove
free bargaining in the labor market "entirely obsolete." Conditions of employment, rather than the abstractions of supply and demand curves, vary according to the strategic bargaining position of workers, said the socio-economists.

To achieve subsistence working conditions, the socio-economists concluded, either a law or collective bargaining must protect workers while they hold out long enough to bargain for a living wage. But the socio-economists predicted that collective bargaining would not succeed for low-skill, low-wage workers for the same reason Seager offered to explain the difficulty with the individual bargain. There is an army of people seeking the same few jobs. The fixing of wages according to strategic position meant the barest possible subsistence wages, if that.

The question remained: given this diagnosis of the labor market, what should be done? The socio-economists chose a reformist course. Accepting supply and demand as the ordinary mechanism for setting prices, the socio-economists concluded that government should intervene to prohibit certain outcomes of labor market deal-making with the goal of assuring workers all that is necessary for their health and efficiency. Safety and sanitation would certainly be appropriate arenas for government action, they concluded. Hours of work would also be a suitable target of government action because excessive work poses a threat to physical health and civic efficiency. The Webbs' view, shared by the other socio-economists but not universally accepted by worker advocates, was that wages belonged on this list of issues. A minimum wage should be fixed with the state as arbitrator and the standard embodied in statute, said the Webbs.8

3. The Economic Theory of a Living Wage

By dedicating themselves to reform within capitalism, the socio-economists wedded themselves to a strategy of persuading those who controlled the economic system that reform would be to everyone's benefit. Employers offered the wages that market conditions and superior power permitted and considered it the worker's business to decide whether he could afford to accept these wages.83 The socio-

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81. See WEBB & WEBB, supra note 16, at 688.
82. See id. at 582-84, 596-97, 694-99, 758.
83. See Seager, supra note 42, at 81.
economists considered the products of these wage deals to be society’s business as well. Ely and his co-authors found that the majority of women in many trades did not receive enough wages to maintain their physical efficiency in turn of the century America. Since workers must find sufficient resources to subsist, an employer paying women and children a wage below the subsistence level in effect received a subsidy from some other sources: families, charity, and even prostitution. The subsidies gave underpaying employers a cost advantage over employers of fully paid labor.

A second subsidy concerned the socio-economists more. They posited that the continued efficiency of a nation’s industry depended upon the continued health and strength of the nation’s workers. If an employer paid workers wages that were insufficient to provide food, clothing, and shelter to maintain them in average health, if long hours deprived workers of adequate rest and recreation, or if workers were subjected to dangerous and unsanitary conditions that shortened their lives, that employer had obtained a supply of the labor force to which it was not entitled. These employers were spending the capital value of future generations by taking more from their workers than their pay justified.

Thus, the socio-economists viewed a mandated minimum wage not merely as the elimination of unfair subsidies, but as a boon to efficiency. In the first instance, employers would be forced to make more efficient hiring decisions. A statutory minimum wage permits employers to hire any worker. It merely shifts the basis for the selection from price (i.e., wage) to quality. Absent a minimum wage, the socio-economists observed, employers would tend to hire whomever they could get at the lowest wage possible. If blocked from cutting wages by law, however, employers would be economically impelled to raise workers’ efficiency. Work would flow to the most efficient firms. Aggregate efficiency in the economy would increase. Dislocations of less efficient workers, including women and children, would result, the socio-economists conceded. But this beneficial competition would

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85. See Webb, Legal Minimum Wage, supra note 80, at 986-89.
86. See id. at 987.
87. See id.
88. See id. at 987-88; see also Webb & Webb, supra note 16, at 723.
89. See Webb & Webb, supra note 16, at 721.
90. See Webb, Legal Minimum Wage, supra note 80, at 977-79, 984; Webb & Webb, supra note 16, at 715-16, 723-24; Seager, supra note 42, at 86.
91. See Webb & Webb, supra note 16, at 86.
create an imperative for workers to increase their efficiency to compete on the basis of productivity rather than wage cutting.\textsuperscript{92}

Workers would increase their efficiency simply because they lived an improved quality of life made possible by higher wages and better working conditions.\textsuperscript{93} Unrestrained competition that drives down wages and thereby supports less mental and physical energy than necessary for peak efficiency threatens the economic system, observed the socio-economists.\textsuperscript{94} Even Alfred Marshall and J.R. M'Culloch noted that improved conditions of employment for the weakest and most necessitous workers increased productivity.\textsuperscript{95} Thus, the establishment of a minimum wage would increase worker efficiency, impel more efficient hiring decisions by employers, and relieve families and society from the burden of subsidizing wage-cutting employers.

In sum, the socio-economists concluded that society had an interest in fulfilling Adam Smith's adage: "A man must always live by his work, and his wages must at least be sufficient to maintain him."\textsuperscript{96} The socio-economists believed that a minimum wage should be determined through practical inquiry as to the cost of food, clothing, and shelter physiologically necessary to prevent workers' mental and bodily deterioration.\textsuperscript{97} Foreshadowing important disagreements to come, however, the Webbs distinguished this national minimum from a "living wage." They argued that a living wage differed for each region and person, with gender being one ground for distinction. Perhaps most important, setting a living wage by legislation threatened trade union successes in establishing higher rates for skilled workers. Articulating a position that would become central to the debate over the FLSA several decades later, the Webbs would leave the establishment of a "living wage" to collective bargaining.\textsuperscript{98}

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    \item \textsuperscript{92} See Webb, Legal Minimum Wage, supra note 80, at 979; see also Webb & Webb, supra note 46, at 721, 723-24 (discussing unrestricted individual competition among wage-earners); Seager, supra note 42, at 86 (same).
    \item \textsuperscript{93} See Webb & Webb, supra note 46, at 715-16.
    \item \textsuperscript{94} See Webb, Legal Minimum Wage, supra note 81, at 981.
    \item \textsuperscript{95} See id. at 980-81; Webb & Webb, supra note 16, at 723 (quoting Alfred Marshall, Principles of Economics 779 (3d ed.) and stating that "[a] rise in the Standard of Life for the whole population will much increase the National Dividend, and the share of it which accrues to each grade and to each trade.").
    \item \textsuperscript{96} Seager, supra note 42, at 81 (quoting Adam Smith).
    \item \textsuperscript{97} Webb, Legal Minimum Wage, supra note 80, at 993; Webb & Webb, supra note 16, at 774-75. A similar inquiry would be made as well into minimum safety and sanitation and maximum hours of work. See id. at 774.
    \item \textsuperscript{98} See Webb & Webb, supra note 16, at 806.
\end{itemize}
III. THE LIVING WAGE MOVEMENT AND TWO CONCEPTIONS OF FAIRNESS

A. Fairness is a Living Wage

1. The Living Wage as a Natural and Absolute Right

With their focus on remedying unequal bargaining power in the labor market and its consequences, the socio-economists responded to Marx's challenge by providing an economic justification for a mandated minimum wage within the context of a flourishing capitalist production system. A papal encyclical entitled Rerum Novarum, or "The Condition of the Working Classes,"99 provided an early moral conception of fairness in wages for important leaders of the American living wage movement. Also responding to Marx, Rerum Novarum sought to proclaim a moral justification for tending to the needs of society's poorest workers while preserving the wage labor system that characterized industrial capitalism.100 Most important for the effort to enact minimum wage laws in the United States, Rerum Novarum motivated two priests who played central roles in the American living wage movement. The two priests, a teacher-student pair like Ely and

99. Pope Leo XIII, Rerum Novarum (May 15, 1891), reprinted in SEVEN GREAT ENCYCLICALS 1 (1963) [hereinafter Rerum Novarum]. Rerum Novarum was the most influential modern declaration of Catholic doctrine on the subject of workers and their place in society, but it drew upon a long history within the Catholic church on the subject. See generally JAMES HEALY, THE JUST WAGE, 1750-1890: A STUDY OF MORALISTS FROM SAINT ALPHONBUS TO LEO XIII (1966) (discussing Catholic theorists and the just wage leading up to Rerum Novarum). Further, although this article focuses on the contributions of two Catholic clergymen, many Protestant churches and Jewish leaders shared their concern and their vision. See, e.g., Don D. Lescohier, Working Conditions, in 3 HISTORY OF LABOR IN THE UNITED STATES, 1896-1932 63 (1966) [hereinafter Lescohier, Working Conditions] (citing the support of the Federal Council of Churches in Christ and the Methodist Episcopal Church, among others).

100. Pope Leo XIII's seminal encyclical on the state of the working class stated the challenge: "It is not an easy matter to define the relative rights and mutual duties of the rich and of the poor, of capital and of labor. And the danger lies in this, that crafty agitators are intent on making use of these differences of opinion to pervert men's judgments and to stir up the people to revolt." Rerum Novarum, supra note 99, at 2. The references become less veiled later in this encyclical when the Socialists—and their belief in social ownership of property—are condemned by name. See id. at 2-8; cf. FRANCIS L. BRODERICK, RIGHT REVEREND NEW DEALER: JOHN A. RYAN 53 (1963) (quoting John A. Ryan, The Marxian Theory of Productivity and of Value, II, 1 CATHOLIC FORTNIGHTLY REV. 613-16 (1909)) ("[Catholics are] so preoccupied refuting Socialism and defending the present order, that they go to the opposite extreme, understating the amount of truth in the claims of the Socialists and overstating the rights of property and the advantages of the present system.").
Commons, developed closely related but different conceptions of fairness that would define the American living wage movement from the turn of the century through the debate over the FLSA.

The first of these priests—the teacher—was John A. Ryan. In 1894, while a student at St. Paul Seminary in his home state of Minnesota, John Ryan was assigned to write an essay on the newly issued Rerum Novarum. From that day forward, explaining the papal encyclical and applying its dictates to industrial America dominated his life's work. Ryan was by no means the first or the only American churchman to comment on Rerum Novarum or the economic and moral conditions of working people,\textsuperscript{101} but he had vast influence on the American living wage movement and the eventual passage of the FLSA.\textsuperscript{102} The conception of fairness Ryan advanced set an ethical standard for the American debate over fairness in wages.

The reach of Ryan's influence can be explained, in part, by his refusal to limit himself to moral judgments drawn exclusively from theology and philosophy. Ryan immersed himself in the study of political economy as a means of carrying out Rerum Novarum's dictate.\textsuperscript{103} Richard Ely was an important secular influence on Ryan, both as a guide in understanding political economy and as a friend.\textsuperscript{104} Through their collaboration, Ryan added a Catholic theological voice to the socio-economists' reformist chorus.\textsuperscript{105}

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\textsuperscript{101} See generally John A. Ryan, Social Doctrine in Action: A Personal History 21-28 (1941) [hereinafter Ryan, Social Doctrine] (discussing other churchmen who influenced his views).

\textsuperscript{102} Representative Connery, who chaired the House Labor Committee and sponsored the original version of the FLSA, praised Ryan as one of the originators of the FLSA: "[I]f this legislation becomes law, this Black-Connery bill will be the fruition of a lot of hard work on your part through many, many years." Fair Labor Standards Act of 1931: Joint Hearings on S.2475 Before the Senate Comm. on Educ. and Labor and H.R. 7200 Before the House Comm. on Labor, 75th Cong. 501-02 (1937) [hereinafter Hearings] (testimony of Monsignor John Ryan).

\textsuperscript{103} See generally Ryan, Social Doctrine, supra note 101, at 59:

At this moment the condition of the working population is the question of the hour; and nothing can be of higher interest to all classes of the State than that it should be rightly and reasonably decided. . . . Every minister of Holy Religion must throw into the conflict all the energy of his mind, and all the strength of his endurance. . . .

Id. (quoting Rerum Novarum).

\textsuperscript{104} For example, Ely helped Ryan find a publisher for his influential text, A Living Wage, and wrote its introduction. See id. at 49.

\textsuperscript{105} In particular, Ryan reinforced the socio-economists' willingness to challenge classical economics: "Heresy in religion is unwarranted and irrational because it opposes infallible pronouncements; heresy in economics may be and sometimes is in accord with truth, because the exponents of the 'orthodox' doctrine do not enjoy the prerogative of infallibility." Ryan, Social Doctrine, supra note 101, at 67 n.2.
\end{flushright}
Conceptions of Fairness

In his first magazine article, published in *Catholic World* in 1900, Ryan endorsed the socio-economists' diagnosis of the wage system:

The whole argument for an unlimited right of free contract is based on a false assumption, the assumption that in all agreements between labor and capital the contract is really free. As a matter of fact whenever an employer, relying on an overstocked labor market, forces his men to accede to his terms, the name free contract is a misnomer. There can be no freedom of contract between laborers who must work today or starve and a capitalist who may pay the wages demanded or wait until hunger compels the men to submit. And, as the labor market is overstocked the greater part of the time, the employer's plea for non-interference and freedom of contract is in reality a demand that he be allowed to use his economic advantage to force his men into a contract that on their side is not free in any adequate sense of that word.  

Like the socio-economists, Ryan's diagnosis of unequal bargaining power in the labor market was a mere beginning. The question remained how, if at all, society should intervene in the operation of the labor market when it produced inadequate wage deals. For Ryan, who laid out his conception of fairness most thoroughly in *The Living Wage* in 1906 and *Distributive Justice* in 1916, the answer began with the principle of natural rights.

According to Ryan, the natural right to a Living Wage is derived from the recognition that God created the earth for the sustenance of all

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106. *Id.* at 71. Although somewhat less directly, *Rerum Novarum* also adopted this diagnosis of the labor market.

Let it be granted, then, that, as a rule, workman and employer should, make free agreements, and in particular should agree freely as to wages; nevertheless, there is a dictate of nature more imperious and more ancient than any bargain between man and man, that the remuneration must be enough to support the wage-earner in reasonable and frugal comfort. If through necessity or fear of a worse evil, the workman accepts harder conditions because an employer or contractor will give him no better, he is the victim of force and injustice.


[R]ich men and masters should remember of this—that to exercise pressure for the sake of gain, upon the indigent and the destitute, and to make one's profit out of the need of another, is condemned by all laws, human and divine. . . . [T]he rich must religiously refrain from cutting down the workman's earnings, either by force, fraud, or by usurious dealing; and with the more reason because the poor man is, weak and unprotected, and because his slender means should be sacred in proportion to their scantiness.

*Id.* at 9-10.

107. This diagnosis remained central to Ryan's philosophy throughout his career. See *RYAN, SOCIAL DOCTRINE*, supra note 101, at 103; see also *ELY ET AL., OUTLINES OF ECONOMICS*, supra note 60, at 13-14.
His children; therefore, all persons possess an inherent and equal claim upon nature’s products. Those who possess the land (i.e., wealth) do not have an unlimited claim to its enjoyment. They hold it in trust for society, as Rerum Novarum announced.108 But neither is every person entitled to equal sustenance. The products of the earth do not become available without labor; therefore, labor is the precondition for sustenance. Only those who cannot work, like the young and infirm, and those who need not work, the wealthy, are excepted. Every other person willing to work, however, has a right to sustenance from the earth on reasonable terms or conditions.

Natural rights are not intrinsic, according to Ryan. They are means to developing the intellectual, moral, and spiritual faculties. The end to be achieved is right and reasonable living and, since the end is sacred and inviolable, the means to the end are as well.109 But the means are not without limitation, and Ryan’s view of the Living Wage was at once generous and frugal. Right and reasonable life consists of the development of a worker’s personality through harmonious and properly ordered exercise of his faculties. But Ryan argued that the worker should subordinate his sense faculties to his rational faculties. Rational faculties must be exercised consistently with religious dictate and the reasonable demands of others in society. The demands of the senses and the selfish promptings of the spirit must be subordinated to the higher goods, namely, the intellect and the disinterested will. Within these confines of personal conduct, all other persons are morally restrained from interfering with the pursuit of a right and reasonable life.110

108. See Ryan, Economic Justice, supra note 36, at 89-90. Ownership is stewardship, according to Ryan, who quoted St. Thomas Aquinas: "As regards the power of acquiring and dispensing material goods, man may lawfully possess them as his own; as regards their use, however, a man ought not to look upon them as his own, but as common, so that he may readily minister to the needs of others." Id. at 89; see also Rerum Novarum, supra note 99, at 11 ("Man should not consider his outward possessions as his own, but as common to all, so as to share them without difficulty when others are in need. Whence the Apostle saith, Command the rich of this world . . . to give with ease, to communicate."); John A. Ryan, Social Reconstruction: A General Review of the Problems and Survey of Remedies (Feb. 12, 1919) (aka Bishops’ Program of Social Reconstruction), reprinted in John T. Ellis, Documents of American Catholic History 604, 606-07 (1967) [hereinafter Ryan, Social Reconstruction] ("[The employer] needs to learn the long-forgotten truth that wealth is stewardship, that profit-making is not the basic justification of business enterprise, and that there are such things as fair profits, fair interest, and fair prices.").


110. See id. at 91-96, 163-64.
2. Quantifying the Living Wage

Ryan argued that there is a certain minimum of goods to which every worker is entitled by reason of his inherent right of access to the earth.\footnote{See \textit{id.} at 116.} “The wage earner’s right to a decent livelihood in the abstract means in the concrete a right to a living wage,” he wrote.\footnote{\textit{Id.}} Ryan’s view was that personal dignity extends beyond the conditions of reasonable physical existence. Each worker has a right to at least those requisites that will enable him to live in a manner worthy of a human being: food, clothing, and housing sufficient in quantity and quality to maintain the worker in normal health, elementary comfort, and an environment suitable to the protection of morality and religion; security in the event of retirement, sickness, accident, or disability; and some opportunity for recreation, social intercourse, education, and church-membership as is required to conserve health and strength and to render possible the exercise of the higher faculties.\footnote{See \textit{id.} at 113-15.}

Employers, not the state, owe the obligation to pay a living wage. The duty lies with the employer, in part, because it receives the worker’s product. But the employer’s duty is not merely contractual. It is social. Employers control the resources of the community. As a result, the employer must be the distributor of the product of nature—“society’s paymaster”—and must do so in accord with fairness. Government would set the standard of fairness. In his thinking about \textit{Rerum Novarum}, Ryan was most deeply struck by the Pope Leo XIII’s view of the regulatory role of the state as an instrument of social reform:

To American Catholics, who, like their fellow Americans had been indoctrinated with theories of nonintervention which were not far removed from \textit{laissez-faire}, the declarations of Pope Leo on the regulatory functions of the state over industry were new and, indeed, startling.\footnote{RYAN, \textit{SOCIAL DOCTRINE}, supra note 101, at 44.}

The state was subject to a moral right and duty, according to Ryan’s interpretation of \textit{Rerum Novarum}, to intervene in the power imbalances that exist in labor markets to assure workers a living wage.\footnote{RYAN, \textit{ECONOMIC JUSTICE}, supra note 36, at 116-17, 119-20, 145.}

Ryan acknowledged that a fair wage based on the living standards of workers could not be a fixed sum.\footnote{\textit{Id.}} In the first instance, every
employer could not equally afford to pay a living wage. Ryan's solution was that employers would not be obliged to pay when to do so would deprive the employer's family of a decent livelihood: "The product is in a fundamental sense the common property of employer and employees. Both parties have cooperated in turning it out, and they have equal claims upon it, in so far as it is necessary to yield them a decent livelihood." Nonetheless, in a choice between the employer's and the worker's right to a decent livelihood, the employer may choose his own over the worker's family. In fact, the employer is entitled to take enough to justify a higher standard of living than the worker "for he has become accustomed to this higher standard, and would suffer a considerable hardship if compelled to fall notably below it." The employer may also pay interest on loan capital before paying his workers a living wage, although he may not take interest on his own capital before paying a living wage. But only these limited circumstances would justify an employer's claim that he cannot pay a living wage, in Ryan's view.

Ryan also acknowledged that differences in the status of women and men in American society might justify differentials in their living standards and wages. Ryan's original conception of the living wage was premised on an average male worker. However, "the support of the family falls properly upon the husband and father, not upon the wife and mother. The obligation of the father to provide a livelihood for the wife and young children is quite as definite as his obligation to maintain himself." The living wage, therefore, must be a "family wage" sufficient to support the worker, his spouse, and children, according to Ryan.

Ryan could not ignore the fact that women participated in the labor force, but he struggled with what constituted fair wages for women. In the first instance, he would set their wage at a level sufficient to support a woman living alone and away from home, if only because that is how a considerable number of women lived in the early twentieth century. If employers were morally free to pay women living at home less than those living on their own, Ryan predicted, then employers would

116. See id. at 118.
117. Id.
118. Id. at 117.
119. See Ryan, ECONOMIC JUSTICE, supra note 36, at 118.
120. See id. at 121.
121. Id.
122. See id.
employ only the former. Ryan would have required that an unmarried man receive a family wage for the same reason; that is, so that the unmarried man would not undercut the employment prospects of the family man. But what of competition between women and men? Ryan said little about it. But he acknowledged that women sometimes supported large families and should, therefore, have been paid the family wage. 123

In sum, Ryan’s first requisite of fairness was that all workers, including those of average ability with no special qualifications of any sort, receive a living wage. Only when this absolute claim had been universally satisfied would Ryan’s analysis permit those groups of workers who are in any way special to collect something more than living wages. 124 Thus, the living wage is the condition for Absolute Fairness.

Ryan’s conception of Absolute Fairness contains two parts of the three-part framework established by the socio-economists. He diagnosed the operation of the labor market to demonstrate that workers’ wages could be driven below subsistence. He also proposed a remedy for these unfair wage deals. But Ryan was unwilling to address the third part of the framework; that is, to establish that paying workers a living wage benefited society. He refused to appeal to the powerful forces in the economy and the political market. Ryan considered the living wage an absolute right and an individual natural right not subject to the vagaries of the comparative bargaining power of employers and workers in the political market or the labor market. 125 This natural right to Absolute Fairness belongs to the individual as an individual, and not to serve society’s ends, in Ryan’s view. 126 He saw no need to prove that it produces the most efficient societal result. 127 He saw no need to establish that the living wage is exchanged for labor of an equivalent value. 128 Absolute Fairness is the worker’s personal prerogative, not his share of social goods. It is born with the worker. It is not a political or civil right that can be annulled or ignored by the state. The state is the guardian of the living wage, not its source. 129

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123. See Ryan, Social Doctrine, supra note 101, at 121-22.
124. See id. at 83-85.
125. See id. at 15, 145, 161-63.
126. See id.
127. See id.
129. See id. at 85, 161-63.
Absolute Fairness set the ethical standard for the debate over fairness in wages. Because of its absolutist view, however, it was ill-suited to the political arena in which the living wage movement sought to have the minimum wage question decided. Absolute Fairness was never enacted in a national minimum wage law and never achieved by the state minimum wage laws it inspired.

B. Fairness is Equality of Bargaining Power

Another of John Ryan’s accomplishments was inspiring Father Edwin O’Hara to become an important leader of the American living wage movement. O’Hara led the state of Oregon to pass a living wage law that set the standard for state laws in the period leading up to the FLSA. In the process, O’Hara and his allies in the living wage movement introduced a new conception to the American debate over fairness in wages. This conception of Bargaining Fairness sought to redress directly workers’ inferior bargaining position in the labor market. In the process of enacting legislation, however, O’Hara and his colleagues also exposed the fissures between the forces sharing the goal of better conditions for workers, but ultimately struggling over the shape and content of the FLSA.

1. Middle-Class Reformers and the Labor Movement

The American minimum wage campaign was led by reform-minded middle-class individuals and groups aroused by the social evil of underpaid women workers and committed to pursuing a remedy through state action. Their commitment to legislative action, rather than collective action by workers, would come to define the debate over fairness in wages. But the pursuit of a government-imposed remedy was by no means a foregone conclusion. Two of the most important organizations in the campaign for minimum wage laws—the National Consumers’ League and the National Women’s Trade Union League—began by pursuing other courses.

The first Consumers’ League was formed in New York City in 1891.130 In 1898, several local federations amalgamated into the National Consumers’ League (“NCL”).131 The NCL’s purpose at its inception was

130. See id.
to use conventional middle-class behavior—shopping—to change working conditions. Members and sympathizers would consume only those products tagged with the NCL label which certified that the goods had been produced under lawful, safe, and fair conditions.\footnote{132}

The NCL’s approach began to change course when Florence Kelley became General Secretary in 1899, a position she held until her death in 1931.\footnote{133} Kelley was the daughter of Congressman “Pig Iron” Kelley from Pennsylvania.\footnote{134} Among the first women to graduate from Cornell University, Kelley also earned a law degree from Northwestern University.\footnote{135} Kelley spent three years studying in Zurich where she became interested in socialism, eventually translating Friedrich Engels’s \textit{Die Lage der Arbeiten Klassen in England} (The Condition of the English Working Classes) into English.\footnote{136} When she returned to the United States, Kelley became an intimate of Jane Addams, the settlement house leader, and a participant in many causes, including the NAACP and the campaign for tenement laws.\footnote{137}

In 1891, the trade unionists of Chicago appointed a committee to study sweatshops.\footnote{138} Kelley served on the committee and urged an investigation upon the Illinois Bureau of Labor Statistics.\footnote{139} She eventually performed the investigation herself and found harrowing conditions. Her report led the legislature to appoint its own committee to investigate working conditions.\footnote{140} This legislative committee recommended a regulatory act to limit hours for women and children in clothing and other manufacturing.\footnote{141} Kelley led the effort in lobbying for the bill working closely with Illinois’s Progressive Governor John Peter Altgeld. The bill passed in 1893 and, in recognition of her role, Altgeld appointed Kelley to be chief factory inspector.\footnote{142} She led the state’s inspection efforts, often conducting investigations herself, until the law

\begin{footnotes}
\footnote{132. See id.}
\footnote{133. See \textit{George Martin, Madam Secretary Frances Perkins} 52 (1976).}
\footnote{134. See Clement E. Vose, \textit{The National Consumers’ League and the Brandeis Brief}, 1 \textit{Midwest J. Pol. Sci.} 267, 267-68 (1957).}
\footnote{135. See Martin, supra note 133, at 53.}
\footnote{136. See id.}
\footnote{137. See Vose, supra note 134, at 269-70.}
\footnote{139. See id.}
\footnote{140. See id.}
\footnote{141. See id.}
\footnote{142. See id.}
\end{footnotes}
was struck down by the Illinois Supreme Court in 1895 as unconstitutional.\textsuperscript{143}

Kelley's Illinois experience put her in league with the socio-economists by reinforcing her faith in the power of facts and pragmatism. Because of her government experience, Kelley saw legislation as the best available solution to the problems of workers in the labor market. Under her leadership, the NCL admitted, at least tacitly, that twenty years of voluntary action had been unsuccessful in solving the problem of exploitative working conditions.\textsuperscript{144}

Kelley attended the International Conference of Consumers' Leagues held in Geneva, Switzerland in 1908 at which national campaigns for statutory minimum wages were urged.\textsuperscript{145} She promptly took the mantle, asking John Ryan to prepare a report laying out evidence of the harsh conditions under which women worked and the substandard wages they were paid.\textsuperscript{146} Kelley raised the issue both at the NCL's 1910 convention in Milwaukee, Wisconsin and, along with Ryan, the 1910 St. Louis meeting of the National Conference of Charities and Correction.\textsuperscript{147} In that same year, the NCL drafted a model minimum wage bill that would become the basis for the first round of state legislation to come.\textsuperscript{148} Thereafter, the NCL became the preeminent voice for statutory minimum wage laws in the states.\textsuperscript{149}

The National Women's Trade Union League ("NWTUL") also began its advocacy of the cause of exploited women workers outside the legislative area.\textsuperscript{150} Although its founders included middle-class social

\textsuperscript{143.} See Brandeis, Labor Legislation, supra note 138, at 465-66.

\textsuperscript{144.} See MARTIN, supra note 133, at 76.

\textsuperscript{145.} See TIMOTHY MICHAEL DOLAN, "SOME FELL ON GOOD GROUND: THE LIFE OF EDWIN V. O'HARA 32 (1992).

\textsuperscript{146.} See id.


\textsuperscript{148.} See Vose, supra note 134, at 268-72; Brandeis, Labor Legislation, supra note 138, at 507; BAER, supra note 8, at 74.

\textsuperscript{149.} The NCL did not operate alone. Kelley's efforts involved an extensive network of supportive organizations and individuals, including the National Conference of Charities and Corrections and its journal The Survey, the AALL, the National Child Labor Committee, and others. Many of these organizations were housed together in the Charities Building in Manhattan. There were also personal connections. Josephine Goldmark, Kelley's main staff support and chair of the NCL's Committee on Legislation (later called the Committee on Legislation and Legal Defense of Labor Laws) was the sister-in-law of Louis Brandeis, who argued many of the NCL's early cases. Brandeis's daughter later served on the District of Columbia Wage Board. John Commons became president of the NCL in later years, and Richard Ely and John Ryan were active participants. The NCL's network eventually extended to figures of great importance to the future of the minimum wage—Eleanor Roosevelt and Frances Perkins. See Vose, supra note 134, at 268.

\textsuperscript{150.} See Brandeis, Labor Legislation, supra note 138, at 507.
workers and well-off reformers, the NWTUL was an affiliate of the AFL originally created to organize women workers into unions.\textsuperscript{151} It found some success with women working in textiles, bakeries, clothes manufacturing, and other industries, and played an essential role supporting numerous strikes.\textsuperscript{152} It also suffered from the disapproval and limited support of its male trade union allies who were not immune to the gender-based fears and prejudices that infected the rest of society. But sexism was not the NWTUL's only problem.\textsuperscript{153}

In the early part of the twentieth century, recruiting women to join unions was a difficult task. Many women perceived themselves to be mere transients in the work world.\textsuperscript{154} Comparatively few received the kind of industrial training that would bind them to the workforce.\textsuperscript{155} In the words of worker advocate Irene Osgood Andrews:

> the majority look to marriage rather than to organization or efficiency as the way to a higher standard of living. . . . Working women have remained largely unskilled and unorganized and thousands of them have been employed at wages insufficient to "maintain them in health and to provide reasonable comfort."\textsuperscript{156}

In the first three decades of the 1900s, between twenty and twenty-five percent of women participated in the work force while the male labor force participation rate during the same period approached ninety percent.\textsuperscript{157} Married women participated at a much lower rate of between five and eleven percent. Roughly half of single women and about one-third of widowed or divorced women participated in the labor force.\textsuperscript{158} This aggregate data would seem to justify the expectations that marriage...
took women out of the labor force in the early part of the twentieth century.

But the "Report on the Condition of Women and Child Wage-Earners in the United States," prepared at President Theodore Roosevelt’s request in 1907 and published between 1910 and 1915, looked behind the aggregate labor force participation numbers. The study of women and children working in several cities did not support women’s expectations of a marital escape hatch. Nearly all the female store and factory workers either lived alone and supported themselves (average age twenty-eight years old), or with their families and supported them (average age approximately twenty-two). Most of these women had been in the labor force since their mid-teens and had little realistic hope of ever being able to quit. The Census showed that between 1870 and 1920 only twenty-five to thirty percent of all women workers were sixteen to twenty-five years old, while about forty-three percent were between the ages of twenty-five to forty-four, and about twenty percent were between the ages of forty-five to sixty-four. Employment outside the home was an increasingly permanent situation for women.

Women not only found themselves working longer than expected, but they were typically shunted into “women’s work.” According to a 1914 study, the American labor market was structured by gender and age. Women predominated in industrial, low-paying jobs concentrated in the so-called “sweated trades.”

New York’s Factory Investigation Commission found that the labor market functioned for low-wage women much like the socio-economists had described:

Those that are unable to get employment at the prevailing rate of wages will go about offering their services for less, and they will displace other employees, who, in turn, will offer their labor for less, and displace still others, until it will get down to the point where we

159. See BAER, supra note 8, at 21.
160. See id. at 21, 22, 72 (citing REPORT ON THE CONDITION OF WOMEN AND CHILD WAGE-EARNERS IN THE UNITED STATES, S. Rep. No. 610, 645, (2d Sess.); 62, 64-5, (1st & 2d Sess.) (1910-1915)).
161. See id. at 21.
162. See id. at 22.
163. See id.
164. See BAER, supra note 8, at 21.
165. See HART, supra note 8, at 66; see also BAER, supra note 8, at 33 (citing a Women’s Bureau study).
are now, the point where in a great many cases the wage that is paid is just a little above the starvation line, if it is there.\textsuperscript{166}

Under the weight of all of these conditions—expectations of short work tenures, limited training, isolation in gender-segregated labor markets, and pay that barely supported subsistence—prospects for organizing women into unions were grim.\textsuperscript{167}

At its second biennial convention in 1909, the NWTUL acknowledged these realities by including in its legislative program a demand for a statutory minimum wage.\textsuperscript{168} For some, like Elizabeth Dutcher of the Retail Clerks’ Union, legislation was a necessary step on the road to the ultimate goal of union organization:

It gives people enough money to pay their union dues. It gives them a sense of security and hope that is better than a tonic for them. They feel strengthened. They have some sort of a basis on which they can stand and come forward... a training in industrial self-government.\textsuperscript{169}

Rose Schneiderman, a founder of the International Ladies’ Garment Workers’ Union, acknowledging that women “have not seen fit” to enter trade unions, also endorsed the need for legislation as a temporary measure on the road to unionism.\textsuperscript{170}

The male leadership of the AFL agreed with the goal of a living wage.\textsuperscript{171} Samuel Gompers, the AFL’s first president, endorsed the living wage as early as 1887.\textsuperscript{172} Henry Demarest Lloyd, writing in an AFL pamphlet in 1893, gave a historical rationale for the living wage.\textsuperscript{173} Some commentators of the period even suggested that the living wage idea originated with the labor movement.\textsuperscript{174} While this may exaggerate

\textsuperscript{166} HART, supra note 8, at 66 (quoting New York Factory Investigating Commission (“NYFIC”) report).
\textsuperscript{167} See id. at 68.
\textsuperscript{168} See MARGARET DREIER ROBINS, NEED OF A NATIONAL TRAINING SCHOOL FOR WOMEN ORGANIZERS: THE MINIMUM WAGE, INDUSTRIAL EDUCATION 3 (1913); BAER, supra note 8, at 72.
\textsuperscript{169} HART, supra note 8, at 96.
\textsuperscript{170} See Lipschultz, supra note 8, at 41-42. Schneiderman was a sufficiently close friend of Eleanor Roosevelt that she was brought to Hyde Park to meet with Franklin Roosevelt during his convalescence from polio. Schneiderman and the Roosevelts engaged in long discussions of the history of the labor movement and sweatshop conditions in New York. See DANIEL R. FUSFELD, THE ECONOMIC THOUGHT OF FRANKLIN D. ROOSEVELT AND THE ORIGINS OF THE NEW DEAL 82-83 (1956).
\textsuperscript{171} See GLICKMAN, supra note 2, at 64.
\textsuperscript{172} See id. at 62, 64.
\textsuperscript{173} See id. at 62-65.
\textsuperscript{174} See id. at 65-66. The Webbs attributed the phrase to Lloyd Jones, who allegedly referred to "living wages" in 1874. See WEBB & WEBB, supra note 16, at 587-90.
the point, the AFL clearly rejected socialism as a replacement for the wage labor system and came to support the view that the wage system could be made fair if a living wage prevailed. 175

Adopting the goal was quite different from agreeing to the means. The AFL sought living wages through collective bargaining and feared that legislation setting wages would undermine unions. 176 Gompers strongly opposed minimum wage legislation, and the unions of the AFL were almost unanimous in their opposition to the inclusion of men in minimum wage laws like those in Australia, New Zealand, and Great Britain. 177 The wage determinations in these countries were enforced through courts of industrial arbitration, and so they became a part of the system of compulsory arbitration of labor disputes. 178 Trade unionists associated compulsory arbitration with hated judicial intervention in labor disputes that was designed, more often than not, to curtail rather than further labor’s ability to organize and bargain collectively. 179 Florence Kelley also speculated, probably with good cause, that trade unionists may have feared that unions’ power would be undermined if unorganized workers could gain through wage commissions higher wages that had been possible to that point only through organization. 180 Other critics have postulated that the AFL’s position was a function of its philosophy of craft unionism. 181

175. See Galenson & Smith, supra note 151, at 51 (quoting Gompers in 1903 to the socialists: “Economically, you are unsound; socially, you are wrong; industrially, you are an impossibility.”); GLICKMAN, supra note 2, at 62-65; see also ANDREWS, supra note 156, at 82-83 (quoting the Official Report of the AFL Executive Council at its 33rd Annual Convention in 1913:

The organized labor movement has insisted from the beginning upon the establishment of a living wage as a minimum, and it has, through the force of organized effort, succeeded in establishing minimum wages and maximum hours of labor far superior to those prescribed by the wage boards of other countries.


177. See id. at 64-65.

178. See id.

179. See ANDREWS, supra note 156, at 11; Shishkin, supra note 176, at 64-65. It is worth noting that Samuel Gompers was a member of the NYFIC for which Andrews wrote her report. See Kelley, Status of Legislation, supra note 147, at 489.

180. See Kelley, Status of Legislation, supra note 147, at 489.

181. See BAER, supra note 8, at 89. Still others have suggested that the AFL’s goal was to exclude women from competition with men. These critics point to a quote from an 1879 annual report of Adolph Strasser, President of the Cigar Makers Union, which said “[w]e cannot drive the females out of the trade, but we can restrict their daily quota of labor through factory laws.” Id. at 26 (citing REPORT ON THE CONDITION OF WOMEN AND CHILD WAGE-EARNERS IN THE UNITED STATES, S. Doc. No. 61-645 (1910)). A 1928 report by the Women’s Bureau concluded, however, that legislation almost never restricted women’s employment opportunities because occupations were so rigidly segregated by gender that women’s opportunities were effectively restricted
A resolution demanding minimum wage legislation introduced at the 1912 AFL convention was condemned to a slow death by referral to the Executive Council for further study. A new resolution adopted at the AFL's 1913 convention articulated a watch-and-wait position regarding minimum wage laws for women:

If it were proposed in this country to vest authority in any tribunal to fix by law wages for men, Labor would protest by every means in its power. Through organization the wages of men can and will be maintained at a higher minimum than they would be if fixed by legal enactment.

But there is far more significant ground for opposing the establishment by law of a minimum wage for men. The principle that organization is the most potent means for a shorter workday, and for a higher standard of wages, applies to women workers equally as to men. But the fact must be recognized that the organization of women workers constitutes a separate and more difficult problem. Women do not organize as readily or as stably as men. They are, therefore, more easily exploited. They certainly are in a greater measure than men entitled to the concern of society.182

The convention instructed the AFL's Executive Council to watch developments where "experimental" minimum wage legislation took effect. The 1913 convention also endorsed maximum hours legislation for women and children, although the AFL quickly reversed its position one year later.183 Opposition to minimum wage legislation for men remained the AFL's position until the debate over the FLSA in 1937 and 1938. Kelley harshly criticized the AFL's "mildewing influence upon such effort even when confined to women."184

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182. ANDREWV, supra note 156, at 82-83 (quoting the Official Report of the AFL Executive Council at its 33rd Annual Convention in 1913); see also PHILIP S. FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES: VOLUME V: THE AFL IN THE PROGRESSIVE ERA, 1910-1915 128-30 (1980) [hereinafter FONER V] (quoting Louis Brandeis, the principal early legal advocate for Bargaining Fairness laws, who also warned that too much reliance on social legislation "would destroy the labor unions, the great protection of the workingman against the trust.").

183. See Brandeis, Labor Legislation, supra note 138 at 556.

There were many in the labor movement who disagreed with the AFL's passive hostility to minimum wage legislation.\(^{185}\) Support for strikes in the garment trades cemented a relationship between the NWTUL and the Amalgamated Clothing Workers of America led by Sidney Hillman. There were other forces within labor, including John Mitchell, President of the United Mine Workers until 1908, the United Textile Workers, and the anarcho-syndicalist Industrial Workers of the World ("IWW"), that joined with the NWTUL.\(^{186}\) Nonetheless, the inability of the living wage movement to join with the leadership of the nation's largest labor federation and the labor movement as a whole in pursuit of a legislated living wage would become central to the struggle over the shape, scope, and content of the FLSA.

2. Early Minimum Wage Laws and the Groundwork for a Living Wage Campaign

Evolution in economic thinking laid the intellectual groundwork for an American argument in support of a statutory minimum wage. But the living wage movement needed added bargaining power in the political market. This required further efforts to move public opinion towards support for the idea of an American minimum wage. The first step in this process was the examination of existing statutory minimum wages that had succeeded in industrial economies similar to the United States of the early twentieth century.

In 1894, New Zealand passed a law providing for the compulsory arbitration of labor disputes.\(^{187}\) The law was primarily intended to preserve industrial peace.\(^{188}\) But the law also created "district conciliation boards" empowered to fix minimum wages.\(^{189}\) The first law setting a wage floor was passed in the Australian province of Victoria two years later, although it was also connected to a system of compulsory arbitration of labor disputes.\(^{190}\) The law established boards consisting of worker, employer, and public representatives to fix minimum wages in certain industries designated by the legislature.\(^{191}\) Other Australian provinces, such as South Australia, Queensland, and

\(^{185}\) See generally BAER, supra note 8, at 74-75.

\(^{186}\) See id. at 74, 77-78.

\(^{187}\) See id. at 74; see also Brandeis, Labor Legislation, supra note 138, at 501 n.2.

\(^{188}\) See Brandeis, Labor Legislation, supra note 138, at 501, n.2.

\(^{189}\) See BAER, supra note 8, at 74.

\(^{190}\) See Brandeis, Labor Legislation, supra note 138, at 501.

\(^{191}\) See id. at 501-02.
Tasmania, adopted similar laws between 1900 and 1910, always as part of a system of compulsory arbitration. Great Britain enacted its first such law, the Trade Boards Act, in 1909 using the Victoria statute as a model. Representative wage boards were permitted to set minimum wages for employees in any industry in which the prevailing rate of wages was "exceptionally low as compared with that in other employments." These statutes proved to Americans that minimum wage laws could succeed in industrial economies.

Wage determinations in the Australian states were generally based on a living wage standard. In 1907, the Australian Commonwealth Court of Conciliation and Arbitration authored a decision interpreting a provision in the law it administered providing that the court was to fix "fair and reasonable" minimum wages. Justice Higgins, writing for the court, interpreted "fair and reasonable" to mean that the wage for unskilled laborers should support "the normal needs of the average employee regarded as a human being in a civilized community." This pronouncement set the standard for Australia. The average employee, in this case, was a married man with a wife and three dependent children. But Justice Higgins's standard was broader than a mere family subsistence wage. Lost wages caused by unemployment were taken into account. For men, the family had to be taken into account. For women, the wage was based on the assumption that they supported only themselves. When both genders worked in an occupation, the prevailing gender determined how the wage would be set. In Great Britain, the general practice was to level the wage up to the standard set by the best employer in that district.

192. See id. at 502 n.3.
193. See id. at 502.
194. ANDREWS, supra note 156, at 49-51; see also Brandeis, Labor Legislation, supra note 138, at 501-02. "Exceptionally" was later changed to "unduly." See ANDREWS, supra note 156, at 49-51
195. See, e.g., ANDREWS, supra note 156, at 8; Webb, Legal Minimum Wage, supra note 80, at 973-74; The Minimum Wage: An International Survey, International Labour Office, League of Nations Doc. 22 SERIES D 193 (1939). For example, the Victoria law increased wages in the five sweated trades to which it first applied by between twelve percent and thirty-five percent while reducing hours and increasing the employment-to-population ratio. Webb, Legal Minimum Wage, supra note 80, at 973-74.
196. See LAUCK, supra note 19, at 93.
197. See id. at 93-94.
198. Id. at 94.
199. See id. at 93.
200. See id. at 94.
201. See LAUCK, supra note 19, at 94-95.
202. See COMMONS & ANDREWS, supra note 156, at 58-61. See generally Henry Bournes
The second step in the living wage movement's effort to accumulate political bargaining power was to demonstrate the pressing need for living wage laws like those in Australia, New Zealand, and Great Britain. Again, swaying public sentiment was the goal. The means to the goal was a series of budgetary studies undertaken by governmental and charitable organizations. These studies were intended to ascertain the cost of the minimum requirements for food, shelter, fuel, clothing, and utilities for an average unskilled wage-earner's family. Scientific analyses were prepared as to the food values necessary to sustain workingmen, their wives, and children. The cost of a healthy diet was computed. Direct investigations of the other elements of subsistence living were also undertaken to arrive at an aggregate family budget. A host of studies followed: Louise Bolard More of Columbia University studied 200 families in New York City in 1903-1905; Doctor R.C. Chapin studied 642 families in New York City in 1907; J.C. Kennedy and others at the University of Chicago in 1914 studied 184 families of the Chicago Stockyards District; Frank Streightoff in 1914 studied families in New York City, Buffalo, Syracuse, Elmira and Albany for the New York Factor Investigating Commission; the Bureau of Personnel Service of New York City undertook a study in 1914; and Esther L. Little and W.J. Henry Cotton in 1914 studied textile workers in Philadelphia.

Chapin's study was the most exhaustive. He found in 1907 that only an income of $900 or more permitted a working family to subsist. More's investigation in 1906 found that $728 was needed, while the New York State Conference on Charities and Corrections in 1907 found that $825 was sufficient for a family of five. Kennedy's 1914 study found that $800 was needed. Taken together, these studies put the subsistence wage for working families during this era, based on budgetary estimates, at approximately $800 to $900.

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Higgins, *A New Province for Law and Order*, 29 HARV. L. REV. 13, 16-22 (1915) (setting forth the principles that guided his precedent-setting standard for the living wage).

203. See LAUCK, *supra* note 19, at 94-95.
204. See id. at 94.
205. See id. at 20.
206. See id.
207. See id.
209. See id. at 21.
210. See id. at 21-22.
211. See id at 22.
212. See id.
213. See LAUCK, *supra* note 19, at 23.
Other investigations supported the socio-economists’ conclusion that workers’ wages could be driven below these subsistence wages of between $800 and $900 per year by employers exercising their superior bargaining power.214 The Federal Immigration Commission’s investigation of almost 16,000 families in 1908 and 1909 across the country and across industries, for example, found an average family income of only $720.215 The Russell Sage Foundation in 1908 found the average income of steel workers in Homestead, Pennsylvania to be only $349.216 In 1909 and 1910, the University of Chicago reported that the families of immigrant workers had a yearly income of only $442.217 Another pre-war study found that seventy-five percent of female wage earners received less than $8 per week and fifty percent earned less than $6 per week, and that these wages were reduced another twenty percent by lost time and unemployment. Yet another study found that in 1912 at least six million adult men, married as well as single, received less than $600 per year in wages, or $12 per week.218 A 1903 report of the United States Commissioner of Labor showed that the absolutely necessary costs of family support were absorbing, “for a large part of the families studied, a larger sum than could be earned by the head of the family.”219 Most of the families studied “had to obtain a substantial part of their income from boarders, lodgers, or the earnings of [a] wife or children.”220 Later analysis proved that these bad conditions became worse as the cost of living steadily increased from 1900 through 1914 with wages failing to keep pace.221 This substantial body of evidence helped set the political conditions for the American minimum wage campaign.222

214. See id. at 23-24.
215. See id.
216. See id. at 24.
217. See id.; see also Lescohier, supra note 99, at 62 nn. 42-43; Brandeis, Labor Legislation, supra note 138, at 507 n.19 (listing many of the same studies); HART, supra note 8, at 63 (according to a history written in 1929 by Clara Mortenson Beyer for the Women’s Bureau, the impetus for the American movement for a statutory minimum wage was a combination of news of the British Trade Boards Act, and the publication of a series of major investigations of women’s work by the Bureau of Labor, the Pittsburgh survey, and individual social scientists).
218. See COMMONS & ANDREWS, supra note 156, at 44.
220. Id.
221. See id. at 61.
3. Massachusetts and the First American Minimum Wage Law

The leadership of the campaign for a minimum wage law in Massachusetts came from the same interlocking group of middle-class social reformers and academics found in Florence Kelley’s network: the Women’s Educational and Industrial Union (“WEIU”), the state Women’s Trade Union League (“WTUL”), and the state Consumers’ League. In 1910, the WTUL and the WEIU formed a legislative drafting committee that eventually included the Consumers’ League, the Central Labor Union of Boston, and the Massachusetts branch of the AALL. Support from labor was largely the product of the United Textile Workers’ successful effort to secure endorsements from the state AFL and the Boston Central Labor Union. Florence Kelley’s view was that these elements within labor—particularly the clothing and textile workers—played a crucial role in the passage of the nation’s first minimum wage law in Massachusetts in 1912.223

A special state commission of five members was formed in 1911 to investigate wages in selected industries. The commission offered more evidence of what the socio-economists and Ryan had found, along with a slap at those who deified the Marginal Productivity Theory:

There is a common and widespread, but erroneous view that an economic law by some mysterious process correlates earnings and wages. There is no such law; in fact, in many industries, the wages bear little or no relation to the value or even to the selling price of the workers’ output.224

The commission submitted a bill to the legislature in 1912 that closely resembled the draft legislation prepared by the NCL in 1910.225 The bill finally enacted, however, emerged in “a much-mangled form of the bill proposed,” according to Kelley.226 All enforcement had been stripped away absent a provision allowing information to be given to the public regarding employers who failed to pay wages.227 In effect,

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224. See BAER, supra note 8, at 83.
225. EDWIN V. O’HARA, WELFARE LEGISLATION FOR WOMEN AND MINORS 8 (1912) [hereinafter O’HARA, WELFARE LEGISLATION] (quoting the Massachusetts Commission on Minimum Wage Boards).
228. See Dorothy W. Douglas, American Minimum Wage Laws at Work, 9 AM. ECON. REV.
Massachusetts' minimum wage was not mandatory. The vain hope was that public outrage and consumer rebellion against goods produced in exploitative circumstances would change employer behavior.229 This was the same hope abandoned by the NCL when it began its campaign for legislation.

Massachusetts's tepid reform bill almost certainly would not have been enacted at all not been for an acute social crisis precipitated by the radicalized textile workers of Lawrence.230 In 1908, the Massachusetts legislature passed a law imposing a fifty-six hour workweek that was further reduced to fifty-four hours per week and ten hours per day in 1911.231 In January 1912, textile manufacturers carried out their oft-repeated threat to cut their workers' already inadequate wages consistent with the reduced work week.232 Lawrence's millworking families, many recent immigrants, had survived to that point by sending every member of the family—including wives and children—into the factories to work.233 This loss of earnings was the last straw.

The IWW, with organizers Elizabeth Gurley Flynn and Joseph Ettor, led a strike in Lawrence by 20,000 workers.234 The conflict was long, violent, and bitter. It divided the labor movement and attracted substantial publicity, especially when Margaret Sanger and other reformers evacuated the strikers' children and the mayor called in the militia to quell the strike.235 The strike produced a stunning victory for the workers. They won a ten percent wage increase and a guarantee of overtime pay.236 The process and the results horrified the legislature, while educating and galvanizing the public to the workers' cause. The strike also proved the inexorable connection between wages and hours.237 In Kelley's words: "The experience of the textile workers at Lawrence in the present year shows convincingly the need of minimum-wage boards for both men and women in relation to the nation-wide

701, 705 (1919).
229. See id. at 706; Lucas, supra note 223, at 39-46; CLARK, supra note 222, at 17, 115.
231. See id. at 227.
232. See id. at 227-28.
233. See id. at 230-31.
234. See id. at 236-42.
235. See DUBOFSKY, supra note 230, at 245, 251.
236. See id. at 253.
effort for a shorter working-day, a shorter working-week."

In the face of worker advocates' strengthened political bargaining position, the Massachusetts legislature agreed.

4. Public Bargaining and the Minimum Wage

Massachusetts was the first state to enact legislation, but eight other states passed minimum wage laws within one year. For example, after the 1910 meeting of the NCL in Milwaukee, John Commons set several of his University of Wisconsin students to work studying the English and Australian minimum wage laws and investigating wages in Milwaukee. The NCL later published the Milwaukee Study. In 1911, Commons drafted a minimum wage bill for the legislature which was the first introduced in any state. The legislator who introduced the bill was a former student of John Ryan who, in turn, testified before a joint hearing on the bill on March 29, 1911. The Wisconsin law was enacted in 1913.

The IWW strike in Lawrence, Massachusetts was not the only event that improved the political bargaining power of minimum wage advocates. Industrial catastrophes also played a role. For example, the Triangle Shirt Waist Factory fire in March 1911 changed the political calculus around fairness in wages and working conditions in New York. Frances Perkins was having tea on the north side of Washington Square Park when she heard the fire engines rushing to the park's east side where the Asch Building was burning. Perkins saw the girls jumping out of the factory's windows, and stayed to comfort grief-stricken family members. The fire and the deaths it caused were commemorated in a Consumers' League and WTUL mass meeting at the Metropolitan Opera House on April 2, 1911 at which Perkins and Rose Schneiderman spoke. It was also commemorated at a mass funeral.

238. Kelley, Minimum-Wage Laws, supra note 226, at 1005. While it may not be possible to know the motivations of an electorate, popular referendums in California, Oregon, and Washington seeking to establish eight-hour days were all defeated, perhaps for the same reasons that motivated the Lawrence strikers. See Brandeis, Labor Legislation, supra note 138, at 555.
240. See Brandeis, Labor Legislation, supra note 138, at 512.
241. See id.
242. See id.
243. See id. at 513.
244. See MARTIN, supra note 133, at 84 (discussing the Triangle Shirt Waist Factory fire).
245. See id.
246. See id.
attended by 100,000 people for the fire’s seven unidentified victims. These events sparked the creation of the New York State Factory Investigating Commission and an overhaul of New York’s labor laws. Yet, this early flurry of legislative activity suggests a great deal more political bargaining power than the living wage movement actually wielded. In fact, 1913 was the most active year for state minimum wage laws. It took another decade before eight more states adopted minimum wage laws, and two states repealed their statutes during that same period. One early commentator pointed out that only Massachusetts’ non-mandatory law applied to an industrial state.

Among the first states enacting early minimum wage laws, only Arizona, Arkansas, South Dakota, and Utah enacted flat-rate minimum wages fixed in the statute. The “public bargaining” model first established in New Zealand, Australia, and Great Britain prevailed. This model involved the creation of wage boards nominally empowered to set wages. In fact, “public bargaining” statutes typically required the wage boards to establish advisory committees consisting of equal numbers of employer and worker representatives, along with one or more people representing the public. The advisory committees used scientifically collected data to determine what sum represented the necessary cost of living for a working family. The committees ultimately agreed to a rate that would be applied to all women workers or to women working in a particular industry or occupation. Geographic distinctions might also be made. The committee would then recommend a minimum wage rate to the wage board which was, in turn, empowered only to reject or accept the recommendation without alteration.

“Public bargaining” statutes generally contained a requirement that the required wage provide for a woman’s “necessary cost of living.”

248. See Brandeis, Labor Legislation, supra note 138, at 501-03.
250. See id. at 28; Douglas, supra note 227, at 709.
251. See Cheyney, supra note 249, at 28-29.
253. Andrews, supra note 156, at 16-17. Minimum wage rates were defined in various states as follows: California: “the necessary cost of proper living and to maintain the health and welfare”; Colorado: “to support the necessary cost of living, maintain them in health, and supply the
Only Nebraska, Massachusetts, and Colorado expressly required that business conditions in the industry be taken into account in wage setting. While "necessary cost of living" might appear to be an objective standard, wages were actually arrived at through a negotiation among the members of the advisory committees. "As a matter of fact," said Wisconsin-laws author and socio-economist John Commons, "the budget is a compromise. The representatives of the employees present their budget and their proposal for a rate based on it; the representatives of the employers do likewise, and the two forces contend until they come to some agreement." Even where the workers' cost of living was the sole statutory consideration, public bargaining necessarily forced consideration of prevailing wages, the amounts of proposed increases, and business conditions. In the end, the public representative frequently cast the deciding vote as a quasi-arbitrator of disputes between worker and employer representatives. Nonetheless, the strengthened bargaining position conferred on the worker representatives improved dramatically their chances of achieving a fair wage. These statutes assured Bargaining Fairness for the worker in the wage determination process.

"Public bargaining" laws also served a secondary purpose: they shielded minimum-wage-setting from the political market. The legislatures that enacted these laws excluded themselves, and the interest groups that influenced them, from the process that determined the wages employers would be required to pay their lowest paid workers. Thus, workers were protected not only from the consequences of their inferior bargaining power in the labor market, but from any

necessary comforts of life[,]" considering also the "financial condition of the business"; Massachusetts and Nebraska: "necessary cost of living and to maintain the worker in health"; Minnesota: "to maintain the worker in health and to supply him with the necessary comforts and conditions of reasonable life"; Oregon and Washington: "necessary cost of living and to maintain the workers in health"; Wisconsin: a wage "sufficient to maintain himself or herself under conditions consistent with his or her welfare" with "welfare" defined to include "reasonable comfort, reasonable physical well-being, decency, and moral well-being." Id.; Douglas, supra note 227, at 713.

254. See Douglas, supra note 227, at 710; COMMONS, supra note 33, at 502-03.

255. ANDREWS, supra note 156, at 58-61; see also VICTOR P. MORRIS, OREGON'S EXPERIENCE WITH MINIMUM WAGE LEGISLATION 67-70 (1930) (discussing the effects of collective bargaining on minimum wage earning women in Oregon).

256. See Brandeis, Labor Legislation, supra note 138, at 527.

257. See id. at 524-27. One serious problem for workers was that their representatives, drawn appropriately from the ranks of low-wage working women, often lacked the education and experience to negotiate with the better-funded and better-prepared employer representatives. See Douglas, supra note 227, at 717.
outcomes that might result from their inferior bargaining position in the political market.

The process of public bargaining was not an end in itself. The lodestar of Bargaining Fairness was a living wage. Nonetheless, the living wage movement did not have sufficient bargaining power even in friendly state legislatures to enact legislation embodying the conception of Absolute Fairness. Compromise was necessary. As a result, the state laws never effected wages that would satisfy John Ryan’s standard for a living wage. Even on the basis of the conservative budgets used by the wage boards, the minimum wages set by public bargaining barely provided for subsistence. According to a Women’s Bureau study entitled “Development of Minimum Wage Laws in the United States,” in 1913, 1914, and 1915, state minimum wages fell within a narrow range that approximated the reasonable cost of living for a single woman living away from home. But columnist Walter Lippmann parodied the suggestion that the budgets were sufficiently generous: “[the wages are] not enough to make life a rich and welcome experience, but just enough to secure existence amid drudgery in gray boarding-houses and cheap restaurants.”

Nonetheless, a study by the Women’s Bureau in 1927 showed that wages increased as a result of public bargaining with only exceptional cases of displacement or employer problems. Other analyses, particularly from 1915 to 1920 and from 1920 to 1923, found that legislated minimum wages did not keep pace with the rising cost of living. But they also found some strong evidence that the minimum wage laws resulted in wage increases for women. Bargaining Fairness set the living wage as its goal, but the exigencies of politics required its proponents to settle for less.

Among the majority of states whose minimum wage laws imposed Bargaining Fairness, Oregon stands as the first among equals. This is partly true because of the happenstance of Oregon’s status as defendant in two leading Supreme Court cases on the validity of state minimum wage and maximum hours laws. It is equally true, however, because of

260. See Morris, supra note 255, at 69-73.
261. See Commons & Andrews, supra note 156, at 527-38. A 1937 review of the available evidence by the Women’s Bureau produced the same conclusion. See Cheyn, supra note 249, at 41.
Father Edwin O'Hara who played a leading role in bringing a public bargaining law to Oregon.

5. Father Edwin O'Hara and Oregon's Public Bargaining Law

John Ryan was the most influential professor in O'Hara's student career at the St. Paul Seminary. Ryan was a professor of moral theology at St. Paul Seminary in 1902 and taught O'Hara four semesters of "Moral Theology: Ethics and Social Problems." O'Hara was quick to adopt Ryan's view of a living wage. O'Hara was influenced by the fact that Protestant leaders like Walter Rauschenbusch, author of Christianity and the Social Crisis in 1907, urged a new era of social concern among believers. Rerum Novarum served the same purpose for Catholics, in O'Hara's view. O'Hara also agreed with Ryan that the Church could not condemn socialism and radicalism unless it proposed workable alternatives clearly demonstrating that genuine social reform was consonant with traditional Catholic moral principles, and that Christ, not Marx, was the true ally of workers.

O'Hara was more organizer and calm promoter than soapbox speech maker or philosopher. His initial secular vehicle for social activism was the Oregon Consumers' League ("OCL"), the local branch of the NCL, with which he became involved after moving to Portland in 1905 to take up his pastoral responsibilities. On June 2, 1912, at Ryan's suggestion, the OCL established a special committee entitled the "Social Survey Committee to Study Wage, Hour, and Working Conditions for Women and Minors in Oregon." The Committee's purpose was to study the problems of the employment of women in the state, and then to lobby for corrective legislation. O'Hara was appointed chair.

Consistent with the living wage movement's broader strategy of swaying public opinion to improve their bargaining position in the political market, O'Hara began his task by collecting evidence that workers' wages were being driven below the subsistence level in the unregulated labor market. He selected Caroline Gleason, another Minnesotan and field secretary of the Catholic Women's League, to

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262. See DOLAN, supra note 145, at 14.
263. See id. at 29.
264. See id. at 29-30.
265. See id. at 30-31.
266. See id. at 32-33.
267. See DOLAN, supra note 145, at 33.
268. See id.
269. See id. at 34.
undertake a comprehensive survey of the wages and working conditions of Oregon's female workers. As a graduate student in 1912, Gleason had investigated living and industrial conditions as they affected women in the factories and mills of Pittsburgh, Philadelphia, Baltimore, and New York. She believed in undercover work at factories, stores, and offices. Gleason herself worked in one of the worst factories, gluing cardboard boxes together for ten hours a day.

Collating all of the evidence she collected, Gleason presented a book to O'Hara which he published in January 1913 and distributed to opinion leaders, editors, and legislators. In O'Hara's words:

It appeared from this careful report that 47 percent of the employees in department stores, 60 percent in factories, and 37 percent of general office help were receiving less than $9 a week; whereas it was the conclusion of the investigation that $10 a week is the minimum on which the average self-supporting woman could live decently.... It was obvious from these facts that the wages of working women were being determined purely by the law of supply and demand, with little reference to their needs.... The hours of labor were frequently excessive and the conditions of work detrimental to the health and morals of employees.

The OCL's study also concluded that the average weekly wage for women was $8.20. Wages as low as $1.50 per week were found, and many were less than $6.00 per week. The budget used in the study took into consideration food, clothing, shelter, needed medical care, allowances for laundry, church dues, lodge dues, education and recreation, including a vacation.

Like the Massachusetts Commission and the New York Factory Investigating Commission, the OCL's study found that there existed among employers no standards for wage-setting or promotion. Women rendering almost identical services were paid radically different wages. The OCL study also answered the question: how can women survive while earning below subsistence? Family members, charities,
and others were making up the difference between wages and subsistence, thereby subsidizing the employer.279

O'Hara's committee drafted a minimum wage bill along the lines of the Australian-British public bargaining model with advice from the Massachusetts Minimum Wage Board Commission, the Legislative Committee of the NCL, the officers of the AALL, and "scores of the ablest economists, legislators and businessmen throughout the country."280 O'Hara sent the draft bill for comment to Florence Kelley and Josephine Goldmark who shared it with Louis Brandeis and Felix Frankfurter.281 The lawyers advised O'Hara not to set an actual minimum wage rate since that could undermine the law's constitutionality. Instead, they urged delegating the authority to a wage board.282 The public bargaining model would have been O'Hara's preference even absent this legal advice:

The purpose of minimum wage legislation with its conferences or wage boards is to substitute to a limited degree a system of compulsory collective bargaining which will give to the contract between employer and employee [sic] some character of freedom by placing the contracting parties on a comparatively equal basis.283

Unlike Massachusetts's law, the work of the wage board in Oregon would be enforced under threat of monetary penalties and imprisonment.284

By the time the Oregon legislature opened in January 1913, each member had a copy of the polished bill.285 On June 3, 1913, Governor West signed the bill into law and immediately thereafter appointed O'Hara to Chair the Industrial Welfare Commission that would administer the new statute.286 Caroline Gleason, O'Hara's investigator...

279. See MORRIS, supra note 255, at 56. O'Hara's push for support began with a speech to the OCL on November 19, 1912 that combined Ryan's living wage philosophy with Kelley's pragmatic and social work influences. See O'HARA, WELFARE LEGISLATION, supra note 225, at 2-9.


281. See DOLAN, supra note 145, at 35.

282. See id.

283. EDWIN V. O'HARA, A LIVING WAGE BY LEGISLATION: THE OREGON EXPERIENCE xiv (1916) [hereinafter O'HARA, OREGON EXPERIENCE]; see also MORRIS, supra note 255, at 68-70 (stating that the Commission created by the bill is a means of collective bargaining).

284. See O'HARA, OREGON EXPERIENCE, supra note 283, at 43 (quoting section 17 of the Oregon law).

285. See DOLAN, supra note 145, at 35.

286. See id. at 35-36.
with the OCL, was to serve as the Commission’s executive secretary.\footnote{See id. at 36.} The Commission began its efforts, at the suggestion of the employer representative serving on the Commission, by calling a voluntary meeting of employers in hopes of gaining agreement to an acceptable wage scale.\footnote{See id. at 37.} But business leaders refused to cooperate.\footnote{See id.} O’Hara turned to the processes set forth in the law.\footnote{See DOLAN, supra note 145, at 81; O’HARA, OREGON EXPERIENCE, supra note 283, at xi.}

The Oregon law’s initial standards required payment of a living wage. Women would be paid, at a minimum, a wage adequate “to supply the necessary cost of living and to maintain them in health.”\footnote{“A legal minimum wage destroys the advantage which unscrupulous employers who are willing to cut wages below the subsistence level have always enjoyed over their more decent competitors.” Id. at xviii.} The law permitted geographic differentials, acknowledging that Portland’s cost of living might exceed that of Oregon’s small, rural towns.\footnote{MORRIS, supra note 255, at 81. The relevant text of section 1 of the Oregon Law is: It shall be unlawful to employ women or minors in any occupation within the state of Oregon for wages which are inadequate to supply the necessary cost of living and to maintain them in health, and it shall be unlawful to employ minors in an occupation within the state of Oregon for unreasonably low wages. Id. at 80.} But cost of living was not the only \textit{de facto} standard. The tripartite nature of the Commission and the Conferences assured that employers’ economic concerns would also be considered even without express authorization in the statute.\footnote{See id. at 81.} The law specifically contemplated different wages for different industries, thus injecting the nature of the work into wage-setting decisions.\footnote{See id. at 100.} In reality, later decisions of the Commission set a uniform minimum for all occupations, with differentials based only on geography.\footnote{See MORRIS, supra note 255, at 81, 100-101. The uniformity resulted less from principle than from the lack of any true cost of living differential based on occupation or location, and the added administrative expense of individual conferences, hearings, and investigations for each occupation or industry. See id.} Nonetheless, O’Hara’s Oregon law codified a different conception of fairness than Ryan’s Absolute Fairness. Bargaining Fairness did not guarantee a living wage, but a process for equalizing the bargaining power of the parties to wage deals so that they might agree to a living wage.
In fact, Oregon’s law did not provide a living wage to most women workers in Oregon. On November 10, 1913, the Commission issued the first minimum wage orders in the United States. The work week for women was set at between fifty-one and fifty-four hours with a work day of between eight and ten hours depending upon the industry. Wages were set at $8.25 per week for most women workers outside Portland and $8.64 per week within Portland. Experienced office workers and a few others were to receive $9.25 per week. Apprentices could be paid less for one year with their wages increasing during that year to the level of the regular minimum wage. The Commission based the wage determinations on the costs of decent living, including respectable lodging, three meals a day, clothing according to the standard demanded by the position the employee fills, some provisions for recreation, healthcare, and self-improvement.

An early Bureau of Labor Statistics (“BLS”) study assessed the effects of the Oregon minimum wage law by comparing mercantile establishments for two months in 1913 before the law took effect and for the same two months in 1914 after the law took effect. Rates of pay for women increased overall, although there was a slight drop in pay for inexperienced women. There was a dramatic increase in the number of women and minors being paid the minimum wage or more. Any wage rates below six dollars per week practically disappeared. Hours of employment increased slightly. Weekly earnings also increased. Employment among both men and women declined, probably because a business depression intervened. There was no evidence that men were substituted for women as women’s wages rose.

296. See O’HARA, OREGON EXPERIENCE, supra note 283, at xi.
297. See id. at 10-12. These apprentice provisions represented an acquiescence in the theory that new workers, even in the lowest skilled work, were not sufficiently productive to justify being paid the minimum wage. See MORRIS, supra note 255, at 174-75. The statutory definition of “apprentice” and the definition used by the IWC did not require that apprentices be given any instruction or education of any sort. See id. Similarly, section 10 of the statute allowed the issuance of licenses for a “woman physically defective or crippled by age or otherwise a special license authorizing her employment at such wage less than said minimum time rate wage as shall be fixed by the Commission.” O’HARA, OREGON EXPERIENCE, supra note 283, at 41. These provisions were a further acquiescence in the productivity theory; that is, these disabled or aged workers would be paid less because they could produce less. See id. at xvii.
298. See MORRIS, supra note 255, at 105 (quoting the First Biennial Report of the Industrial Welfare Commission (1915)).
299. See MARIE L. OBENAUER & BERTHA VON DER NIENBURG, U.S. BUREAU OF LABOR STATISTICS, EFFECT OF MINIMUM-WAGE DETERMINATIONS IN OREGON 9-18, 23, 25-28 (Bulletin No. 176 July 1915). The authors of this study noted that there were several factors exogenous to the minimum wage law that affected these results. See id. at 7-8. Victor Morris raised similar concerns: the business depression beginning in 1914, increased activity due to World War I, rapid
But there was a price to be paid for the compromises that permitted passage of the legislation. Although wages increased, the wage level set by the IWC did not reach the ten dollar weekly wage Gleason's study found to be the minimum required for a self-supporting woman. While the costs of living might have been supported by the $9.25 weekly wage rate set for Portland's experienced office workers, the lower rates set for apprentices and women working in other sectors were plainly inadequate.300 In the years following, there was a decided lag between the rise in the cost of living and the wage rates.301 The cost of living increased thirty-one percent between 1914 and the close of 1917, but minimum wages in Oregon were not increased again until June 1918.302 By then, the cost of living had increased forty-five percent. Increases legislated at that point ranged from between twenty-percent and forty-five percent.303 A near "catching up" did not occur until around 1930.304 Admittedly, legislated rates and actual rates of pay were not the same.305 But there is good reason to conclude that the operation of the Oregon law fell short even of O'Hara's vision of a living wage, a less generous vision than John Ryan's living wage.306

IV. FAIRNESS IS THE ECONOMIC HIERARCHY

The conceptions of Absolute Fairness and Bargaining Fairness sought to correct inadequate wages that resulted from unequal bargaining power in the labor market. Absolute Fairness would assure a minimum result; that is, every worker would be paid at least a living wage. Bargaining Fairness would assure rough equality of bargaining power between workers and employers. Workers would be placed on the same plain as employers and permitted to bargain over the amount of their wages in hopes that the bargaining would produce a living wage.

A third conception of fairness in wages also arose in the earliest part of the twentieth century, principally in the courts. This conception acknowledged that unequal bargaining power existed in labor markets and that inadequate wages sometimes resulted. But its proponents did

movement of women into work because of the war, business conservatism, and political conservatism. See MORRIS, supra note 255, at 31.
300. See MORRIS, supra note 255, at 121.
301. See id. at 120.
302. See id.
303. See id.
304. See id.
305. See MORRIS, supra note 255, at 119.
306. See id. at 118-20.
not seek to fix these labor market conditions. Unequal power relationships were not only acceptable in the normative vision of the conception of Hierarchic Fairness, but necessary conditions of a progressive human society.

A. Lochner and Hierarchic Fairness

*Lochner v. New York*[^307] is typically cited as defining a period during which the Supreme Court elevated a purported liberty of contract to the status of a fundamental right, and yielded that “right” to defeat government interventions in markets.[^308] This view oversimplifies the debate over fairness in wages. Justice Holmes’s famous dissent in *Lochner* properly identifies Herbert Spencer’s writings as the guide to understanding the conception of fairness that emerged from the so-called *Lochner* Court.[^309]

British philosopher Herbert Spencer’s views focused on the individual and his natural course of development.[^310] The conception Spencer set forth in his *Social Statics* is built on two foundations.[^311] First, Spencer observed that, given cultural and personal differences, an objective definition of happiness and the path to it is not possible.[^312] Spencer would define happiness and its pursuit as each individual exercising his faculties to his fullest extent in his own way.[^313] Second, Spencer believed that, like their counterparts in the natural world, human beings adapt to bad conditions in their environment through a

[^307]: 198 U.S. 45 (1905).
[^308]: *See Lochner*, 198 U.S. at 64.
[^309]: *See id.* at 75:

[Lochner] is decided upon an economic theory which a large part of the country does not entertain.... The Fourteenth Amendment does not enact Mr. Herbert Spencer’s *Social Statics*.... [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. *Id.* (Holmes, J., dissenting).

[^310]: *See HERBERT SPENCER, POLITICAL WRITINGS* xiv-xvii (John Offer ed. 1994). Spencer originally published his *Social Statics* in 1850, nine years before Charles Darwin’s *Origin of a Species* appeared. Further, Spencer’s view of evolution was quite different from Darwin’s view. *See id.*

[^311]: *See HERBERT SPENCER, SOCIAL STATICS, TOGETHER WITH THE MAN VERSUS THE STATE* 10, 28 (1901) [hereinafter SPENCER, SOCIAL STATICS].

[^312]: *See id.* at 10.

[^313]: *See id.* Spencer’s foreword notes that he modified his writings in this third edition to reflect changed circumstances and the evolution of his thought. *See id.* at 3-4. Since this edition pre-dates the Supreme Court decisions that drew upon Spencer’s writings, it is reasonable to assume that his modified writings influenced the members of the Court and the politics of the time as much as did the original editions.
necessary and natural process.\textsuperscript{314} For example, animals moved from warm climates to colder climates grow thicker coats. Similarly, human beings naturally adapt to "evils" they experience. The evolution could take generations, Spencer acknowledged.\textsuperscript{315} But exercising human faculties strengthens them, said Spencer, thereby facilitating this adaptive or evolutionary process.\textsuperscript{316} From these two foundations, Spencer built a first principle of justice: each person must be given full liberty to exercise his faculties compatible with the possession of a like liberty by all others.\textsuperscript{317}

Spencer rejected the idea that an individual's exercise of his faculties should be restricted if it causes pain to others.\textsuperscript{318} Concern for pain would interfere with both of Spencer's foundational premises.\textsuperscript{319} It would unduly limit the achievement of happiness by the party causing the pain. It would also artificially interfere with the natural adaptation process for the party experiencing the pain. Only self-restraint by the pain-inflicting party should be relied upon in these circumstances, said Spencer.\textsuperscript{320}

Spencer's view of the proper role of government was predictable in light of his conception of justice:

\begin{quote}
Nature will not be cheated. . . . No philosopher's stone of a constitution can produce golden conduct from leaden instincts. No apparatus of senators, judges, and police, can compensate for the want of an internal governing sentiment. No legislative manipulation can eke out an insufficient morality into a sufficient one. No administrative sleight of hand can save us from ourselves.\textsuperscript{321}
\end{quote}

Spencer concluded that government can neither assure happiness nor increase the ability to exercise human faculties, particularly when its principle means of action restricts the exercise of human faculties by

\begin{footnotes}
314. See id. at 28.
315. See SPENCER, SOCIAL STATICS, supra note 311, at 29-32.
316. See id. at 28-32 (discussing the need of man to continue in the process of adaptation). Spencer believed that man is altered by the influences brought to bear on him and tends to become fitted to them, for if man is unable to facilitate the adaptive process, all schemes of education, government, and social reform are useless. See id.
317. See id. at 31-32.
318. See id. (explaining that to restrict an individual's exercise of his faculties because this would cause pain to others would be to limit progress, which is not an accident but a necessity). According to Spencer, by virtue of adaptation man will eventually evolve. See id.
319. See SPENCER, SOCIAL STATICS, supra note 311, at 124.
320. See id. at 33-45, 57.
321. Id. at 116-17.
\end{footnotes}
taking individuals' property.\textsuperscript{322} Spencer's first principle subsumed the ancillary principle that each person is free to claim all those gratifications and sources of gratification he can procure through the exercise of his faculties, as long as no other person's liberty is constrained as a result.\textsuperscript{323} Thus, the regulation of commerce and redistribution schemes like poor laws would undermine human progress, in Spencer's view.\textsuperscript{324}

Spencer reasoned, accordingly, that government's role should be strictly limited.\textsuperscript{325} It should protect each person's liberty to exercise his faculties.\textsuperscript{326} Yet, it is a "proper sphere of government to repress nuisances" because nuisances infringe on the liberty of others.\textsuperscript{327} Government should also sustain people in the conditions that are necessary to natural adaptation; that is, it should support the social status quo.\textsuperscript{328} If the state intervened to upset the social structure, then adaptation would be suspended and evolutionary progress toward social equilibrium could not occur.\textsuperscript{329} Finally, perhaps in its most fundamental function, government can properly protect a society against foreign aggression.\textsuperscript{330}

Spencer's philosophy echoed throughout the Supreme Court's minimum wage and maximum hours decisions in the first three decades of the twentieth century as conservative justices attempted to apply Spencer's conception of fairness to labor market regulation.\textsuperscript{331} Their chosen tool was recognition of a fundamental right to contract beginning with the decision in \textit{Allgeyer v. Louisiana}.\textsuperscript{332}

\textsuperscript{322} See id. at 124-25.
\textsuperscript{323} \textit{SPENCER, SOCIAL STATICS, supra} note 311, at 65-67, 124-25.
\textsuperscript{324} See id. at 137, 146-52.
\textsuperscript{325} See id. at 127, 149 (discussing the inevitable retardation of the process of adaptation that occurs when the government oversteps its duty of maintaining men's rights). Spencer claims that the state cannot exceed its duty without defeating itself. See id.
\textsuperscript{326} See id. at 124-25.
\textsuperscript{327} Id. at 124-35.
\textsuperscript{328} See \textit{SPENCER, SOCIAL STATICS, supra} note 311, at 131-35.
\textsuperscript{329} See id. at 126-27.
\textsuperscript{330} See id. at 125-37.
\textsuperscript{332} See \textit{Allgeyer}, 165 U.S. at 589. In fact, \textit{Lochner}'s author, Justice Peckham, cited his own opinion in \textit{Allgeyer} as a starting point for the Supreme Court's recognition of a fundamental right to enter into unfettered contracts as purportedly guaranteed by the Fifth and Fourteenth Amendments. See \textit{Lochner}, 198 U.S. at 53. \textit{Allgeyer} was by no means the first ever discussion of the "liberty of contract" in this context. Spencer had discussed it in 1891, and a long list of state courts had decided cases by relying on it beginning in 1886. See Roscoe Pound, \textit{Liberty of Contract}, 18 Yale L.J. 454, 470-80 (1908-09); \textit{BAER, supra} note 8, at 46-47. For a further discussion of Herbert Spencer's views and their place in the intellectual history of the United States, see id. at 46-47.
Justice Peckham’s opinion in *Allgeyer* struck down a Louisiana statute that prohibited a foreign insurance company from doing any business in Louisiana. The *Allgeyer* Court found that the statute unnecessarily impinged on a “liberty of contract,” defined as:

not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned. 3

The *Allgeyer* Court acknowledged that the liberty of contract was not absolute. Government had a proper role, although the *Allgeyer* Court would not define it. The question of when and how the state’s police power could be legitimately exercised to restrain a citizen’s liberty of contract “must be left for determination to each case as it arises.”

Such a case arose just a few years after *Allgeyer*, and a few years before *Lochner*, in *Holden v. Hardy*. Utah had enacted a statute that established an eight-hour daily limitation on employment in the underground mining, smelting, reduction, and refining of ore, absent emergencies. The statute was challenged on the same constitutional grounds later raised in *Lochner*. It allegedly violated the liberty of contract inferred from the Fourteenth Amendment. After following *Allgeyer*’s construction that the Constitution protects such a liberty, the *Holden* Court rejected the challenge.

The *Holden* Court began its analysis by embracing a dynamic philosophy of constitutional interpretation. Government’s police powers should expand in response to the changes to the nature of work that

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States, see Richard Hofstadter, *Social Darwinism in American Thought* 31-50 (1944).


334. See id. at 591-92.

335. See id.

336. Id. at 590. Peckham illustrated his point by distinguishing *Allgeyer* from *Hooper v. California*, 155 U.S. 648 (1895), which upheld a similar state statute prohibiting foreign insurance companies from doing business in California unless they met certain conditions, and leaving that earlier case standing. See id. at 583, 586-88.

337. 169 U.S. 366 (1897).

338. See *Holden*, at 391-92.
arrived with the Industrial Revolution and the threats the new world of work posed, the Court reasoned. 339

Dynamic constitutional interpretation led the Court to a three-part syllogism similar to the framework employed by the socio-economists in their analysis of the labor market and wages. First, the Court acknowledged that employers and workers

do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while that latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. 340

Second, every owner of property, stated the Court, holds his property "under the implied liability that its use may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community." 341 Third, since excess time in dangerous work causes negative health effects, and the miners could not protect themselves because of their weaker bargaining position, Utah could regulate the employment contracts between miners and mining companies. 342 On these three bases, the Court upheld Utah’s hours law for miners. 343

Allgeyer established a liberty of contract consistent with Spencer’s focus on individuals’ free exercise of their faculties. Holden established that working conditions and unequal bargaining power could cause a nuisance sufficient to justify government regulation, although undoubtedly much more broadly than Spencer had suggested. Nonetheless, Lochner was decided with these precedents in the background.

New York had enacted a statute to prohibit bakeries from requiring their employees to work more than ten hours in one day or sixty hours in one week. 344 The Court’s rejection of New York’s law depended principally on the legal equality of the parties: “There is no contention that bakers as a class are not equal in intelligence and capacity to men in

339. See id. at 385-86.
340. Id. at 397.
341. Id. at 392 (quoting Commonwealth v. Alger, 7 Cush. 53, 84 (1851)).
343. See id. at 398.
344. See Lochner, 198 U.S. at 46.
other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State. . . ." Or, as the Court said in one of Lochner’s progeny: “In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.” There was no dispute in Lochner that employers had greater bargaining power in the labor market than workers. There was no dispute that equality under the law did not assure a fair result. But absent evidence of a sufficient nuisance, the government had no role regulating the affairs of legally equal parties.

It was on the question of “nuisance” that Lochner effected two modifications in the Allgeyer-Holden reasoning. First, Lochner defined “nuisance” far more narrowly than did Holden. The health threats faced by Utah’s miners were qualitatively similar, if quantitatively greater, than those experienced by New York’s bakers. Second, and more important, Lochner looked not to the effects of the nuisance on the individual bakers, but to the effects on society as a whole. Spencer focused on the individual and his liberty to exercise his faculties. Holden similarly looked to the health and safety of the individual workers. Lochner asked, instead, whether the bakeries threatened a societal nuisance, and answered in the negative: “[W]e think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act.” In the absence of a showing

345. Id. at 57.
346. Adair v. United States, 208 U.S. 161, 175 (1908). The Adair Court struck down a federal statute that established a system for arbitration of labor disputes affecting common carriers and prohibited the threatening of any employee with loss of employment or discrimination because the employee was a union member. See id. at 167-69, 172, 180. The statute apparently arose out of the 1894 Pullman strike led by Eugene V. Debs that resulted in the introduction of federal troops and a violent confrontation. See id. at 185, 187 (McKenna, J., dissenting) (citing In re Debs, 158 U.S. 564 (1894)). See generally Nick Salvatore, Eugene V. Debs: Citizen and Socialist 127-37 (1982) (describing the strike and Debs’s role). See also Coppage v. Kansas, 236 U.S. 1, 9, 13-14 (1915) (following Adair and striking down a Kansas law that prohibits coercing an employee not to join a union). Coppage is noteworthy principally for this defense of the liberty of contract: “The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.” Id. at 14. This suggestion is worthy of Anatole France’s Le Lys Rouge: “At this task they must labour in the face of the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.” Anatole France, The Red Lily 95 (Winifred Stephens trans., 1930).
347. See Lochner, 198 U.S. at 56-64.
348. Id. at 57.
of public nuisance, the Court found no justification for permitting New York to mandate modifications in the employment contracts that resulted from a fair bargaining process between bakers and bakeries. Thus, employers could use their superior bargaining position to impose any form of nuisance on the bakery workers absent some showing that society would suffer some resulting externality. The *Lochner* Court's version of Hierarchic Fairness deprived the government of the ability to protect one party from another, stronger party even when the weaker party would not be able to exercise its faculties to their fullest as a result.

The idea that Hierarchic Fairness defends a Darwinistic social system had its foundations in Greek and Roman law. These laws defined "justice" as the maintenance of the status quo, or in Roscoe Pound's words, "to keep each man in his appointed groove and thus prevent friction with his fellows." A plainer description of the Spencerist view of law comes from *State and Federal Control of Persons and Property*, a law school textbook published in 1900:

[The employer] has acquired this superior position... through the exertion of his powers... and can to some extent dictate terms to [ ] his employees, because his natural powers are greater, either intellectually or morally; and the profits, which naturally flow from this superiority, are but just regards of his own endeavors. At any rate, no law can successfully cope with these natural forces.

This was the conception of Hierarchic Fairness adopted by the Supreme Court in the era of *Allgeyer*, *Lochner*, and *Holden*. The economic hierarchy was not only immutable, but fair, appropriate, and optimal. Government could intervene if, and only if, the externalities caused by the hierarchy's operation created a nuisance for society.

The Court's adoption of Hierarchic Fairness left the proponents of Bargaining Fairness laws with a difficult strategic path to follow after *Allgeyer*, *Lochner*, and *Holden*.Arguments that government should be permitted to intervene in the labor market to protect workers would run directly counter to *Allgeyer* and *Lochner*. The only hope for preserving

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349. See id. at 59 (stating that the trade of a baker is not so unhealthy as to authorize the legislature to interfere with the right to labor and the right of free contract for the individual employee or employer).

350. See id. at 53-54.


352. BAER, supra note 8, at 45 (quoting *State and Federal Control of Persons and Property* 940, 942 (1900)).
Bargaining Fairness laws was to rely on the opportunity presented by *Holden*, but sharply narrowed by *Lochner*, to prove that government intervention was necessary to protect society, not merely workers, from the externalities of unregulated labor markets. The living wage movement’s argument that a statutory minimum wage starved society’s interests, not merely the interests of low-wage workers, would be put to the Spencerist test.

### B. Gender Inequality as a Remedy for Societal Nuisances

The strategic path through Hierarchic Fairness’ loophole began with *Muller v. Oregon*353 in which the Supreme Court reviewed a 1903 statute limiting the number of hours a woman could work in a laundry to ten per day.354 Seven cases on the constitutionality of women’s hours laws had been decided in lower courts over a period of thirty-two years leading up to *Muller*.355 Four statutes had been upheld, and three overturned.356 The National Consumers’ League, understanding the importance of the case to the future of Bargaining Fairness, approached Louis Brandeis and asked him to file an *amicus curiae* brief with the Court.357 Brandeis successfully demurred, insisting that he represent Oregon directly with full control over the litigation strategy.358

Brandeis and the NCL’s Josephine Goldmark decided on a strategy of marshaling empirical evidence to convince the Court that the facts supported Oregon’s law. They produced the first-ever “Brandeis brief,” a practical application of sociological jurisprudence and socio-economics.359 Of 113 pages in the brief, only two were dedicated to legal argument. Thirteen pages listed hours limitations laws elsewhere in the world. Eighty-seven pages of the brief presented the empirical evidence accumulated by Goldmark.360

Brandeis and Goldmark might have sought to overturn *Lochner*. One of the justices in the *Lochner* majority had retired.361 Instead, they elected to distinguish their case using an argument based on *Holden* and

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353. 208 U.S. 412 (1908).
354. See id. at 412-13.
355. See BAER, supra note 8, at 56.
356. See id.
357. See id. at 57.
358. See id.
359. See id.
360. See BAER, supra note 8, at 57.
361. See id.
a claim of societal nuisance. New York's law included men. Oregon's law applied only to women. Thus, gender became the grounds for distinction. Goldmark's data showed that overworked women in factories and laundries were particularly subject to disease and injury, and that fatigue increased accidents. The cap on working hours set by the law meant improved health, fewer injuries, less disease, and a lower incidence of alcoholism.

But the brief failed to define clearly why women were especially susceptible to the negative effects of excessive working hours. One answer could have been that permanent physical differences between the sexes caused women to fare less well in identical working conditions. A second answer could have been, as the socio-economists and their allies in the living wage movement found, that women had to endure inferior working conditions, were less able to unionize to protect themselves, and were subject to family responsibilities to which men were not. Brandeis and Goldmark did not choose a preferred answer, essentially leaving it to the Court to choose.

The opinion for a unanimous Court was written by Justice David Brewer, a leading judicial conservative who had concurred in Lochner and dissented from Holden. Brewer's devotion to the liberty of contract exceeded even that of his colleagues. Women and men have equal contractual and personal rights under Oregon law, he noted, so the state cannot infringe women's liberty of contract any more than it can infringe men's liberty. But Brewer accepted Brandeis's gender-based argument, choosing to focus on physical differences: "woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil." He invoked the same claim about the labor market for women workers that living wage advocates had asserted for all workers:

Though limitations upon personal and contractual rights may be removed by legislation, there is in her disposition and habits of life which will operate against a full assertion of those rights. She will still

362. See id. at 57-61.
363. See id.
364. See id. at 6, 7, 10, 23, 60-66.
365. See BAER, supra note 8, at 62, 64.
366. See Muller, 208 U.S. at 418.
367. Id. at 420.
be where some legislation to protect her seems necessary to secure a real equality of right. 368

But within the conception of Hierarchic Fairness, it was not enough to establish that women were differently affected by long hours of work or especially subject to exploitation. Brandeis and Goldmark had to establish that the effects on working women imposed substantial externalities on society. Brewer concluded that they did:

That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, *the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.*

... The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. 369

Women’s reproductive health is a societal resource, said Brewer. Thus, any substantial threat to women’s ability to reproduce resulting from women’s inadequate bargaining power in the labor market imposed an externality sufficiently egregious to permit government intervention in the market.

*Muller* adhered to the conception of Hierarchic Fairness as constructed in *Allgeyer, Holden,* and *Lochner.* In the process, it elevated women’s reproductive functions to the status of societal imperatives. For this reason, *Muller* became the founding precedent for sex discrimination against women on the basis of physical difference. A strong presumption of legitimacy had been given to any kind of employment discrimination which could be related to permanent differences between men and women. 370 *Muller* also cast significant

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368. *Id.* at 422.
369. *Id.* at 421-22 (emphasis added).
370. One commentator suggested that courts, over a period of sixty years, upheld nearly all cases of sex discrimination by relying on *Muller.* See *Baeer,* supra note 8, at 66-67. The incremental process that detached women’s physical difference from substantial societal
doubt on any wage or hours legislation that could not be justified on these grounds. 371

C. Upholding the Minimum Wage and Achieving Industrial Peace During World War I

The question remained after Muller whether a minimum wage statute, as opposed to a maximum hours statute, could satisfy the Court’s conception of Hierarchic Fairness. Minimum wage advocates would be forced to prove that a sub-standard wage for women posed an egregious threat to society’s interest in women’s maternal role. Frank Stettler, an Oregon paper box manufacturer, set out to prove that the advocates could not successfully make that case. Caroline Gleason had performed her undercover work in Stettler’s factory while preparing the 1913 report on women’s working conditions for the Oregon Consumers’ League. 372 Stettler took it quite personally, branding Edwin O’Hara a “radical and socialist.” 373 O’Hara labeled Stettler “the most vicious of the parasites feeding on vulnerable women.” 374

Stettler’s challenge to Oregon’s Bargaining Fairness law failed in the Oregon Supreme Court on March 17, 1914. He brought his case to the United States Supreme Court. 375 Stettler argued that the creation of

externalities began when the Supreme Court upheld statutes designed to protect women in significantly less egregious working conditions than those presented in Muller. See Bosley v. McLaughlin, 236 U.S. 385 (1915) (discussing a female pharmacist working in a hospital).

371. Muller set off a rush to enact new state hours legislation for women. Within five years of Muller, thirty-nine states either enacted new legislation or strengthened laws already on the books. But the movement came to a halt in the 1920s. No new state entered the field after 1921 and the only significant change in an existing law came in New York with Governor Al Smith signing a compromise bill in 1927 providing for a nine-hour day, a forty-nine and one-half hour week and seventy-eight hours of annual overtime. Earlier, there had been an act of Congress in 1912 requiring insertion of an eight hour restriction in all contracts of employment to which the federal government was a party. By 1929, nearly half the states had similar eight-hour limits for their public works contracts. About half the states set a sixteen-hour day for workers on trains, street cars, and elevated lines. With the 1916 Adamson Act, Congress established an eight-hour day on interstate railroads, with a fifty percent premium for overtime after 1919. After 1922, fifteen states passed laws imposing an eight-hour day on mining like that in Holden. But the Bunting v. State of Oregon, 243 U.S. 426 (1917), experience of a statute limiting men’s hours generally was not replicated after that decision. See Irving Bernstein, The Lean Years: A History of the American Worker, 1920-1933 223-25 (1960).

372. See DOLAN, supra note 145, at 32-34.

373. Id. at 38.

374. Id.

375. Stettler v. O’Hara, 139 P. 743 (1914); see also Simpson v. O’Hara, 141 P. 158 (1914) (holding the police power of the state legitimately extended to the right to prevent employment of women for unreasonably small wages).
the Industrial Welfare Commission was an unlawful delegation by the
Oregon legislature and that the orders issued by the Commission
unconstitutionally deprived him of his property. 376 Specifically, Stettler
claimed to have been deprived of the right to employ $8.00 women for
$8.00, rather than $8.64 women for $8.64. 377 A companion suit by an
employee named Simpson argued that her right to work for $8.00 rather
than $8.64 had been abridged. 378 Felix Frankfurter mocked this argument
as valuing "a liberty to employ an inefficient woman in the place of an
efficient one" which, in reality, masked the true goal of "getting labor at
less than the true value of its product." 379

O'Hara was represented at first by Brandeis and Goldmark, and
later by Frankfurter and Goldmark after President Wilson selected
Brandeis for the Supreme Court. 380 Their briefs followed the three-part
framework that originated with the socio-economists. First, wages were
not sufficient to support women in good health. The brief cited the OCL
study and others as evidence that a majority of women were earning less
than a living wage, a large number were ruining their health by not
eating enough, those eating enough lived in unwholesome conditions or
were insufficiently clothed, and others found sufficient support only
through "contributions from gentlemen friends." 381 Second, society's
interests lay in protecting women from inadequate wages:

In view of the function of women as the bearers of children, and in
view of the fact that women may become in any community an
instrument of immorality, the Legislature found that in Oregon, if
women did not have wages sufficient to maintain them in health and in
morals, detriment would result to the state in two ways. In the first

376. See Morris, supra note 255, at 44-45.
377. See id.
378. See id. The plaintiff in Stettler also argued that the employees he paid less than the
Commission-ordered minimum were "incompetent by reason of age, inability, or otherwise to earn
greater wages than they are being paid." Thomas Reed Powell, The Oregon Minimum-Wage Cases,
32 Pol. Sci. Q. 296, 302 (1917). However, the plaintiff in Stettler never applied for a special
permit to pay these workers a sub-minimum wage, so he faced an exhaustion problem with this
argument. See id.
379. Powell, supra note 378, at 303.
381. Louis Brandeis, The Constitution and the Minimum Wage, The Survey 490 (Feb. 6,
1915) [hereinafter Brandeis, The Constitution and the Minimum Wage] (this article was Brandeis's
summary of his legal argument for a popular audience); see also Powell, supra note 378, at 296-
97. The briefs echoed the socio-economists' argument that someone must support Stettler's
employees if he was to have their labor, and that he benefited from that support. If he did not
furnish the support, he profited from others' subsidies. Stettler's objection to the statute, said the
brief, was that the law deprived him of a subsidy. See id. at 305.
place, degeneration would threaten the people of Oregon, because unhealthy women would not as a rule have healthy children. In the second place, unhealthy or immoral women would impose upon the community, directly or indirectly, heavy burdens by the development of ever larger dependent classes which would have to be supported by tax-payers.\textsuperscript{382}

The briefs supplemented this argument from \textit{Muller} with a new claim on society’s interests, drawn from the socio-economists, that proper treatment of workers produced more efficient industry.\textsuperscript{383}

Expressly seeking an overruling of \textit{Lochner} was unnecessary to their success, but Brandeis and Frankfurter took the opportunity to lay blame for the condition of working women at the very foundation of Hierarchic Fairness. The “liberty of contract,” they argued:

\begin{quote}
\textit{is only the ‘liberty’ of an employer to abuse and the ‘liberty’ of an employee to be abused. . . . [Oregon’s] very purpose is to assure the parties an equal basis for bargaining, so that they may be \textit{free} to bargain on the merits, and not under the compulsion of a crippling necessity. With no margin or the margin of but a singlemeal between starvation there can be no true liberty of contract.}\textsuperscript{384}
\end{quote}

Thus, the brief’s third and final point was that women could not protect themselves and society from the negative results of labor market deal-making. Men could organize into unions to secure a living wage. Women could not and did not because their work life was shorter and they did not have an adequate opportunity to educate themselves about the benefits of trade unionism. The state had to step in.

The Supreme Court issued its decision without opinion on April 9, 1917. The Court evenly split 4 to 4 with newly appointed Justice Brandeis recused. The Oregon Supreme Court’s decision upholding the law was not disturbed.\textsuperscript{385} But with Brandeis’s views well-known, \textit{Stettler} was taken as precedent for the proposition that minimum wage laws were constitutional. O’Hara stepped down from his position on Oregon’s Industrial Welfare Commission in June 1917 feeling his work was done.\textsuperscript{386}

\begin{footnotes}
\footnote{382. Brandeis, \textit{The Constitution and the Minimum Wage}, supra note 381, at 491.}
\footnote{383. \textit{See id.} at 492; \textit{see also} MORRIS, supra note 255, at 45-46; Powell, \textit{supra} note 378, at 310.}
\footnote{384. Powell, \textit{supra} note 378, at 308 (quoting the brief).}
\footnote{385. \textit{See Stettler v. O’Hara}, 243 U.S. 629 (1917); \textit{see also} BAER, \textit{supra} note 8, at 92.}
\footnote{386. \textit{See DOLAN, supra} note 145, at 39.}
\end{footnotes}
On the same day the Court decided Stettler, it also decided Bunting v. Oregon.\textsuperscript{387} Bunting considered the constitutionality of an earlier Oregon statute providing that no employee, whether male or female, could work more than ten hours in a mill, factory, or manufacturing establishment, except for three hours of overtime compensated at a premium.\textsuperscript{388} On behalf of Oregon, Frankfurter submitted a one-thousand page brief, the longest yet, dedicated to proving that long working hours were as detrimental to men as to women.\textsuperscript{389}

Bunting changed the emphasis in the argument about externalities to society. Society needed women to be protected because of their status as mothers of the race. Men needed protection so that they could value leisure and recreation, and society could reap the benefits of citizenship made possible by shorter hours. The brief quoted economists, social reformers, and other authorities who argued that with fewer hours at work men would educate themselves by going to libraries, night schools, and public lectures and thereby enhance civic life.\textsuperscript{390} It also argued that education was a necessary part of good citizenship and intelligent use of the vote.\textsuperscript{391} Without any reference to Allgeyer, Lochner, or Holden, the Bunting Court agreed with Frankfurter's arguments by a vote of 5 to 3, with Justice Brandeis again recused.\textsuperscript{392}

At first glance, it would appear that Bunting and Stettler cannot be reconciled with the conception of Hierarchic Fairness constructed in Allgeyer and Lochner. Under the reasoning of the briefs in Stettler and the Court's decision in Bunting, every worker forced by an employer's superior bargaining position to enter into a disadvantageous wage or hour deal could claim that his disadvantage resulted in societal externalities. Thus, every worker could call upon the state to intervene on his behalf, just as the proponents of Absolute Fairness and Bargaining Fairness had argued.

Undeniably, it is possible that Bunting and Stettler signaled the Court's re-thinking of Hierarchic Fairness in favor of Bargaining

\textsuperscript{387} 243 U.S. 426 (1917).
\textsuperscript{388} See id. at 433-34.
\textsuperscript{389} See BAER, supra note 8, at 89.
\textsuperscript{390} See id. at 90.
\textsuperscript{391} See id. at 89-90; Lipschultz, supra note 8, at 11.
\textsuperscript{392} In Wilson v. New, 243 U.S. 332 (1917), the same Court upheld an eight-hour day for employees of interstate carriers and a temporary minimum wage scale without any reference to these three cases. The Court typically distinguished contracts to which the government was a party from contracts between private parties. The freedom of contract found in the latter was not found in the former. See Atkin v. Kansas, 191 U.S. 207, 220-21 (1903) (stating there is no freedom of contract where the government is a party).
Fairness. A second analysis, more likely given the Court's return to Hierarchic Fairness in later years, begins from the premise that Supreme Court decision-making does not occur in a political vacuum. A substantial socio-economic crisis had arisen which shifted the balance of power in favor of workers. *Bunting* and *Stettler* were both decided during World War I just prior to the entry of the United States.

World War I, like many wars, effected a labor supply problem in the United States. After a sizable number of men were conscripted into military service, the remaining able-bodied men would be needed for the war industries. The war had already caused a drastic reduction in the supply of immigrant workers who supplied industry with a cheap and ready supply of labor. From 1914 to 1915, immigration declined from 1.2 million to roughly 300,000. The labor supply problem was further complicated in 1917 with the passage of a law over President Wilson's veto requiring any immigrant older than sixteen seeking admission to the United States to demonstrate the capacity to read English or some other language. The purpose of the law was to discriminate against immigrants from southern and eastern Europe who were thought to be less literate than their northern European counterparts. The effect was a further reduction in the number of immigrants available to work, particularly in lesser skilled jobs. Industry needed a steady and reliable flow of healthy and able American men and women and a minimum of industrial strife to supply the war effort adequately. Instead, important industries faced labor shortages.

Concern over wages could easily have stanched the flow of labor into the war industries. The cost of living between 1915 and 1920 rose at two-and-one-half times the rate of increase from 1894 to 1914. Cost of living increased thirteen percent from the end of 1915 to the end of 1916, and twenty percent from 1916 to 1917. From 1916 to 1917, factory workers experienced a seven percent loss in the purchasing power of their wages. Cost of living rose another thirty-one percent from December 1917 to December 1918, with significant wage increases still falling well behind cost of living.

393. See Foner VI, supra note 151, at 192.
394. See id.
396. See id. at 64.
397. See id. at 65.
398. See id. at 66.
399. See id. at 67 (stating that the wage increases did not equal the rise in living costs in most industries).
Declining real wages might have inspired some workers to work harder, but it might have caused others to drop out of the labor force or seek employment outside the war industries. Further, unduly hard work for those recruited to the war industries might have resulted in the litany of horrors—including rising inefficiency—listed in the Bunting, Stettler, and Muller briefs. The federal government could not risk failure as it prepared for and fought the war. Thus, the judicial conception of Hierarchic Fairness may have yielded to Bargaining Fairness laws in Bunting and Stettler as a service to the American war effort.400

An important indication of the rising political importance of workers’ interest in the living wage can be found in the response of the federal executive branch to the labor supply crisis. On April 9, 1918, President Wilson signed an official proclamation creating the War Industries Board, the Labor Policies Board, and the National War Labor Board ("NWLB").401 The first two entities established policies of industrial control and administration. The latter entity was judicial. In determining wage and workplace disputes, the NWLB applied principles and standards agreed to by the AFL, speaking for labor, and the National Industrial Conference Board, representing capital.402 These principles were enshrined in Wilson’s proclamation and thereby made binding on all government departments and procurement agencies for the duration of the war.403

One of the proclamation’s original goals was to sustain pre-war real wages throughout the course of the conflict. Achieving this result required assuring workers cost-of-living adjustments. The Bureau of Labor Statistics ("BLS") was directed to formulate an index based on pre-war conditions and determine a cost-of-living index periodically,

400. Accepting this interpretation of Bunting and Stettler does not require rejecting the seriousness of the Spencerists’ purpose. Lochner left open the possibility of putting aside the status quo to protect against significant threats to societal interests. American interests lay in prosecuting the war, according to the government. A more cynical, and questionable, case could be made that Hammer v. Dagenhart, 247 U.S. 251 (1918), served the same purpose by effectively prohibiting federal regulation of child labor in legitimate industries.

401. See LAUCK, supra note 19, at 42-43.

402. See id. at 43.

403. See id. at 42-43; see also PHILIP S. FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES: VOLUME VII: LABOR AND WORLD WAR I, 1914-1918 174-76 (1987) (hereinafter FONER VII) (discussing the origins and principles of the NWLB). W. Jett Lauck served as Secretary to the NWLB. See HENRY F. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 916 (1939). Lauck’s economic history cited here built on earlier work he performed, including two documents Lauck prepared for the United Mine Workers’ presentation to the United States Anthracite Coal Commission in support of that union’s claim for a living wage in 1920: WHAT A LIVING WAGE SHOULD BE and THE SANCTION FOR A LIVING WAGE.
usually every six months, throughout the course of the war. Although the original plan called for taking local standards and customs into account, the NWLB abandoned this effort to avoid the migration of labor toward better conditions and higher earnings and because it concluded that regional differentials were not significant.

The wages goal evolved to include the enforcement of a living wage. The NWLB assumed the responsibility for addressing the problem of unskilled workers' below-subsistence wages with a new policy adopted in 1918: "1. The right of all workers, including common laborers, to a living wage, is hereby declared. 2. In fixing wages, minimum rates of pay shall be established which will insure the subsistence of the worker and his family in health and reasonable comfort." The NWLB's definition of a "living wage" made provision for the physical needs of wage-earners and their families, but also provided for social needs such as some degree of recreation, reading, essentials of health preservation, decent clothing for social intercourse, and a minimum amount of health and life insurance.

It turned out, however, that living wages so far exceeded the wages then being paid to unskilled workers that the NWLB feared the potential dislocating effects of an immediate and sudden application of its new policy. In 1918 and 1919, the BLS and the NWLB made an investigation into the cost of living in industrial centers in the United States. The study found that the average income for a family of five for one year was $1,513.29, with ninety-six percent of the income coming from wages. But the study also found that, after accounting for expenditures on the principal items of living such as food, clothing, rent, fuel and light, furniture and furnishings, 43.4% of families earning less than $900 experienced a deficit in their family budget at the end of the year. Similarly, 34.6% of families earning between $900 and $1,200 per year experienced a deficit, and almost 25% earning between $1,200 to $1,500 experienced a deficit. Too many people received wages too

404. See LAUCK, supra note 19, at 42-43.
405. See id. at 45.
406. Id. at 47-48. Along with the living wage principle, the Board's principles included an endorsement and protection of collective bargaining that was a clear precursor to the NIRA's section 7 and the National Labor Relations Act. See FONER VII, supra note 403, at 175; PRINGLE, supra note 403, at 918.
407. See LAUCK, supra note 19, at 48, 152.
408. See id. at 76.
409. See U.S. BUREAU OF LABOR STATISTICS, COST OF LIVING IN THE UNITED STATES 4 (Bulletin No. 357 May 1924).
410. See id. at 5.
far below a living wage. Unable to apply its own generous wage standard, the NWLB revised its policy on the motion of former President William H. Taft, one of its public Joint-Chairmen. The revised policy required a living wage only in those cases where wages were abnormally low and where the physical maintenance of labor for war production was being impaired. 411

When the war and its labor supply crisis ended, the living wage movement's political bargaining power receded to its pre-war levels. As a result, workers saw little lasting improvement in wages. 412 By 1919, retail prices had doubled from their 1914 levels, far outstripping increases in wages. 413 In 1919 and 1920, wages continued to chase prices unsuccessfully, with unskilled workers falling farthest behind. 414 A depression hit in 1920 and 1921 leaving roughly twenty-one percent of all workers unemployed, unable to satisfy even a declining cost of living. 415 The New York Consumers' League estimated that the living wage for a woman in 1919 was $15.00, while the District of Columbia Wage Commission estimated it to be $16.50. 416 Wages did not match these cost-of-living estimates. The New York Industrial Commission found that sixty percent of women working in factories and sixty-one percent in stores still received less than $14.00 per work week. In 1923, fifty-seven percent of the factory women in four of the largest industries in New York were being paid less than $16.00 per week. The Women's Bureau found from 1920 to 1924 that state averages ranged from $11.60 in Arkansas to $14.95 in New Jersey. A series of subsequent studies through the 1920s found that there was little improvement in wages and that the majority of low-skilled industrial workers in the United States received wages too small for decent self-support. 417

At the end of the war, both capital and labor were unhappy. The cost of living advanced more rapidly than wages during the war, so labor wanted restraints on wages lifted. Employers wanted to be free of government intervention. 418 Only the social reformers who constituted the living wage movement, including John Ryan and the National Catholic War Council, wanted to continue enforcement of the principles set forth in President Wilson's proclamation and the operation of the

411. See LAUCK, supra note 19, at 50, 152-53.
412. See id. at 50.
413. See Lescohier, supra note 19, at 76.
414. See id.
415. See id. at 79.
416. See id. at 528.
417. See id. at 77.
418. See LAUCK, supra note 19, at 50-51.
NWLB. In 1919, the Administrative Committee of the National Catholic War Council turned to its Committee on Reconstruction. \(^{419}\) The Committee prepared a plan of social reconstruction, written by John Ryan, that was issued as the "Bishops’ Program for Social Reconstruction." \(^{420}\) Central to the Social Reconstruction Program was maintaining the progress made under the NWLB, its principle of the family living wage, and its protection of the right of labor to organize and bargain collectively. The Reconstruction Program endorsed state minimum wage laws with minimum wage levels slowly increasing over time so that individuals could protect their families against sickness, accidents, invalidism, and old age. \(^{421}\) But the bargaining power of the living wage movement, enhanced by the labor supply crises that attended World War I, had faded and, with it, the prospects for continued living wage legislation.

**D. Striking Down the Minimum Wage with a Reassertion of Hierarchic Fairness**

The only new minimum wage law between 1918 and 1925 was enacted by Congress for the District of Columbia. The District of Columbia’s law was based on Oregon’s law and Bargaining Fairness. \(^{422}\) But the personnel on the Supreme Court changed dramatically at the start of the 1920s to reflect the conservative resurgence after Woodrow Wilson’s presidency. \(^{423}\) William Howard Taft, former President and sponsor of the living-wage limiting policy at the NWLB, became Chief Justice on June 30, 1921. \(^{424}\) He remained until February 3, 1930. \(^{425}\) Taft’s view of workers fell well short of salutary. For example, when the newspapers reported that federal troops had killed thirty American Railway Union workers striking against the Pullman Company, Taft reportedly wrote: “Everybody hopes that it is true.” \(^{426}\)

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419. See id. at 54-55.
420. See RYAN, SOCIAL DOCTRINE, supra note 101, at 228.
421. See Ryan, Social Reconstruction, supra note 108, at 589-606; RYAN, SOCIAL DOCTRINE, supra note 101, at 146-47.
422. See BERNSTEIN, supra note 371, at 228-29.
423. See id. at 191.
424. See id. at 190.
425. See id.
426. Id.; see also DAVID H. BURTON, WILLIAM HOWARD TAFT: IN THE PUBLIC SERVICE 118 (1986) (stating that Taft’s service on the NWLB showed a surprising sense of “fair play toward labor not to be expected from a former judge who had a reputation for being hostile to workers”); PRINGLE, supra note 403, at 915 (“Organized labor had long viewed him as hostile to its interests.”).
Taft was only one of President Harding’s four appointments. Harding also added George Sutherland, Pierce Butler, and Edward T. Sanford to the Court. With Willis Van Devanter, James Clark McReynolds, and Joseph McKenna, they formed a conservative majority that Taft seemingly could move to serve his purposes. But George Sutherland was a man with an idea. He had studied Herbert Spencer’s philosophy closely.427 Like Spencer, he viewed the individual as the defining political reality and concluded that his task was to expand personal freedom by reducing government intervention as much as possible. Sutherland applied his philosophy of individual freedom evenly. As a United States Senator from Utah in 1916, for example, Sutherland had spoken vigorously for women’s suffrage just as Spencer had advocated for the equality of women.428 Sutherland would move the Court when it came to minimum wages.

The District of Columbia minimum wage law arrived at the Supreme Court for review in Adkins v. Children’s Hospital,429 which was heard and decided in 1923. Elizabeth Brandeis, daughter of the Supreme Court justice and a member of the District of Columbia Wage Board, had earlier used a summer vacation in Europe shared by the Brandeis and Frankfurter families to recruit Felix Frankfurter to serve as the attorney for the Board.430 Frankfurter intended to pursue the same strategy of establishing the existence of a societal nuisance that had succeeded in Muller, Stettler, and Bunting. But when Frankfurter and Mary Dewson, who replaced Josephine Goldmark at the NCL, began collecting data for the case, they were concerned about the lack of available evidence of conditions in the District of Columbia. They relied on the Monthly Labor Review, BLS reports, and a 1919 wage survey of hotel, restaurant, club, and hospital workers, but there had never been a wages survey for the entire District. Nonetheless, Dewson collected sufficient factual data to fill a 1,138-page tome.431

The brief sought to correct the strategic error in Muller by de-emphasizing female dependence, difference, and domesticity in favor of a focus on female responsibility and independence. The strategic shift was also intended to broaden the Muller rationale to encompass

427. See Bernstein, supra note 371, at 228.
428. See id. at 191, 228; see also Spencer, Social Statics, supra note 311, at 73-79; Burton, supra note 426, at 133-35 (discussing the conservatism and anti-labor slant of the Taft Court).
429. 261 U.S. 525 (1923).
430. Vose, supra note 134, at 280-81.
431. See id. at 267, 280-81; Lipschultz, supra note 8, at 97, 125.
minimum wage statutes, thereby reaffirming the apparent victory in *Stettler* for the conception of Bargaining Fairness. The brief offered evidence that women had responsibility for the support of others, including parents, children, and sometimes husbands and siblings. In the District of Columbia, thirty-one percent of female workers lived away from home and supported themselves, while twenty-one percent supported dependents, and forty-five percent needed outside assistance to subsist. Many lived at home, but that did not mean that they received support from their families. Many supported themselves and their families. Studies with similar findings were collected from Arkansas, California, and Georgia.

With this evidence, Frankfurter revised the argument from *Stettler* and stepped away from the defense of women as reproductive vessels. Poverty and its ill effects would become the societal nuisances that justified government intervention in the employer-worker bargain. Upon establishing women as providers for their families, Frankfurter would assert that low wages were linked to poor nourishment and lack of medical care for families as well as for the women themselves. The cycle of "poor health’ and ‘poor wages’” was a “descending spiral into the regions of destitution.” He linked women’s wages to infant care, thereby emphasizing the passage of destitution from one generation to the next. He reiterated that women could not protect themselves from the forced sale of their labor because they did not and could not join unions. The individual woman had no choice but to take the wages offered. Thus, the state must be permitted to intervene to protect women and society.

Justice Sutherland and the conservative majority on the Supreme Court rejected Frankfurter’s arguments, but found themselves constrained in their reasoning by precedent. For Sutherland, *Lochner* and Hierarchic Fairness remained good law: “[F]reedom of contract is... the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances.” But *Muller* and *Bunting* had intervened.

433. See id. at 135, 139.
434. Adkins v. Children’s Hosp., 261 U.S. 525, 546 (1923). Chief Justice Taft, in dissent, explicitly stated his view that *Lochner* was no longer good law: “It is impossible for me to reconcile the *Bunting Case* and the *Lochner Case* and I have always supposed that the *Lochner Case* was thus overruled *sub silentio.*” Id. at 564 (Taft, C.J., dissenting). At least two of Taft’s biographers credit his service on the NWLB “which had brought him face to face with the exploitation of workers” for his dissent in *Adkins*. BURTON, *supra* note 426, at 135; see also PRINGLE, *supra* note 403, at 915-16. The more likely explanation is that Taft’s support for the
and Sutherland was forced to address them. Rather than contest the facts of working women's economic lives or their importance to society, Sutherland returned to *Lochner*'s focus on whether women needed the state's protection.

The heart of the *Adkins* decision was a return to *Lochner*'s focus on political rights and legal equality. Sutherland never challenged the living wage movement's diagnosis of the labor market. In his Spencerist view, however, it was an invalid basis for government intervention. The women employees of Children's Hospital, Sutherland noted, "were all of full age and under no legal disability." Plaintiff Lyons was a twenty-one-year-old hotel elevator operator capable of deciding that she should not earn more than her sub-minimum wage of thirty-five dollars per month.

[T]he ancient inequality of the sexes, otherwise than physical, as suggested in the *Muller Case* has continued 'with diminishing intensity.' In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point. In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances.

Unable to rely on a purported threat to society's interest in women's reproductive systems, government had no authority to intervene in the employer's and worker's liberty to exercise their faculty for bargaining. This argument went too far even for Chief Justice Taft: "The Nineteenth Amendment did not change the physical strength or limitations of women upon which the decision in *Muller v. Oregon* rests." Justice

minimum wage law was aberrational and due to his loyalty to precedent and stability. See Alpheus Thomas Mason, William Howard Taft: Chief Justice 250-51 (1981). Nonetheless, Taft arrived at his vote to uphold the District of Columbia minimum wage law despite a grave dislike for Louis Brandeis, its principal proponent and father of one of its administrators. See Pringle, supra note 403, at 952-53, 970-71.

436. *See id.*
437. *Id.* at 553 (citation omitted).
438. *Id.* at 567 (Taft, C.J., dissenting).
Holmes agreed: "It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account."\(^{439}\)

Rationalizing away gender differences allowed Sutherland to sidestep Muller and perhaps Stettler, but it did not address Bunting. To accomplish this feat, Sutherland relied on the old distinction between hours laws and wages laws that had separated the living wage movement from the labor movement and helped to inspire the IWW-led textile strike at Lawrence, Massachusetts.\(^460\) Hours laws redressed threats to health, safety, and well-being, while wage laws addressed only money, said Sutherland.\(^441\) The police power could be used to protect health, because society had an interest in health, but it could not be used to redistribute money merely to avoid the imposition of pain on some members of society.\(^442\) Of course, the District of Columbia's law was a wage-fixing law that did not, in Sutherland's estimation, affect workers' health or society's interests.\(^443\) Bunting was inapposite, according to Sutherland.

To this point in his decision, Sutherland had merely revived the conception of Hierarchic Fairness that had yielded to Bargaining Fairness in the days leading up to World War I. Apparently unsatisfied that he had defeated the conception of Bargaining Fairness once and for all, however, Sutherland imported the Marginal Productivity Theory into his decision and introduced an entirely new conception of fairness—Fairness as Commutative Justice—into the debate over fairness in wages.

The wages set by the District of Columbia's minimum wage law were not required to bear any relation to the capacity or earning power of the worker, Sutherland noted.\(^444\) Employers may or may not have received services worthy of the wage:

To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for

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439. \(\text{id. at } 569-70\) (Holmes, J., dissenting).
440. See Adkins, 261 U.S. at 554.
441. See id.
442. See id. But see Bosley v. McLaughlin, 236 U.S. 385 (1915) (upholding a law protecting women working in hospital pharmacies).
443. Both Holmes and Taft also disagreed with the distinction Sutherland drew between wages and hours: "One is the multiplier and the other the multiplicant." Adkins, 261 U.S. at 564 (Taft, C.J., dissenting); id. at 569 (Holmes, J., dissenting) (discussing Justice Holmes' lack of understanding for an equal minimum wage for women).
444. See id. at 557.
the support of a partially indigent person, for whose condition rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole. ... The moral requirement implicit in every contract of employment, viz, that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. 445

This appeal to Commutative Fairness appropriated the argument relied upon by the living wage movement that employers failing to pay a living wage received a subsidy from the worker, her family, and society. In Sutherland’s world, where an overgeneralized form of marginal productivity analysis rose to the level of morality, it was the statutorily protected worker being subsidized by the employer and society. 446

Sutherland’s excessive exuberance for striking down Bargaining Fairness created three problems for opponents of minimum wage laws. First, Sutherland’s embrace of the Marginal Productivity Theory overreached even the internal logic of that theory. Classical and neoclassical economists could not support a suggestion that a supply and demand model requires that every worker receive a wage equal to her marginal productivity. Marginal Productivity Theory suggests the mere tendency that the last worker hired would receive such a wage. Even reaching this far requires assumptions about rational employer behavior which may not prove true in practice. Further, measuring individual workers’ productivity may be impossible in most cases. It necessarily follows that enforcing a law based on the premise that it could be measured would lead to failure.

Second, and more troubling for the advocates of Hierarchic Fairness, Sutherland’s conception of Commutative Fairness directly contradicted Lochner and Spencer. If equivalence of exchange is the moral requirement implicit in every contract of employment, as Sutherland suggested, then many unregulated waged deals could be immoral. Government cannot at once leave wage deals to the contracting parties while at the same time intervene to assure that each party receives a fair exchange.

Finally, and most important for the history of the debate over fairness in wages, Sutherland’s detour into marginal productivity theory opened a new strategic path for the advocates of Bargaining Fairness laws. Adkins dealt a serious blow, almost a deathblow, to the living

445. Id. at 557-58.
446. See id. at 558.
wage movement. But after Adkins, the living wage movement could gasp for air through Sutherland's marginal productivity loophole. New Bargaining Fairness laws would require a wage commensurate with the value of the worker's product, or a "fair wage." Frankfurter's view was that adding this requirement would not change the practice of existing wage boards, which already took other wage levels and the economic conditions of the involved industries into account. The only alternative was to amend the Constitution, which met with little support even among supporters of the living wage.

This Adkins-derived strategy led to two new minimum wage laws: Wisconsin's law of 1925 and New York's law of 1933. The New York law created a two-step analysis. First, it established a civil offense for paying an oppressive or unreasonable wage that was "both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health." Second, the law established that the remedy for this offense would be a wage fairly and reasonably commensurate with the value of the service or class of service rendered.

In 1936, the New York law reached the Supreme Court in Morehead v. New York ex rel. Tipaldo. But the Court refused to address the apparent Adkins loophole directly. Rather, it relied on the New York Court of Appeals' conclusion that the New York law should be read as effectively equivalent to the District of Columbia law. Adkins, therefore, governed. Indirectly, the Supreme Court majority backed away from Sutherland's conception of Commutative Fairness:

[T]he dominant issue in the Adkins Case was whether Congress had power to establish minimum wages for adult women workers in the District of Columbia. The opinion directly answers in the negative. The ruling that defects in the prescribed standard stamped that Act as arbitrary and invalid was an additional ground of subordinate consequence.

448. Id. at 98.
449. See BAER, supra note 8, at 139-42.
451. See id. at 608.
452. See id. at 609.
453. Id. at 614.
The Court also refused to consider overruling *Adkins*, hiding behind the appellant’s failure to request it.\(^{454}\)

**E. Resurrection in a West Coast Hotel**

*Morehead* was decided in June 1936. Franklin Delano Roosevelt was elected to a second term as President in November 1936. On March 29, 1937, the Supreme Court decided *West Coast Hotel Co. v. Parrish*,\(^{455}\) and ended the reign of Hierarchic Fairness. *Parrish* came to be known as the “switch in time that saved nine,” with Justice Owen Roberts changing his vote to join the 5 to 4 majority that upheld Washington’s state law, thereby preempting President Roosevelt’s court-packing plan.

Chief Justice Hughes, who dissented vigorously in *Morehead*, launched a frontal assault on *Adkins* and the conception of Hierarchic Fairness in his decision for the Court in *Parrish*.\(^{456}\) He began by sweeping aside the idea that the purported liberty of contract was entitled to special constitutional protection:

> What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law... But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people.\(^{457}\)

Hughes then proceeded to reinstate the three-part analysis from *Muller* and *Bunting* and clean up the mistakes that had been made along the way.\(^{458}\) First, workers and employers are unequal in the labor market, a circumstance “peculiarly applicable in relation to the employment of women in whose protection the State has a special interest.”\(^{459}\) Second, women are especially subject to exploitation and low wages, not because of physical differences, but because of their socio-economic position.\(^{460}\) Finally, society suffers the externalities of these exploitative

\(^{454}\) See id. at 604.

\(^{455}\) 300 U.S. 379 (1937).

\(^{456}\) See *Parrish*, 300 U.S. at 391.

\(^{457}\) Id.

\(^{458}\) See id. at 393-99.

\(^{459}\) Id. at 394.

\(^{460}\) See id. at 398 (“The [New York State] legislature... was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances.”).
wage deals and is entitled to protect itself by protecting women in the labor market.\textsuperscript{461} With this analysis, \textit{Adkins} was overruled and the way was cleared for state minimum wage laws and the conception of Bargaining Fairness.\textsuperscript{462}

In sum, after succeeding in some state legislatures in the early 1910s, and briefly in the Supreme Court and the Executive Branch leading up to and during World War I, the living wage movement found itself unable to win a significant battle in the 1920s.\textsuperscript{463} By 1933, only nine state minimum wage laws remained. Of these, two were rendered inoperative by state legislatures’ failure to appropriate enforcement funds, and two effectively protected only minors. No state minimum wage laws, other than Wisconsin’s \textit{Adkins}-inspired revision, were enacted during the decade.\textsuperscript{464} Even before \textit{Adkins}, laws previously enacted were repealed in two states.\textsuperscript{465} The conception of Hierarchic Fairness reigned through most of the first three decades of the twentieth century until the economic earthquake of the Depression struck.

It is tempting to explain the failure of the living wage movement and the extended success of the Hierarchic Fairness by pointing to the apparent prosperity of 1920s America and suggesting that a widespread contentment with economic conditions dampened the public’s ardor for minimum wage legislation. Some evidence would support such an explanation. The average national income increased by more than 43% from 1922 to 1929, an average of 6.25% per year.\textsuperscript{466} The share of national income going to wages increased 41.5%, although the share allotted to dividends increased 110%.\textsuperscript{467} According to Paul Douglas, author of \textit{Wages and the Family}, the average annual earnings of large city residents working in all industries increased from $1,288 in 1923 to $1,405 in 1928, or 9.1%.\textsuperscript{468} Real earnings increased 10.9% during the same period.\textsuperscript{469} Average hourly earning in all industries increased from

\textsuperscript{461} See Parrish, 300 U.S. at 399 ("The exploitation of a class of workers who are in an unequal position with respect to bargaining power . . . is not only detrimental to their health and well being but casts a direct burden for their support on the community. What these workers lose in wages the taxpayers are called upon to pay.").

\textsuperscript{462} See id. at 400.

\textsuperscript{463} See, e.g., \textit{Adkins}, 261 U.S. at 526 (holding that the Minimum Wage Act of 1918 unconstitutionally interfered with the liberty of contract).

\textsuperscript{464} See Cheyney, supra note 249, at 38.

\textsuperscript{465} See id. at 28.

\textsuperscript{466} See BERNSTEIN, supra note 371, at 54.

\textsuperscript{467} See id.

\textsuperscript{468} See id. at 64-65 (citing PAUL H. DOUGLAS, WAGES AND THE FAMILY 5, 5-6 (1925)).

\textsuperscript{469} See id. at 65.
66.2 cents in 1923 to 71 cents in 1928.\textsuperscript{470} Average weekly earnings in all industries increased from $30.39 in 1923 to $33.32 in 1928.\textsuperscript{471}

But aggregate economic data almost always mask the realities of working families’ lives. In 1929, there were approximately 27,470,000 families of two or more persons.\textsuperscript{472} Paul Douglas, in his 1925 study, identified four standards of living: “poverty” (an inadequate diet, overcrowded living arrangements, and no resources for unexpected expenses);\textsuperscript{473} “minimum subsistence” (sufficient to meet physical needs, with nothing left over for emergencies or pleasures);\textsuperscript{474} “minimum health and decency” (adequate food, housing, and clothing as well as a modest balance for recreation);\textsuperscript{475} and minimum comfort or the “American standard” of living.\textsuperscript{476} Living just beyond poverty required a family of five to earn between $1,000 to $1,100 per year.\textsuperscript{477} In pre-Depression 1929, there were 5,899,000 families that did not earn enough to achieve that standard of living.\textsuperscript{478} Minimum subsistence required between $1,100 and $1,400 for a family of five in one year.\textsuperscript{479} In 1929, there were 11,653,000 families that earned less than $1,500.\textsuperscript{480} Minimum health and decency required between $1,500 and $1,800.\textsuperscript{481} In 1929, 16,354,000 families earned less than $2,000.\textsuperscript{482} Twenty million earned less than $2,500 annually, and 21,546,000 families, constituting 78.4% of the total, had no savings at all.\textsuperscript{483}

Many factors accounted for this want among plenty. One of the most important was a dramatic population shift associated with the now-mature industrial revolution. From 1920 to 1929, 19,436,000 people moved from the farm to large and small towns.\textsuperscript{484} From 1915 to 1928, 1.2 million African-Americans migrated from South to North after finding a foothold in the war industries.\textsuperscript{485} This mass migration was

\begin{footnotesize}
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  \item \textsuperscript{470} See id. at 66.
  \item \textsuperscript{471} See BERNSTEIN, supra note 371, at 66.
  \item \textsuperscript{472} See id. at 63.
  \item \textsuperscript{473} See id. at 64.
  \item \textsuperscript{474} See id.
  \item \textsuperscript{475} See id.
  \item \textsuperscript{476} See BERNSTEIN, supra note 371, at 64-65.
  \item \textsuperscript{477} See id. at 64.
  \item \textsuperscript{478} See id.
  \item \textsuperscript{479} See id.
  \item \textsuperscript{480} See id.
  \item \textsuperscript{481} See BERNSTEIN, supra note 371, at 64.
  \item \textsuperscript{482} See id. at 64-65.
  \item \textsuperscript{483} See id. at 63.
  \item \textsuperscript{484} See id. at 48.
  \item \textsuperscript{485} See id. at 49.
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caused, in part, by the economic paradox of rural depression in the midst of relative urban prosperity. Agriculture prices collapsed in the depression of 1921 and did not recover. City incomes, even sweatshop incomes, were an improvement for farm families. In addition, technological farming with trucks and combines increasingly became the rule rather than the exception. As a result, industrial employers had at their disposal a great pool of working men and women accustomed to low wages and intermittent work to relieve the increasing demand for labor.

The total number of gainfully employed workers increased from 41.6 million to 48.8 million, or 17.4%, between 1920 and 1930, while the number of women aged fifteen and over gainfully employed rose 27.4%, from 8.3 million to 10.6 million. Almost twenty-five percent of the workforce were women by 1930 and almost twenty-five percent of women worked. This significant growth in the workforce coincided with a growing trend towards mechanization of industry. Part of the result was a dramatic increase in productivity during the 1920s.

Between 1919 and 1929, output per person-hour rose seventy-two percent in manufacturing, thirty-three percent in railroads, and forty-one percent in mining. As a result of all these factors, and the rising importance of technology in industry, the typical employer hired workers at will. Just as the socio-economists had described, the person seeking work in most cases was both powerless and incapable of exercising a rational choice if alternatives were even available. Women, a rising share of the workforce, remained largely unorganized and even more powerless than men. Competition among workers further weakened their already weak bargaining position. At least one estimate put unemployment between ten and thirteen percent between 1924 and 1929. Low-wage

486. See Bernstein, supra note 371, at 48.
487. See id.
488. See id.
489. See id.
490. See id. at 48-49.
491. See Bernstein, supra note 371, at 55.
492. See id. at 55-56.
493. See id. at 54.
494. See id.; see also Galenson & Smith, supra note 157, at 12-13.
495. See Bernstein, supra note 371, at 57.
496. See id.
497. See id. at 56 (discussing how women refrained from organizing).
498. See id. at 59.
499. See id.
workers needed protection from employers exercising their superior bargaining power in the labor markets of the 1920s as much as they had in the 1910s. 500

Economic and social justification for state intervention in the labor market certainly remained. But the 1920s lacked a social or political crisis to galvanize the political bargaining power of worker advocates. In the absence of power like that made possible by the IWW strike or the labor supply crisis of World War I, the living wage movement could not advance its cause. Further, the living wage movement had not healed its long-standing rift with the labor movement. The political bargaining power that worker advocates could claim was diffused, and workers were left without remedial legislation.

V. FAIRNESS IS FAIR COMPETITION

A. Franklin and Frances: Experience and Understanding

The onset of the Depression effected a deep crisis in the lives of working families and the political life of the nation. 501 National income was cut in half. Real factory payrolls were the lowest since the turn of the century. Actual wages were lower and hours of work were longer than at any time since World War I. 502 The average weekly earnings of workers in manufacturing industries fell from approximately $28.50 to $14.50. 503 Employment was lower than at any time since 1910, with unemployment encompassing one third of the working population. 504 By 1933, for every three unemployed Americans, there were two part-time workers. 505 President Roosevelt summarized the conditions in a speech to the United States Chamber of Commerce:

It is a simple fact that the average of the wage scale of the Nation has gone down during the past four years more rapidly than the cost of living. It is essential, as a matter of national justice, that the wage scale

500. See BERNSTEIN, supra note 371, at 48-49 (discussing how much power employers had over workers).
501. See generally Hearings, supra note 102, at 156-57 (testimony of Leon Henderson, Director of Research and Planning Division of the National Recovery Administration).
502. See id.
503. See id.
504. See id. at 156 (testimony of Leon Henderson).
505. See id.
should be brought back to meet the cost of living and that this process should begin now and not later.\textsuperscript{506}

The economic crisis dramatically improved the political bargaining position of the forces seeking to enact statutory minimum wages. Roosevelt and his Secretary of Labor Frances Perkins would spend the next five years trying to enact into law some conception of fairness in wages that would, once and for all, remedy the inadequate wages that resulted from unequal bargaining power in the labor market.

Neither Roosevelt nor Perkins was new to the debate over fairness in wages. Perkins began her career as an important but lesser player supporting Florence Kelley.\textsuperscript{507} Perkins first joined the NCL while a student at Mount Holyoke College after hearing Kelley speak in 1902.\textsuperscript{508} In 1909, Perkins succeeded Pauline Goldmark as the Secretary of the New York City Consumers' League while also studying sociology at Columbia University.\textsuperscript{509} She began in October 1910 to survey the working conditions in New York's bakeries, becoming the state's leading expert.\textsuperscript{510}

Perkins soon focused her efforts on enacting a bill to establish a fifty-four hour workweek for women and children.\textsuperscript{511} Perkins met Roosevelt in 1910 while he was a state senator and she was the chief lobbyist for the hours bill in Albany.\textsuperscript{512} In Perkins's words, support for the bill "was a measure of the progressive convictions of the politicians of 1910."\textsuperscript{513} Years later, Perkins remembered that Roosevelt did not actively associate himself with the hours bill.\textsuperscript{514} In a speech to the Young Democratic Clubs in 1935, Roosevelt remembered his role more charitably:

In 1911, twenty-four years ago, when I was first a member of the New York State Legislature, a number of the younger members of the


\textsuperscript{507.} See MARTIN, supra note 133, at 52.

\textsuperscript{508.} See id.

\textsuperscript{509.} See id. at 77; see also FRANCES PERKINS, THE ROOSEVELT I KNEW 9 (1946) (discussing how she went to Columbia for a Master's Degree).

\textsuperscript{510.} See MARTIN, supra note 133, at 77-78.

\textsuperscript{511.} See PERKINS, supra note 509, at 10.

\textsuperscript{512.} See id. at 9, 10-13.

\textsuperscript{513.} Id. at 14.

\textsuperscript{514.} See id.
Legislature worked against these old conditions and called for laws
governing factory inspection, for workmen’s compensation and for the
limitation of work for women and children to fifty-four hours, with
one day’s rest in seven. Those of us who joined in this movement in
the Legislature were called reformers, socialists, and wild men.\textsuperscript{515}

Even with the success of the hours bill, it was the Triangle Shirt
Waist Factory fire in the next year that changed the political calculus
around fairness in wages and working conditions in New York. It also
sparked the creation of the New York State Factory Investigating
Commission and an overhaul of New York’s labor laws.\textsuperscript{516} Future
Governor Alfred E. Smith and future Senator Robert Wagner got their
education in the realities low-wage workers’ lives as members of the
Factory Investigation Commission ("FIC").\textsuperscript{517} Perkins served as an
investigator for the FIC, and took Smith and Wagner to see the
conditions personally. As Perkins explained, "[t]hey got a firsthand look
at industrial and labor conditions, and from that look they never
recovered. They became firm and unshakable sponsors of political and
legislative measures designed to overcome conditions unfavorable to
human life."\textsuperscript{518}

By contrast, Franklin Roosevelt had been called to Washington by
President Wilson in 1913 and did not learn about the conditions
experienced in New York’s sweatshops.\textsuperscript{519} As a devotee of Woodrow
Wilson’s brand of liberal social justice, Roosevelt was responsive to the
ideas, but he never saw the evidence personally.\textsuperscript{520} Eleanor Roosevelt,
who had joined the NCL and, after the war, the WTUL, underwent the

\textsuperscript{515.} A Radio Address to the Young Democratic Clubs of America, August 24, 1935, in \textit{4 THE}
PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE COURT DISAPPROVES 1935 341
(1938). Perkins’s gentle and implied criticism of Roosevelt accurately reflects Roosevelt’s
ambivalence about the fifty-four-hours bill, but probably understates Roosevelt’s overall record of
support for progressive labor legislation during his years as a state legislator. \textit{See \textsuperscript{FUSfeld, supra}
note 170, at 46-47 (describing Roosevelt’s active support for numerous labor and employment
laws and his membership in the American Association for Labor Legislation).

\textsuperscript{516.} \textit{See generally \textsuperscript{Martin, supra} note 133, at 84-89 (discussing the fire and its aftermath,
including a description of the investigation and the mass meeting held on the fire at the
Metropolitan Opera House); Wandersee, \textit{supra} note 247, at 11 (noting that Perkins worked on the
Triangle Commission after the fire, an experience that convinced her that government would need
to assume responsibility for the health and safety of America’s working class).

\textsuperscript{517.} \textit{See \textsuperscript{Perkins, supra} note 509, at 17.}

\textsuperscript{518.} \textit{Id. at 17. Perkins later served as a member of the New York Industrial Commission
under Governor Smith and when he became governor, Roosevelt named Perkins his Industrial
Commissioner. \textit{See \textsuperscript{Martin, supra} note 133, at 142-145, 205.}

\textsuperscript{519.} \textit{See \textsuperscript{Perkins, supra} note 509, at 17.}

\textsuperscript{520.} \textit{See id. at 17-18.}
first-person experiences that Perkins plainly wished Franklin Roosevelt had.\footnote{521}

Perkins's view of unions, although the subject of some dispute, reflected the historical split between the living wage movement and the labor movement. One commentator argues that her middle-class upbringing contributed to an early prejudice against unions that Perkins overcame after graduating from Mount Holyoke.\footnote{522} Another doubts that she ever viewed unions other than skeptically or, more importantly, that she viewed union organizing as the path to eliminating exploitation in labor markets.\footnote{523} Regardless, in the coming struggle between trade unionists and the living wage movement over the shape of national minimum wage legislation, Perkins fell squarely into the living wage camp. In her own famous words, “I'd rather pass a law than organize a union.”\footnote{524}

Unlike Perkins, Roosevelt never became a partisan in the contest between conceptions of fairness in wages.\footnote{525} His lack of personal attachment to the living wage movement and his failure to witness personally the consequences of unequal labor market power made it possible for him ultimately to accept a legislative deal that fell substantially short of the living wage movement's expectations. But Roosevelt was not entirely disconnected from the early years of the debate over fairness in wages. Secretary Newton Baker, a former president of the NCL, launched investigations and inquiries into factory working conditions on contracts for the War Department during the World War I.\footnote{526} Secretary Baker called on Florence Kelley to organize an inspection service and to recommend changes.\footnote{527} The Women's Bureau of the United States Department of Labor set up standards for women working in factories.\footnote{528} As a Baker protégé, Roosevelt supported

\begin{itemize}
\item \footnote{521} See id. at 18, 26, 28.
\item \footnote{522} See Wandersee, supra note 247, at 9.
\item \footnote{523} See MARTIN, supra note 133, at 326-29.
\item \footnote{525} See generally PERKINS, supra note 509, at 256-67 (discussing how President Roosevelt was trying to find a middle ground).
\item \footnote{526} See id. at 21.
\item \footnote{527} See id.
\item \footnote{528} See id.
\end{itemize}
Perkins accepted that the future President could believe what he read in the investigators’ reports, even without the visceral experience of seeing the conditions himself.  

Perkins’s assessment is borne out by Roosevelt’s record as Governor of New York. Roosevelt strongly supported legislation to redress the exploitative conditions experienced by sweated workers. For example, in 1929 and 1930, he urged the state legislature to pass bills providing for the establishment of a fair wage board to determine wages for women and minors in certain industries and an eight-hour day and a forty-eight hour week for women and children in industry. On April 20, 1931, as he prepared to campaign for the presidency, he signed legislation establishing a six day, forty-eight-hour work week bill for women and minors.

B. National Industrial Recovery Act and the Conception of Bargaining Fairness

The opening skirmish between the living wage movement and the labor movement over national minimum wage legislation began with a dispute over maximum hours legislation. Senator Hugo Black’s legislation to establish a national thirty-hour work week reopened the disagreements that kept natural allies—the labor movement and the living wage movement—apart.

The AFL had traditionally been opposed to legislation that would take the place of collective bargaining in setting work hours. By the end of 1931, however, the AFL’s leaders found it increasingly difficult to sustain this position in the face of mounting unemployment. In the December 1931 issue of the AFL’s newspaper, The Federationist,
President William Green estimated that a universal thirty-five hour week would be needed to absorb the unemployed.\textsuperscript{537} By August 1932, he estimated it would take a thirty-hour week.\textsuperscript{538} In July 1932, as the Depression reached its deepest point, the AFL executive council urged President Hoover to call a conference of industry and labor representatives to develop a universal five-day work week.\textsuperscript{539} The call was an apparent last ditch effort to avoid pursuing a legislative solution. Hoover refused.\textsuperscript{540} While the AFL still balked at supporting legislation, Sidney Hillman of the Amalgamated Clothing Workers Union, speaking at the International Ladies’ Garment Workers Union’s 1932 convention, declared that “[n]ational legislation for the shorter work day is the only way out.”\textsuperscript{541} The convention adopted a resolution “that officers continue working for legislation to universally enforce the 6-hour day and 5-day week.”\textsuperscript{542} Finally, at its 1932 convention, the AFL endorsed legislation for a thirty-hour work week.\textsuperscript{543}

Black introduced his bill in the Senate on December 21, 1932 in the lame duck session before Roosevelt’s first term as President.\textsuperscript{544} Senate hearings began on January 5, 1933 with AFL President Green and United Mine Workers President Philip Murray both testifying in support of the bill.\textsuperscript{545} The labor leaders would not allow the scope of the maximum hours bill to reach minimum wages, however.\textsuperscript{546} Green made clear that the AFL remained opposed to regulating wages: “Pass your bill and let us handle the question of wages.”\textsuperscript{547}

Secretary of Labor Perkins, the living wage movement’s voice in the Roosevelt Administration, was faced with a dilemma when she was invited to testify on the President’s behalf. She did not want to oppose the AFL, but she remembered the hard lessons of the IWW strike in Lawrence.\textsuperscript{548} Shorter hours without minimum wages would mean lower incomes for families struggling at the subsistence level. With Roosevelt’s approval, Perkins testified that Black’s bill could be

\textsuperscript{537} See id.
\textsuperscript{538} See id.
\textsuperscript{539} See id.
\textsuperscript{540} See Brandeis, Organized Labor, supra note 533, at 200.
\textsuperscript{541} Id.
\textsuperscript{542} Id.
\textsuperscript{543} See id. at 200-01.
\textsuperscript{544} See id. at 201.
\textsuperscript{545} See Brandeis, Organized Labor, supra note 533, at 202.
\textsuperscript{546} See id. at 202-03.
\textsuperscript{547} Id. at 203.
\textsuperscript{548} See MARTIN, supra note 133, at 203.
strengthened by making it conform to the conception of Bargaining Fairness. Perkins proposed revising the bill to provide for the creation of minimum wage boards that could analyze conditions in industries and set both wages and hours according to the living standards of the workers in those industries. As with other public bargaining laws, the boards would act on recommendations from committees made up of employers and workers. Green vigorously disagreed:

The Executive Council of the AFL... feels that [Perkins's proposal] would be a dangerous experiment. While it would help some, it would in our opinion tend to injure the efforts of the bulk of labor to raise their living standards, to bring about increases in wages. We, therefore, look with disfavor upon the proposal to establish minimum wage boards except that such minimum wage boards shall be created for the purpose of fixing minimum rates for women and minors.

The old battle line between the living wage movement and the labor movement was reinforced. Victory in this first skirmish went to the AFL as the Senate passed the Black bill by a vote of 53 to 30 on April 6, 1933, less than a month after Roosevelt took the oath of office.

The second, and more important, skirmish resulted in a victory for the living wage movement, although along different lines than Perkins had laid out in her testimony on the thirty-hours bill. Roosevelt's alternative to the Black bill, the National Industrial Recovery Act ("NIRA"), was to become the first comprehensive, national effort to regulate minimum wages and maximum hours for men and women in the United States. It was also the first legislation proposed in service of the conception of fairness as Fair Competition.

549. See id. at 261-62; Perkins supra note 509, at 195-96.
550. See Martin, supra note 133, at 261-62; Brandeis, Organized Labor, supra note 533, at 203; Perkins, supra note 509, at 193-96.
552. Brandeis, Organized Labor, supra note 533, at 204.
553. See id. at 199. The Perkins proposal was also vigorously opposed by the U.S. Chamber of Commerce and the National Association of Manufacturers. See Paulsen, A Living Wage, supra note 524, at 44. On the other hand, seven states agreed with Perkins's position, adopting new minimum wage laws in 1933, while 11 states extended their laws. See Brandeis, Organized Labor, supra note 533, at 198-99.
555. See Himmelberg, supra note 551, at 182 ("It is widely held that at the beginning of the Hundred Days there was no plan for a measure such as the N.I.R.A. and that a serious intention to
Roosevelt believed the cause of inadequate wages was overproduction. Depression-strapped employers faced stern pressures to cut product prices so their goods would sell in glutted product markets. The imperative to cut product prices caused employers to use their superior bargaining position in the labor market to impose even stingier wage and hour deals on workers. Thus, sub-subsistence wages resulted from a competitive pathology. Fair competition in product markets, therefore, would require the imposition of standards for competition in labor markets. Roosevelt’s solution was the NIRA, a hybrid statute codifying Bargaining Fairness and Competitive Fairness.

Title I of the NIRA reversed the order of the public bargaining process found in most state minimum wage laws. Rather than tripartite advisory boards negotiating agreements on wages and hours to be referred to a wage board, the NIRA empowered trade or industry associations consisting of employers, along with worker representatives in some cases, to write codes of fair competition that included minimum wages and maximum hours. The negotiated codes were thereafter referred to separate labor, employer, and consumer advisory committees to develop a legislative proposal embodying some or all of its goals came only after passage by the Senate of the Black Thirty-Hour bill on April 6, 1933); see also id. at 199-204 (describing Roosevelt's journey from Perkins's alternative, as presented in Perkin's testimony on the Black Bill, to the NIRA). Congress had previously enacted the Davis-Bacon Act in 1931, which required only that federal construction contractors pay their workers the locally prevailing wage and benefit rate. See 40 U.S.C. §§ 276(a)-7, 276d-1 to d-2, 808 (Supp. III 1997).

556. See, e.g., ADDRESS BEFORE UNITED STATES CHAMBER OF COMMERCE, supra note 506:

You and I acknowledge the existence of unfair methods of competition, of cut-throat prices and of general chaos. . . . In almost every industry an overwhelming majority of the units of the industry are wholly willing to work together to prevent overproduction, to prevent unfair wages, to eliminate improper working conditions. In the past success in attaining these objectives has been prevented by a small minority of units in many industries. I can assure you that you will have the cooperation of your Government in bringing these minorities to understand that their unfair practices are contrary to a sound public policy.

Id.; see also 3 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE ADVANCE OF RECOVERY AND REFORM 123 (1934) [hereinafter 3 ROOSEVELT PAPERS] (A Survey of the Purposes, Accomplishments and Failings of the N.R.A. Extemporaneous Address Before the Code Authorities of Six Hundred Industries, March 5, 1934):

Individuals were seeking quick riches at the expense of other individuals. Geographical sections were seeking economic preference for themselves to the disadvantage of other sections. Cities were recklessly offering inducements to manufacturing plants to move away from other cities. . . . There was little consideration for the social point of view, and no planning whatsoever to avoid the pitfalls of overproduction or of selling methods which foisted articles on a gullible public, which the family budget could not afford.

Id.

557. See PERKINS, supra note 509, at 208.
that could suggest changes in the codes to the National Recovery Administrator ("NRA").\textsuperscript{558} Direct collective bargaining might occur in the code committees, as it had in different form in the states' advisory boards. But indirect public bargaining might also occur through the labor, employer, and consumer advisory committees' recommendations. The Administrator would consider the recommendations, approve the negotiated codes after a public hearing, and bring them to the President for signature.\textsuperscript{559}

Approved codes would bind the entire industry to which they applied with enforcement through the courts. Perhaps drawing on the legacy of the National Consumers' League, additional pressure to comply came with the issuance of "Blue Eagle" emblems to businesses that cooperated with the NRA along with a public campaign urging consumers to patronize these "patriotic" vendors. With an enforceable floor for labor standards in place in every industry, wages and hours could not be driven below subsistence levels by employer competition.\textsuperscript{560}

Fresh from her experience with the Black bill, Perkins sought to heal the rift between the living wage movement and the labor movement. She met with Green to secure the AFL's support for the NIRA. Green was not unalterably opposed to the NIRA. Instead, Green used his bargaining power with Perkins to insist on provisions protecting private collective bargaining.\textsuperscript{561} Section 7A was quickly included in the legislation to protect the rights to organize and bargain collectively, and to guard against workers being forced to join company unions.\textsuperscript{562} As a result, neither Green nor John Lewis of the United Mine Workers and the newly forming Committee on Industrial Organization

\textsuperscript{558} See id.
\textsuperscript{559} See id.
\textsuperscript{560} See id. at 208-10; LEVERETT S. LYON ET AL., THE NATIONAL RECOVERY ADMINISTRATION: AN ANALYSIS AND APPRAISAL 756-61 (1935); The Machinery of N.R.A. is Set-Up -- The Administrator Is Appointed, Executive Order No. 6173 (June 16, 1933), in 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE YEAR OF THE CRISIS 247-48, 254 (1933) [hereinafter 2 ROOSEVELT PAPERS]. Roosevelt's own statement suggested that he viewed the process, at least in part, as an effort to equalize bargaining power. See, e.g., 3 ROOSEVELT PAPERS, supra note 556, at 125 ("What we seek is balance in our economic system—balance between agriculture and industry, and balance between the wage earner, the employer and the consumer.").

\textsuperscript{561} See PERKINS, supra note 509, at 199-200.
\textsuperscript{562} See id.; Brandeis, Organized Labor, supra note 533, at 207-08. Perkins had raised the issue of wage and hour regulation at a conference on unemployment and labor standards that was attended by representatives of several AFL unions. See HIMMELBERG, supra note 551, at 191-92.
opposed the wage-setting and hour-setting provisions in the bill.\textsuperscript{563} Both men may have mistakenly believed that the labor movement, through the Labor Advisory Board, would draft the wage and hour provisions as the codes were prepared.\textsuperscript{564} The bill was sent to Congress on May 17, 1933, Senate debate began on June 7, 1933 and the NIRA was signed into law on June 16, 1933.\textsuperscript{565}

Roosevelt made clear in his statement upon signing the bill that he expected every code to assure living wages for workers.\textsuperscript{566} Living wages were not merely an end in themselves for Roosevelt, as his sometime advisor John Ryan might have liked,\textsuperscript{567} but a means to increase consumer demand to redress the overproduction that Roosevelt believed sparked and sustained the Depression. Roosevelt’s bill-signing statement reflected his adherence to the Keynesian view of the Depression-era economy and the socio-economists’ view of labor markets’ operation. He turned away from the gender-specific concerns Brandeis and Frankfurter had relied on in \textit{Muller, Stettler, and Parrish} and the appeals to citizenship and good health argued in \textit{Bunting}. Instead, he offered a further exposition on Competitive Fairness.

As overproduction caused competition between employers that drove wages down, inadequate wages meant insufficient consumer demand for an economy burdened by overproduction. Taking certain wages and hours out of competition in the labor market, on the other hand, would force businesses to compete in the product market by improving their efficiency. Society’s benefit, Roosevelt and Perkins postulated, would come from a burgeoning economy driven by rising consumer demand and increased efficiency resulting from higher and fixed minimum wages. Thus, regulation of labor markets would improve competition in product markets.\textsuperscript{568}

\textsuperscript{563.} See Brandeis, \textit{Organized Labor}, supra note 533, at 206.


\textsuperscript{565.} See id.

\textsuperscript{566.} See The Goal of the National Industrial Recovery Act – A Statement by the President on Signing It (June 16, 1933), \textit{in 2 ROOSEVELT PAPERS, supra} note 560, at 246 (Statement by FDR on signing the NIRA, June 16, 1933) ("Its goal is the assurance of a reasonable profit to industry and living wages for labor with the elimination of the piratical methods and practices which have not only harassed honest business but also contributed to the ills of labor.").

\textsuperscript{567.} Ryan was an enthusiastic supporter of the NIRA, and served on the NRA’s Independent Appeals Board in 1934 to hear appeals from businessmen aggrieved by the code authorities. While he supported the NIRA, Ryan did not see it as a substitute for a statutory maximum hours and minimum wages law. See \textit{RYAN, SOCIAL DOCTRINE, supra} note 204, at 217-18.

\textsuperscript{568.} See Presidential Statement on N.I.R.A. – “To Put People Back to Work” (June 16, 1933),
Conceptions of Fairness

2 ROOSEVELT PAPERS 251-52 (1938):
The law I have just signed was passed to put people back to work, to let them buy more of the products of farms and factories and start our business at a living rate again. . . . It seems to me to be equally plain that no business which depends for existence on paying less than living wages to its workers has any right to continue in this country. By ‘business’ I mean the whole of commerce as well as the whole of industry; by workers I mean all workers, the white collar class as well as the men in overalls; and by living wages I mean more than a bare subsistence level—I mean the wages of decent living.

Throughout industry, the change from starvation wages and starvation employment to living wages and sustained employment can, in large part, be made by an industrial covenant to which all employers shall subscribe. It is greatly to their interest to do this because decent living, widely spread among our 125,000,000 people, eventually means the opening up to industry of the richest market which the world has known. . . .

On this idea, the first part of the Act proposes to our industry a great spontaneous cooperation to put millions of men back in their regular jobs this summer. The idea is simply for employers to hire more men to do the existing work by reducing the work-hours of each man’s week and at the same time paying a living wage for the shorter week.

_id. (emphasis in original); see also id. at 255 (“I am fully aware that wage increases will eventually raise costs, but I ask that managements give first consideration to the improvement of operating figures by greatly increased sales to be expected from the rising purchasing power of the public. That is good economics and good business. The aim of this whole effort is to restore our rich domestic market by raising its vast consuming capacity.”); 3 ROOSEVELT PAPERS, supra note 556, at 127-28 (An Extemporaneous Address Before Code Authorities of 600 Industries, March 5, 1934) (“[T]he people in this country whose incomes are less than $2,000 a year buy more than two-thirds of all the goods sold here. It is logical that if the total amount that goes in wages to this group of human beings is steadily increased, merchants, employers and investors will in the long run get more income from the increased volume of sales.”); The President Recommends Legislation Establishing Minimum Wages and Maximum Hours (May 24, 1937), in 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE CONSTITUTION PREVAILS 1937 210-11 (1941) [hereinafter 6 ROOSEVELT PAPERS] (“Today, you and I are pledged to take further steps to reduce the lag in the purchasing power of industrial workers and to strengthen and stabilize the markets for the farmers’ products. The two go hand in hand.”); id. at 435 (Fireside Chat on Legislation for Extraordinary Session of Congress, October 12, 1937) (“I am a firm believer in fully adequate pay for all labor. But right now I am most greatly concerned in increasing the pay of the lowest-paid labor, those who are our most numerous consuming group but who today do not make enough to maintain a decent standard of living or to buy the food, clothes and other articles necessary to keep our factories and farms fully running.”); A “Fireside Chat” Discussing Legislation to be Recommended to the Extraordinary Session of the Congress (Oct. 12, 1937), in 6 ROOSEVELT PAPERS, at 435.

[A] wages and hours and child labor law will undoubtedly accomplish two great purposes, first, an increase in employment, and secondly, an increase in the total of the Nation’s income. . . . The more I study the subject the more I become convinced that it does not pay any community or any region in the long-run to maintain low wage or low living standards. Throughout the Nation we are working toward fairly uniform standards of pay and work in every section and in every community. And the only exception to this will give some effect to a small differential based on an actual lower or an actual higher cost of living in some communities or sections as compared with the average of the country.

Address at St. Paul, Minn., on Wages and Hours Legislation (Oct. 4, 1937), in 6 ROOSEVELT
The first code approved was the Cotton Textile Code, hailed by the President on July 9, 1933 for establishing a forty-hour work week and setting thirteen dollars per week and twelve dollars per week as the minimum wages respectively for the North and the South. But Roosevelt quickly became restless with the pace of code development. NRA Administrator Hugh Johnson generated the President’s Reemployment Agreement (“PRA”) on July 27, 1933 to solicit individual employers directly to bind themselves to a set of labor standards while additional NRA codes were being produced. The standards set were: 1) work weeks of between thirty-five and forty hours, depending upon the industry; and 2) weekly wages of not less than $15.00 in any city over 500,000, $14.50 in cities between 250,000 and 500,000, $14.00 in cities between 2,500 and 250,000, and in smaller towns to increase wages twenty percent but not to higher than $12.00; or, for some industries an hourly rate of not less than thirty or forty cents an hour. More than 2.3 million employers with approximately 16.3 million workers were signed to the PRA. Both the Cotton Textile Code and the PRA established wage and hour patterns that were extremely influential on later codes.

According to testimony by Leon Henderson, Director of the Research and Planning Division of the NRA, the PRA was effective in raising wages and increasing employment without reducing hours worked for the workers covered by its provisions. Between June and October 1933, work hours in manufacturing industries remained the same but employment rose almost twenty percent. Total employment increased by 2,462,000 workers. NRA industries increased their employment by 11.4% while non-NRA industries increased only 4.4%. In June 1933, there were twenty industries with average hourly wage rates below 32.5 cents per hour, but by October 1933, there was only one. In July, the average hourly wage rate for NRA industries

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569. See 3 ROOSEVELT PAPERS, supra note 556, at 276; LYON ET AL., supra note 560, at 305.
570. See 3 ROOSEVELT PAPERS, supra note 556, at 309-10, 312. Many employers “volunteered” for the PRA under the compulsion of an executive order requiring that all Public Works Administration and Emergency Relief contractors adhere to the PRA standards. See PERKINS, supra note 509; BERNARD BELLUSH, THE FAILURE OF THE NRA 50-51 (1975).
571. See LYON ET AL., supra note 560, at 304.
572. See Hearings, supra note 102, at 157 (testimony of Leon Henderson).
574. See id.
575. See id.
576. See id.
was 43.8 cents, but by October it had risen twenty percent to 52.1 cents. Labor income for NRA industries increased thirteen percent, while in other industries it increased only seven percent. Eventually, almost 600 codes were established under the NIRA with estimates suggesting that over ninety percent of industrial employees in NRA industries were covered. Although it is generally agreed that the NRA did not revive the national economy as Roosevelt had hoped, its effectiveness matched that of the PRA in raising wages without curtailing hours for covered workers. By May 1935, hourly wage rates increased about five cents an hour and weekly average income increased twelve percent. Almost half of all codes had forty-cent per hour minimum wage rates covering almost forty percent of total employment in the United States. Fifty-three additional codes had minimum wage rates of more than forty-cents covering 16.4% of total employment. Workers’ share of the national income rose from 64% in 1932 to 66.8% in 1934 and to 67.3% in 1935. Nonetheless, unemployment remained high and purchasing power did not return to pre-Depression levels.

577. See Hearings, supra note 102, at 157 (testimony of Leon Henderson).
578. See id. But see LYON ET AL., supra note 560, at 785-93 (concluding that the NRA caused only a very small increase in average real wages throughout the workforce, and thereby did not serve its purpose of increasing workers’ overall purchasing power).
579. See 3 ROOSEVELT PAPERS, supra note 556, at 276; COMMONS & ANDREWS, supra note 156, at 57; BELLUSH, supra note 570, at 35 (noting 546 codes of fair competition and 185 supplemental codes); LYON ET AL., supra note 560, at 308-16 (explaining that codes covered 22 million workers or ninety percent of those in industries subject to the NRA and many of the remainder were covered by the PRA).
580. See Hearings, supra note 102, at 157 (testimony of Leon Henderson).
581. See id.
582. See id.
583. See id.
584. See id. at 158.
585. See Hearings, supra note 102, at 157-58 (testimony of Leon Henderson); see also id. at 310-15 (testimony of Isador Lubin, Commissioner of Labor Statistics of the Department of Labor) (discussing BLS study of the situation in 16 industries before and after Schechter: weekly hours were increased substantially after the NRA was struck down, including above forty hours, and the plants paying the least increased hours the most. Prices did not go down necessarily where wages were cut and hours increased; and the most business went to the businesses that cut wages the most); ALICE OLEININ & THOMAS F. CORCORAN, U.S. BUREAU OF LABOR STATISTICS, HOURS AND EARNINGS IN THE UNITED STATES 1932-40, at 4 (Bulletin No. 697) (explaining that two major upward movements in average hourly earnings occurred during this period: one in the summer and early fall months of 1933; mainly as a result of the President’s Reemployment Agreement and the provisions of the NRA codes; and the other in the late months of 1936 and early 1937); LYON ET AL., supra note 560, at 871-85 (noting that the NRA did not contribute to the recovery); PAULSEN, A LIVING WAGE, supra note 524, at 48.
These mixed data did not soothe the discontent of the AFL over the failure of the NRA's public bargaining system. Where codes carried adequate wage rates, it was most often because of private collective bargaining. The higher paying industries were generally organized and unions in those industries assured compliance with codes' wage and hour provisions. But organized labor played little part in drafting the codes' wage and hour provisions outside the industries in which they already represented the workers. 86 There was little organization in the large manufacturing and distributive industries where codes were needed most and being drawn up first. 87 In fourteen industries with code-defined rates of thirty cents or below, there was no collective bargaining at all. 88

Further, the public bargaining system did not function as the labor movement expected. The Labor Advisory Board, a necessary backstop to public bargaining in the code committees, was not in a strong enough position to press workers' point of view. Code-defined workweeks turned out to be a disappointment sufficiently large that the AFL continued to demand passage of the Black bill. There was also evidence that business was exploiting the codes in an effort to prevent strikes and wage increases. 89 The operation of the NIRA had not given the AFL any reason to believe that public bargaining could serve as an adequate substitute for private collective bargaining. 90

The NIRA was struck down by unanimous vote of the Supreme Court in A.L.A. Schechter Poultry Corp. v. United States. 91 Some employers leapt at the opportunity to cut wages and increase working hours. 92 Unemployment increased and with it calls for additional remedial action by the federal government. 93 Roosevelt turned the failure of the NRA into a campaign issue in his 1936 re-election effort.

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586. See Hearings, supra note 102, at 162 (testimony of Leon Henderson).
587. See id.
588. See id. at 162.
589. See id. at 204-07; see also Lyon et al., supra note 560, at 439-44 (comparing certain aspects of codes produced, in essence, by collective bargaining and "normal" code procedures).
590. See Brandeis, Organized Labor, supra note 533, at 206.
591. 295 U.S. 495 (1935). Schechter was premised principally on the Court's view that the NRA was an inappropriate delegation of legislative authority, rather than any consensus on the freedom of contract or the merits of the labor standards established in the codes. See id. at 537-38.
592. See Martin, supra note 133, at 378.
593. See id. Congress' first response, urged by Roosevelt and Perkins, was the limited Walsh-Healey Public Contracts Act enacted in June 1936. See id. Walsh-Healey provided that goods and services bought by the government in quantities over $10,000 must be manufactured under certain conditions: eight-hour day, forty-hour week, no child or convict labor, safety and health conditions, and payment of prevailing wages. See id. (citing 41 U.S.C. §§ 35 (1994)).
He sided with the socio-economists in their diagnosis of the labor market while pointing fingers at his opponents in politics and on the Supreme Court in his famous "Economic Royalists" speech. In his 1937 State of the Union Address, using more temperate language, Roosevelt reiterated his view that new legislation was needed.

C. Competitive Fairness vs. Bargaining Fairness: The Struggle to Define the Fair Labor Standards Act

Faced with Morehead, Schechter, and other New Deal-blocking precedents, President Roosevelt sought an assurance that the shift in the political balance of power effected by the Depression would reach the Supreme Court. Accordingly, he decided that the next skirmish of the battle for minimum wage legislation would be fought at the Supreme Court over its allegiance to Hierarchic Fairness.

On February 5, 1937, he revealed his notorious "court-packing" plan. The plan proposed to add fifty new federal judges, purportedly to help with administration of the growing federal docket. Roosevelt would also appoint six new Supreme Court justices, one for each justice who

594. See THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE PEOPLE APPROVE 1936 233-34 (1940) [hereinafter ROOSEVELT PAPERS] (Acceptance of Renomination, Philadelphia, PA, June 27, 1936) (illustrating what an old English judge once said); Necessitous men are not free men. Liberty requires opportunity to make a living—a living decent according to the standard of the time, a living which gives man not only enough to live by, but something to live for. For too many of us the political equality we once had won was meaningless in the face of economic inequality. A small group had concentrated into their own hands an almost complete control over other people's property, other people's money, other people's labor—other people's lives. For too many of us life was no longer free; liberty no longer real; men could not longer follow the pursuit of happiness... The royalists of the economic order have conceded that political freedom was the business of the Government; but they have maintained that economic slavery was nobody's business. They granted that the Government could protect the citizen in his right to vote, but they denied that the Government could do anything to protect the citizen in his right to work and his right to live. Today we stand committed to the proposition that freedom is no half-and-half affair. If the average citizen is guaranteed equal opportunity in the polling place, he must have equal opportunity in the market place.

Id.; see also id. at 624 (conveying Roosevelt's telling of his famous story of a little girl in New Bedford who tried to hand him a note during a campaign rally that described her Dickensian factory working conditions).

595. See 81 CONG. REC. H85 (Jan. 1937). Late in February 1937, FDR sent Congress a report on the NRA prepared by a committee of businessmen and Cabinet members. See PAULSEN, A LIVING WAGE, supra note 524, at 51. Given its hand-selected membership, the committee found that the NRA had generally rejuvenated the economy of the country, raised wages, reduced child labor, and increased employment. See id. With the lessons learned from the NRA's failure, the committee believed additional reforms were possible. See id.
Roosevelt had failed to take members of Congress into his confidence before announcing the plan. It sparked intense opposition, even among loyal supporters within his own party. Perkins felt the plan was unnecessary. She later claimed to have identified Justice Roberts as a potential swing vote in Parrish, both from his early positions and from a personal acquaintanceship: Roberts was married to one of Perkins’s college classmates. Roberts always denied that the court-packing plan played any role in his decision making. He would have switched his vote in Morehead and overruled Adkins if he had been asked, he said later. Nonetheless, Parrish—the so-called “switch in time that saved nine”—was decided on March 29, 1937, a few weeks after the court-packing plan was announced. Two weeks thereafter, the Supreme Court upheld the National Labor Relations Act in NLRB v. Jones & Laughlin Steel Corp. Roosevelt had seemingly won.

Perhaps insufficiently heedful of the need to marshal his political capital, Roosevelt pressed his court-packing plan even after the Supreme Court had relented and conservative Justice Van Devanter had retired. It was not until after Roosevelt suffered an embarrassing defeat in the Senate Judiciary Committee that a compromise was finally reached in June 1937.

The damage to worker advocates’ political bargaining position had been done. After Senator Black brought the Labor Committee’s report on the FLSA to the Senate floor on July 8, 1937 and made his valedictory speech in support of the bill, he was immediately forced into a colloquy on the court-packing plan by Senator Burke, whom Black described as a member of “the flying squadron who are opposed to the President’s Court plan.” In this poisoned legislative environment, with

596. See MARTIN, supra note 133, at 387-88.
597. See id.
598. See MARTIN, supra note 133, at 388.
599. Some have claimed that the decision in Parrish had been reached before the court-packing plan became public. See id.; MARTIN, supra note 133, at 387-89; Brandeis, Organized Labor, supra note 533, at 217-18; PAULSEN, A LIVING WAGE, supra note 524, at 74, 80.
600. 301 U.S. 1 (1937); see Brandeis, Organized Labor, supra note 533, at 217-18.
601. See PAULSEN, A LIVING WAGE, supra note 524, at 78.
602. See id. at 78, 93-94.
the country entering a new recession and the living wage movement and the labor movement still split over a statutory minimum wage, the legislative struggle over fairness in wages and the FLSA began.  

When doubts about the NRA’s future had arisen, Perkins asked the Solicitor of Labor, Charles Gregory, to draft a national minimum wage bill. A special lawyers’ committee within the Administration led by Roosevelt confidants Thomas Corcoran and Ben Cohen, and including Assistant Attorney General Robert Jackson, re-drafted Solicitor Gregory’s bill. When the draft was completed, Roosevelt held last-minute conferences with Green, Lewis, Hillman, House Majority Leader Sam Rayburn, House Labor Committee Chair William Connery, and Black. On May 21, 1937, the bill was given to Black and Connery for introduction in both houses of Congress on May 24, 1937. Roosevelt used the opportunity to remind members of Congress that “[o]ne-third of our population, the overwhelming majority of which is in agriculture or industry, is ill-nourished, ill-clad, and ill-housed. . . . A self-supporting and self-respecting democracy can plead no justification for the existence of child labor, no economic reason for chiseling workers’ wages or stretching workers’ hours.”

This original version of the FLSA would have made Bargaining Fairness the foundation for the nation’s minimum wage law. An independent Labor Standards Board (“the board”) would operate much like the wage boards in the Oregon public bargaining statute. The board would have broad powers to vary wages above forty-cents per hour and hours below forty per week to maintain the physical and economic health, efficiency, and well-being of employees. The board could conduct investigations and, if it found substandard conditions, recommend minimum wages and hours. The board could not set an annual wage in excess of $1,200, or about sixty-cents per hour for a full-time, year-round worker. Roosevelt’s version of the bill did not set a

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604. See generally Brandeis, Organized Labor, supra note 533, at 217-30 (including a subchapter on the Fair Labor Standards Act and discussing its growth from proposal to finish).

605. See Paulsen, A Living Wage, supra note 524, at 54.

606. See Brandeis, Organized Labor, supra note 533, at 218; Perkins, supra note 509, at 256.

607. See Perkins, supra note 509, at 257-58.

608. See Paulsen, A Living Wage, supra note 524, at 78; Perkins, supra note 509, at 219; see also 81 Cong. Rec. S4954, S4961 (daily ed. May 24, 1937) (statement of Sen. Black introducing the Fair Labor Standards Act, S. 2475, which is referred to the Senate Education and Labor Committee).

609. The President Recommends Legislation Establishing Minimum Wages and Maximum Hours (May 24, 1937), in 6 Roosevelt Papers, supra note 568, at 210-11 (discussing a letter to Congress dated May 24, 1937).
specific minimum wage or maximum hour level. The expectation was that Congress would set the levels at forty cents and forty hours respectively. Leaving these amounts out of the draft bill was intended, in part, to appeal to an AFL still dedicated to a thirty-hour work week.\textsuperscript{610}

Black and Connery agreed to hold joint hearings on the bill in an effort to expedite committee action. These hearings exposed the fissures in Roosevelt’s coalition. The first dividing line was the old disagreement between the living wage movement and the labor movement. The living wage movement’s dedication to Bargaining Fairness required a statute that imposed a public bargaining regime. The labor movement, after its experience with the NRA, remained dedicated to unfettered private collective bargaining.

Befitting her role in the living wage movement, Perkins was the most vigorous advocate for Bargaining Fairness at the joint hearings. The Secretary wanted no designation of a specific minimum wage or maximum hour level in the legislation: “I should prefer that even the determination of the basic wage be left to the Board, to be set industry by industry. . . .”\textsuperscript{611} She argued for the importance of advisory committees of representative employees and employers, like those in Oregon, to bargain over wages and hours and present the board with a negotiated result. Perkins announced with little hesitation that she wanted government-managed bargaining: “It gives both to employers and workers some experience and some realistic education in the technique of collective bargaining.”\textsuperscript{612}

Perkins knew that the preservation of collective bargaining had been the AFL’s principal concern since the beginning of the minimum wage campaign twenty-five years earlier. In response to questions from Senator Robert LaFollette and Representatives William Connery and Ruben Wood, Perkins attempted to lend the labor movement some comfort. She assumed aloud that an effective collective bargaining agreement would fix a wage as high as any that could be fixed by the board: “I presume the Board would always honor and take into consideration a collective bargaining agreement once it has been arrived at, if it had been arrived at fairly.”\textsuperscript{613} Pressed on the point, however,

\textsuperscript{610} See Paulsen, A Living Wage, supra note 524, at 56-67; Brandeis, Organized Labor, supra note 533, at 222-23.

\textsuperscript{611} Hearings, supra note 102, at 178 (testimony of Secretary of Labor Frances Perkins); see also Perkins, supra note 509, at 258 (“The amount of the wage should have been left for the consideration of wage boards which could scrutinize the economic problems of an industry and fix a minimum wage for each industry as the evidence indicated.”).

\textsuperscript{612} Hearings, supra note 102, at 179-80 (testimony of Secretary of Labor Frances Perkins).

\textsuperscript{613} Id. at 182-83.
Perkins suggested that the board would be empowered to inquire into the legitimacy of a collective bargaining agreement to determine whether a higher minimum wage should be set than that agreed to by the union and employer. The board’s inquiry, presumably, could result in the board setting a higher wage than the union could negotiate. 614

Public bargaining remained anathema to the AFL. It threatened the only method the labor federation considered effective for remedying workers’ inferior bargaining position in the labor market: private collective bargaining. The labor movement foresaw that government-dictated minimum wages would be declared the “legal” or maximum wage in judicial actions intended to block collective efforts to achieve higher wages. Given Perkins’s suggestion that the Labor Standards Board could set a minimum wage rate higher than a collectively bargained rate, it is also possible that the AFL feared that unions would find themselves competing with the board when it came to the core collective bargaining issues of wages and hours. Beyond embarrassment, unions’ ability to organize new members or even retain existing members might be threatened.

Green of the AFL and Lewis of the CIO testified to the views of the labor movement’s leadership at the joint hearings. As with the NRA, both men endorsed the legislation but sought to limit the reach of governmental wage and hour setting to those “special and limited” circumstances in which collective bargaining did not yet exist. 615

614. *See Hearings, supra* note 102, at 198-99, 209 (testimony of Assistant Attorney Gen., Robert Jackson). Although Robert Jackson actually testified before Perkins and was the first witness at the joint hearings on June 2, 1937, Mr. Jackson actually reinforced Perkins’s arguments. *See id.* Jackson’s status as the first witness probably showed that the committees and the Administration were more concerned that the Supreme Court might use Commerce Clause and delegation arguments to strike down the FLSA than the freedom of contract arguments that had been effectively swept away by *Parrish*. *See id.* In fact, Jackson testified that the FLSA was a direct challenge to the Court’s Commerce Clause decision in *Hammer v. Dagenhart*. *See id.* Most of Jackson’s prepared testimony was dedicated to the constitutional issues. *See id.* at 2-6, 8-15. Nonetheless, Jackson also argued that the existence of the board would strengthen the government’s position if the law were challenged on constitutional grounds. *See id.* The board would build up a body of experience and provide the evidence needed to justify the imposition of particular wage and hour standards. *See id.* This experience and evidence would be a defense against any claim of arbitrary and capricious congressional action. *See id.* The board would also be able to avoid the danger inherent in a uniform, national minimum wage of setting a rate that could effect a hardship on an employer that might challenge the law on due process grounds. *See id.* Jackson interpreted the Constitution as permitting a fixed national minimum wage only if, while being high enough to help some workers, the wage was not so high as to displace other workers. *See id.* Finally, Jackson agreed with Perkins that nothing in the law prohibited the board from setting a minimum wage higher than a collectively bargained wage. *See id.* at 4, 20, 23, 27, 39, 66, 79, 84.

615. *Hearings, supra* note 102, at 221-23, 271. “We, of the United Mine Workers of America,
made clear to the members of the Senate and House committees on which side of the conflict between public and private bargaining he expected them to err:

I should rather preserve the principle of industrial democracy than to yield a right to the Board to interfere in the free exercise of collective bargaining. . . .

. . . . It is better for us to preserve the principle of collective bargaining and industrial democracy than it is to clothe some board with authority to determine whether a collective-bargaining agreement, honestly entered into between employers and employees, is valid and should stand. That is a very serious matter. 616

Lewis testified that section 5 of the draft bill, which created the Labor Standards Board, should be eliminated. 617

Green proposed six amendments that would circumscribe public bargaining and establish it as nothing more than a precursor to private collective bargaining. 618 The most important amendments would have overridden Perkins's interpretation of the bill as empowering the board to impose higher wages and shorter hours than those agreed to through collective bargaining. One amendment would have required the board to adopt collectively bargained wages and hours that prevailed in an industry or craft. 619 Another eliminated the danger that government-imposed wage and hour levels would establish ceilings for private
bargaining by expressly protecting the ability of unions to negotiate for better arrangements.\textsuperscript{620}

As in the effort to enact Massachusetts' minimum wage law, the labor movement did not speak with one voice on all issues. Lewis disagreed with Green's view that the board should not be permitted to raise substandard collectively-bargained wages.\textsuperscript{621} Clothing Workers Union President Sidney Hillman disagreed with Lewis's view that section 5 should be eliminated entirely and supported the bill as written, preferring to take the best bill Congress would pass.\textsuperscript{622} But the predominant view, at least within the AFL, was that the FLSA:

\begin{quote}

is not for the purpose of setting minimum wages by legislative fiat; it is not for the purpose of interfering in the exercise of industrial democracy or interfering in the collective bargaining relationship between employer and employee; but rather to promote industrial democracy and the establishment of wages, minimum wages and maximum hours of employment, through collective bargaining.\textsuperscript{623}
\end{quote}

In sum, unions and collective bargaining should set wages, not the government. Congress should merely institute a national forty-cent minimum hourly wage, even if that wage did not amount to a living wage.\textsuperscript{624}

The second dividing line in the minimum wage coalition arose out of Roosevelt's redefinition of the causes and externalities of unfair wage deals. Roosevelt's premise for governmental intervention in the labor market was that employers used their superior bargaining power to drive down wages so that they could cut prices in the product market. He sought to eliminate both sinking product prices and declining consumer purchasing power.\textsuperscript{625} Restoring fair competition to product markets,

\begin{itemize}
\item \textsuperscript{620} See id. at 221-22 (testimony of William Green) (listing the AFL's amendments). Lewis was quite concerned that the minimum wage would become a maximum wage or a "legal wage" enforced by a court of equity challenging a collectively bargained higher wage. See \textit{Hearings}, supra note 102, at 285-86 (testimony of John L. Lewis).
\item \textsuperscript{621} See id. at 274 (testimony of John L. Lewis).
\item \textsuperscript{622} See \textit{Hearings}, supra note 102, at 943, 945-48 (testimony of Sidney Hillman, President of the Amalgamated Clothing Workers of America).
\item \textsuperscript{623} See id. at 240 (testimony of William Green).
\item \textsuperscript{624} See id. at 220 (listing the AFL's amendments); \textit{id.} at 272, 276, 303 (testimony of John L. Lewis); \textit{id.} at 953-54 (testimony of Sidney Hillman). John Ryan agreed that forty cents did not amount to a living wage for the needs of a family. See \textit{id.} at 500-01 (testimony of Monsignor John Ryan).
\item \textsuperscript{625} See The President Recommends Legislation Establishing Minimum Wages and Maximum Hours (May 24, 1937), in \textit{6 THE ROOSEVELT PAPERS}, supra note 568, at 210 (addressing Congress).
\end{itemize}
therefore, required that every competitor in a product market be subjected to the same labor standards. In this conception of Competitive Fairness, local factors like the economic condition of the employer or geographic differentials in living standards were relevant only to establishing a level competitive field in local product markets. They became entirely irrelevant for product markets with a national scope. The purest solution to unfair price competition in national product markets would be a single minimum wage standard and a single maximum hour standard covering every employer selling into the product market, regardless of where the employer was located.626 Roosevelt and his allies in Congress plainly intended to reach national product markets with their new minimum wage law.

It would have been possible, at least in theory, to construct a public bargaining statute that served both the conceptions of Bargaining Fairness and Competitive Fairness. Public bargaining could occur at a national level and uniform rates could be set for each industry or trade. But the living wage movement did not see Bargaining Fairness as a means to the end of fair competition between employers. The goal of Bargaining Fairness was to achieve a living wage for workers. Assuming that the cost of living differed in different regions of the United States, as the proponents of the FLSA did, it would not have been possible for a national public bargaining law to set both uniform, national wage and hour standards and assure a living wage for each worker in different parts of the country. Uniform wage and hour standards, no matter how they were arrived at, would not assure each worker wages sufficient to satisfy his or her local standard of living. The public bargaining versions of the FLSA introduced by Black and Connery and enacted in Oregon required the wage-and-hour-setting authorities to take into account cost of living and other necessarily local

626. A modern example might help illuminate this point. The market for fast food service is distinctly local. Ready-to-eat grilled chicken sandwiches cannot be served to customers through fiber-optic cable or, to this author’s knowledge, shipped in a timely way via an overnight service. Thus, fast-food servers work in a labor market probably defined by the distance customers are willing to travel (or have their food travel if it is being delivered) to purchase a grilled chicken sandwich or some acceptable substitute. Competitive Fairness would therefore require that the employers of all fast-food service workers in a given local labor market be subjected to the same labor standards. By comparison, the market for the chicken breasts that are the central ingredients in a grilled chicken sandwich is national. Chicken producers in the Delmarva peninsula compete with chicken producers in Arkansas for the business of fast-food establishments, among others, across the United States. Thus, all of these chicken producers, regardless of where they are located and the local living standards in their regions, must be subject to the same labor standards to achieve Competitive Fairness.
Conceptions of Fairness

factors. 627 Achieving a living wage made such inquiries necessary. Thus, this kind of public bargaining model, contemplating products of bargaining sensitive to local factors if not bargaining on a local level, could not be reconciled with Competitive Fairness.

The Mason-Dixon Line would have been a ready substitute for this second dividing line. Progressive Southern Democrats in Congress, led by Representative Robert Ramspeck of Georgia, joined with Perkins and Jackson to oppose the imposition of uniform national wage and hour standards. 628 Regional differences existed in living standards, they argued, and the board should take these differences into account when setting labor standards. 629 The southern congressmen feared that any national standards would be too high and thereby impose an onerous burden on home-state employers that paid wages below those typically found in northern industry. 630 Roosevelt made a similar point, in less complimentary form, in his letter conveying the FLSA to Congress:

Backward labor conditions and relatively progressive labor conditions cannot be completely assimilated and made uniform at one fell swoop without creating economic dislocations. Practical exigencies suggest the wisdom of distinguishing labor conditions which are clearly oppressive from those which are not as fair or as reasonable as they should be under circumstances prevailing in particular industries. Most fair labor standards as a practical matter require some differentiation between different industries and localities. 631

As with the fissure over public bargaining and private collective bargaining, Perkins understood the importance of regional differentials to both northerners and southerners within her party. 632 Her efforts to provide succor to both, however, caused confusion. On the one hand, Perkins sought to avoid rigid standards that would hamper the industrial development of certain sections of the country or cause worker dislocations. 633 On the other hand, she argued that "industries or plants

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627. See PAULSEN, A LIVING WAGE, supra note 524, at 82-83.
628. Ramspeck resisted efforts to cast the South as the only low-wage region of the country. See, e.g., Hearings, supra note 102, at 206 (including colloquy between Ramspeck and Perkins who noted that the worst wage exploitation she had seen was in Mt. Vernon, New York).
629. See, e.g., id. at 40-41 (testimony of Assistant Attorney General Robert Jackson).
630. Id. See generally 6 ROOSEVELT PAPERS, supra note 568 (noting the differential between southern and northern industries).
631. 6 ROOSEVELT PAPERS, supra note 568, at 213 (Letter to Congress, May 24, 1937, transmitting FLSA to Congress).
632. See PAULSEN, A LIVING WAGE, supra note 524, at 86.
633. See Hearings, supra note 102, at 186-87 (testimony of Secretary of Labor Frances
selling into the same market ought not to have any differential." 634 Her unsuccessful efforts to reconcile Competitive Fairness with Bargaining Fairness illustrated the irreconcilable differences dividing the forces behind the effort to enact a national minimum wage law.

Many Democrats representing constituencies in the Northeast and the Midwest claimed that regional wage differentials had already caused northern industries to be lured south and northern workers to be dislocated. Evidence from the NRA had shown that narrowing regional differentials reduced the number of plants and industries relocating to cheaper localities. 635 Thus, Democrats from the Northeast and Midwest argued for a Competitive Fairness law—that is, uniform, national standards—to eliminate southern employers' price advantage in the product market:

It seems to me that if the marketing of the merchandise is to be the controlling factor, as probably it ought to be, in view of the fact that this bill is among other things seeking to prevent the movement of industry from where there are good labor conditions and high wages, to those localities where there are, as illustrated by the boot-and-shoe industry, lower wages paid, that the tendency would be to do away with differentials, and that you would arrive finally at the place of market and the competition idea, so that the high-priced labor is not going to be in competition with low-priced labor when the goods go into the market, and therefore that you would almost reach the conclusion that there is no need for differentials. 636

For northern Congressmen and Senators, and their labor allies, provision for geographic wage differentials was "no more than a plea for the continuance of low living standards in the Southern States." 637

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634. Id. at 186. One commentator charitably characterized Perkins's unavoidably contradictory statements as "a flexible position." PAULSEN, A LIVING WAGE, supra note 524, at 86.

635. See Hearings, supra note 102, at 168 (testimony of Leon Henderson, Director of Research and Planning Division of the NRA).

636. Id. at 202 (presenting a question by Sen. David Walsh of Secretary of Labor Frances Perkins); see also id. at 40-41 (including questions by Reps. Connery and Griswold of Assistant Attorney Gen. Robert Jackson).

637. Id. at 272 (testimony of John L. Lewis); see also id. at 236 (testimony of William Green) (opposing differentials); 83 CONG. REC. S3581 (daily ed. March 23, 1938) (explaining that memorandum sent to members of Congress by the AFL on March 8, 1938 opposed differentials to avoid industry dislocations and to provide purchasing power to the workers in the South).
D. The Ebb and Flow of Conceptions of Fairness

1. The Revised Senate Bill: Bargaining Fairness Ascendant

The revised bill that emerged from the Senate Education and Labor Committee after the joint hearings remained a model of Bargaining Fairness. The Labor Standards Board remained, with essentially the same technical authority over wages and hours. Only its jurisdiction had been circumscribed. The board would be permitted to intervene only when workers were subjected to wages lower than forty-cents or more than forty hours, and it could impose no higher wages or shorter hours. The committee report accompanying the bill acknowledged that a minimum wage of forty cents, which would yield no more than $800 per year to the small percentage of workers fortunate enough to find fifty weeks of employment in a year, was not sufficient to maintain "the minimum American standard of living. But forty-cents per hour is far more than millions of American workers are receiving today."

Black explained that the purpose of the board would be to perform the detailed analyses required to address the diversity of hours, wages, economic and living conditions, and methods of production that exist in a host of industries. But Senator David Walsh was far more direct in proclaiming the public bargaining purpose of the bill:

   [it] is attempting to set up machinery which, if administered wisely and prudently, ought to be helpful in providing collective bargaining through a Government agency for the men and women who are not organized, who are working in small industries, who are subject to the tyranny and oppression of sweatshops and chiselers. One of the benefits of the bill is that the board, in the absence of unions, in the absence of organizations of employees, shall be this collective-bargaining agency and fix for the lowest wage groups a decent, reasonable minimum wage and the number of hours per week such employees should be required to work.

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638. See S. REP. NO. 75-884, at 6-7.
639. See id. at 7.
640. See id. at 6-7.
The nature of the bargaining would differ from that contemplated by the state public bargaining laws and their worker-management-public tripartite advisory committees. The members of the Labor Standards Board would be selected based on geography and, presumably, would represent their regions' interests in the board's decision-making.\textsuperscript{643}

The new bill retained the board's ability to establish differential wages and hours based on differing local conditions.\textsuperscript{644} Senator Black's defense of this provision focused on the impact of uniform national standards on workers:

the pending bill recognizes that it would be wholly and completely impossible at this time, without a complete disarrangement and dislocation of industry and business, to bring about overnight a complete leveling of the wage scale throughout the Nation. It also recognizes the fact, however, that wherever a man may live, whether it be in the South, the North, the East, or the West, when he is compelled to work in order to obtain food and clothing for himself and his family, he is entitled to receive a minimum wage sufficient to prevent him from dying from slow undernourishment and slow starvation.\textsuperscript{645}

Senator Walsh, in a difficult position with his constituents because of lost jobs in Massachusetts's boot, shoe, and textile industries, argued vigorously against strictly geographic differentials. He justified his support for the board's authority to establish differential wages on the grounds that accomplishing a forty-cent minimum wage and a forty-hour week would be impractical.\textsuperscript{646} But just as Secretary Perkins sowed confusion when she sought to reconcile Competitive Fairness with differentials, Walsh found it difficult to explain his position supporting the inconsistent goals.\textsuperscript{647}

\textsuperscript{643} See \textit{S. REP. No. 75-884}, at 4; see also \textit{81 CONG. REC. S7746} (daily ed. July 28, 1937) (including a letter by Sen. Black in the congressional record which stated his view that different regions of the country should be represented on the board "so that the board shall be familiar with the industrial, commercial, and agricultural problems of all parts of the United States").

\textsuperscript{644} See \textit{S. REP. No. 75-884}, at 7.


\textsuperscript{646} \textit{See generally Paulsen, A Living Wage, supra note 524, at 95} ("Walsh defended the flexible 40-hour-40-cent standard and claimed that the 40-cent rate would improve the wages of 36.7 percent of all employees in seventy-one industries.").

\textsuperscript{647} \textit{See, e.g., 81 CONG. REC. S7651} (daily ed. July 27, 1937) (including colloquy between Sens. Black and Sen. Walsh on differentials). Walsh sponsored the amendment in committee that established forty cents as the wage ceiling and forty hours as the workweek floor for the Labor Standards Board. His stated purpose was "to maintain working standards at levels of efficiency
Like Perkins in her joint hearings testimony, Black and Walsh sought to convince the AFL through a colloquy on the Senate floor that the bill preserved and strengthened private collective bargaining. But the conclusion was unavoidable, even to these advocates for the bill, that the Labor Standards Board would have the authority to change the substance of concluded collective bargaining agreements. Public bargaining could trump private collective bargaining.

The AFL’s position caused increasing confusion and consternation, as it became apparent that President Green’s contingent support for the bill was too conciliatory for some of the federation’s affiliates. After Black took to the Senate floor on July 29, 1937 to snuff out rumors that the AFL opposed the bill, Senator Burton Wheeler retorted that AFL members had telephoned his office and those of other senators seeking to have the bill recommitted. Black responded that he had called Green and was told that Green did not support recommittal. The next day, Black returned with a short and tepid endorsement of the bill from Green:

The wage and hour bill in the form in which it is now before the Senate does not meet the expectations of labor. However, we recognize the need for the enactment of wage and hour legislation. For that reason, rather than recommit the Senate bill for further committee consideration, it would seem advisable to pass the best wage and hour bill possible in the Senate, with the hope that it can be revised and amended in the House in such a way as to make it more nearly satisfactory and acceptable to labor.

Senator Maloney immediately responded by reading a letter on the floor of the Senate from I.M. Ornburn, Secretary of the AFL’s Union Label Trades Department, contradicting Green’s letter. Senator Connally then came forward with a letter from John P. Frey, President of the

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and to promote the well-being of workers and the profitable operation of business.” PAULSEN, A LIVING WAGE, supra note 524, at 91.


649. See id. (Sen. Black explained that the Board could, in limited circumstances, set aside certain collective bargaining agreements if the facts warranted such action. The Senator also noted, however, that “[t]he board would be very reluctant, indeed, to attempt to interfere with a bona-fide agreement made between employer and employee.”).


651. See id.


653. See id.
AFL's Metal Trades Department, and J.W. Williams, President of the AFL's Building Trades Department, calling for the bill to be recommitted.654

The AFL's apparent opposition to the bill did not keep the bill's supporters from defeating a motion to recommit by a vote of 36 to 48.655 The Senate's revised version of the Bargaining Fairness bill then passed by a vote of 56 to 28, with two Republicans, former Secretary of Labor Davis of Pennsylvania and Henry Cabot Lodge of Massachusetts, joining the majority and fifteen Democrats voting with thirteen Republicans against.656

654. See id. The CIO and Labor's Non-Partisan League (effectively the CIO's political action committee), on the other hand, threatened retribution if the proposal were recommitted. See generally Pauelsen, A Living Wage, supra note 524, at 93 ("When [John P.] Frey [of the Building Trades Department] broke openly with [William] Green and asked the Senate to delay the bill, the latter warned him that its enemies would justify their opposition on AFL criticism and shift the blame for its failure to the federation."). Id.

Critics of the bill, both friendly and unfriendly to labor standards, sought to widen the divide between the AFL and the Senate's version of the bill by fueling fear of centralized wage-setting by five unaccountable members of a federal board. "Manifestly this can be a power of incalculable portent . . . . I doubt if Congress was ever asked to delegate a larger, wider, more potentially dangerous power to a bureaucracy." 81 CONG. REC. S7720 (daily ed. July 28, 1937) (statement of Sen. Vandenberg). Vandenberg also shrewdly raised the specter of compulsory arbitration, in case the AFL's hated target had been forgotten in the debate. See 81 CONG. REC. S7724-25 (daily ed. July 28, 1937) (statement of Sen. Vandenberg). Sen. William Borah, a Republican populist supporter of minimum wage laws, explained that he would have preferred a uniform national rate to avoid repeating the bureaucratic flaws of the NRA inherent in allowing any board to "deal with the most vital matters of human life. . . . " 81 CONG. REC. S7797 (daily ed. July 28, 1937) (statement of Sen. Borah). Undoubtedly, some part of these objections were based on sincere concerns over delegating legislative authority to a five-person board. Experiences with the NRA and other New Deal institutions, ratified by the unanimous decision in Schechter and exacerbated by the President's court-packing plan, reinforced the view that the President's entire enterprise was calculated to consolidate as much economic and political power in the federal government as possible. The authority to set wages and working hours, circumscribed though it was, would be a significant increase in that power. For these critics, the bill represented bureaucracy, not true bargaining. Democratic Senate Leader and future Vice-President Alben Barkley doubted the sincerity of arguments about bureaucracy, giving examples of other widely supported boards that had been adopted and worked successfully: Interstate Commerce Commission, Federal Reserve Board, Federal Trade Commission, and the Social Security Board. See 81 CONG. REC. S7941 (daily ed. July 31, 1937) (statement of Senate Majority Leader Barkley).


2. The First House Committee Bill and the First House Floor Debate: The High-Water Mark for Bargaining Fairness

The House Labor Committee suffered a serious setback to its work on the FLSA with the death of its chairman, Representative William Connery. Chairman Connery, in addition to being the FLSA’s lead sponsor, had vast experience successfully navigating legislation through Congress. The next ranking Democrat on the committee was Mary Norton who had not played a significant role in labor legislation. She also had not attended the joint hearings. But like Roosevelt, Norton was not bound to any particular conception of fairness or burdened by a history of advocacy like Secretary Perkins. She eventually played the compromiser’s role that allowed the FLSA to become law, albeit without fulfilling the promise of the minimum wage campaign.

The Committee began its consideration of the FLSA on July 12, 1937, after the Senate committee had completed its business, and after considerable momentum had developed in the House for adjournment. The bill that emerged from the committee on August 6, 1937 was a slight modification of the Senate’s final bill, but similar in all important respects. Unlike the Senate, however, the House committee endeavored to appease the AFL by including three amendments to further preserve collective bargaining: 1. the board would be prohibited from intervening if collective bargaining agreements covered a substantial portion of the employees in the occupation or if “existing facilities for collective bargaining [were otherwise] inadequate or ineffective”; 2. any minimum wage set by the board would have to be higher and maximum hours shorter than that which prevailed in the occupation; and 3. wages and hours in collective bargaining agreements would be \textit{prima facie} evidence of appropriate wages and hours. The changes appeared at the time to be sufficient. Green wrote to
Representative Wood, one of the House’s negotiators and president of the Missouri AFL, proclaiming:

The wage and hour bill, as reported by the House Labor Committee, is reasonably acceptable and fairly satisfactory to labor.... I am, therefore, writing you this letter, advising you of the American Federation of Labor’s endorsement and approval of the wage and hour bill as reported by the House Labor Committee.\(^{666}\)

At the same time the committee sought to placate the AFL, it reinforced the idea that the board’s role was to sponsor bargaining between regions of the country, rather than between employers, workers, and consumers. Members of the board were to be selected to represent specific geographic regions.\(^{667}\) Further increasing the possibility that wage differentials would result, the board was directed to take into consideration the relative costs of transporting goods and differences in unit costs of production and “manufacturing occasioned by varying local natural resources, operating conditions, or other factors entering into the cost of production.”\(^{668}\)

The rush to adjournment was compounded by the procedural maneuvering of the bill’s opponents.\(^{669}\) An obstructionist majority of Southern Democrats and Republicans on the Rules Committee blocked the bill’s progress to the House floor by refusing to issue a rule for its consideration.\(^{670}\) These steadfast opponents of labor market regulation and their conservative colleagues gave no indication that they would ever permit the bill to come to a vote of the House’s full membership.\(^{671}\) When liberal Democrats led by Arthur Healey of Massachusetts and the aptly named Maury Maverick of Texas petitioned for a party caucus to consider the bill and hold off adjournment, a sufficient number of conservatives frustrated the effort by lingering in the hallway outside the meeting room to avoid becoming part of a quorum.\(^{672}\) The House adjourned without taking action on August 21, 1937.\(^{673}\)

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666. 82 CONG. REC. H1485 (daily ed. Dec. 14, 1937) (including an introduction into the record by Rep. Wood which explains that he had personally negotiated with Green); see also PAULSEN, A LIVING WAGE, supra note 524, at 98 (describing Wood’s AFL credentials).


668. Id. at 14.

669. See PAULSEN, A LIVING WAGE, supra note 524, at 100-01 (listing opponents).

670. See id. at 100-01.

671. See id.

672. See id. at 101.

673. See id. Rep. Martin Dies, a leader of the anti-FLSA conservative bloc, attempted to cast the conservatives as the victims of strong-arm lobbying by John Lewis and the CIO on behalf of...
Unwilling to allow delay to defeat his wages and hours bill, President Roosevelt announced in mid October 1937 that he would call Congress into special session on November 15, 1937 to consider the FLSA. But Representative O'Connor, the Rules Committee’s Chairman, reported that additional time would not change the opinions of his committee members. Further, the AFL’s concerns had hardened to opposition. At the federation’s 1937 convention, a report was approved criticizing the Senate bill as an intrusion on collective bargaining rights:

The experiences of our movement with the authority exercised by N.R.A. and the difficulty, if not impossibility, of having the unwise and conflicting decisions of subordinates reviewed and set aside, [and] the experiences of our movement under the National Labor Relations Act give valid reason for most searching examination before we give our approval to the establishing of further boards or commissions having power to determine questions of minimum wage and maximum hours or any other phase of the relationship of employer and employed.

In an effort to rein in Green, the resolution also recommended the AFL’s president consult with the heads of the Union Label Trades, the Metal Trades, the Building Trades, and the Railway Employee Department before taking any further action on the bill.

Time ran out on Norton’s continued efforts to assuage the AFL. After conferring with the AFL’s executive council, a chastened Green issued a public statement on November 22 and sent a letter to Norton on November 27 denouncing the bill and demanding that it be returned to the caucus’ sponsors. See 82 CONG. REC. H196 (Nov. 19, 1937) (statement of Rep. Dies). Dies’s effort to don the cloak of victimization during the debate over the FLSA at times reached a level of high irony, such as when the future Chairman of the House Un-American Activities Committee made the following plea:

I hope the time will never come in my public career, whether it lasts a long or short time, when I shall become so intolerant and so illiberal that I cast insinuations upon the motives and conduct of my colleagues because I happen to disagree with them. The very essence of liberalism is tolerance.

Id. at H196.

674. See PAULSEN, A LIVING WAGE, supra note 524, at 102, 106-07.

675. See id.

676. 82 CONG. REC. S265 (daily ed. Nov. 23, 1937) (stating the convention resolution entered into the record by Sen. Borah); see also PAULSEN, A LIVING WAGE, supra note 524, at 101.

677. See Brandeis, Organized Labor, supra note 533, at 225; see also PAULSEN, A LIVING WAGE, supra note 524, at 92.
the Labor Committee for reconsideration. In a further rejection of Bargaining Fairness, the AFL now wanted no board and the shorter workweek it had long sought. Not yet willing to concede, however, Norton started a drive to collect signatures on a petition that would discharge the Rules Committee from further consideration of the FLSA. With Majority Leader Sam Rayburn's support, the petition garnered the necessary 218 signatures by the beginning of December 1937. The motion to discharge the Rules Committee and permit the bill to be considered on the House floor was adopted on December 13, 1937 by a vote of 285 to 123. This vote would be the last victory for the supporters of the conception of Bargaining Fairness.

On December 10, Green wrote to all members of the House saying that the AFL would accept nothing less than a bill pure in its dedication to Competitive Fairness: "a flat 40-cent minimum wage and an absolute eight-hour day and forty-hour maximum week, with no overtime permitted except in emergencies." Southern conservatives seeking to defeat any minimum wage bill joined the fray with attacks on the purported bureaucracies in the committee's bill and accusations that their northern colleagues were out to kill industrial growth in the South. Norton brushed aside the conservatives to focus on responding to the AFL's opposition. First, she repeated the arguments propounded by the socio-economists: "[The bill] is intended to protect employees who are not protected by collective-bargaining agreements. The bill, if enacted, will in no way interfere with the program of collective

678. See generally Paulsen, A Living Wage, supra note 524, at 111 ("President Green sent telegrams to all members urging them to recommit the substitute for further study."); see also Brandeis, Organized Labor, supra note 533, at 225-26.
679. See Brandeis, Organized Labor, supra note 533, at 226.
Second, she announced that she would offer a "committee amendment" on the floor of the House replacing the Labor Standards Board with a single Administrator to be housed within the Labor Department. Her amendment would preserve public bargaining, however, as the new Administrator could act only after a wage and hour committee representing employers, workers, and consumers had examined the facts thoroughly and made a recommendation.  

Norton's seeming concession to the AFL lost her the support of Robert Ramspeck, a leader of the pro-FLSA southern Democrats and heretofore an ally. Ramspeck understood that under Norton's new proposal the real power in wage and hour decisions would lie with the tripartite public bargaining committees, not the Administrator.  

Ramspeck finally said aloud what appeared to be true all along. He wanted regional bargaining that would protect his home state, not public bargaining between workers, employers, and consumers:

> The five-man board would be appointed from five sections of the country, thus giving representation to all sections. It would have lodged in it the real power which the bill contained to regulate minimum wages and maximum hours. . . . I cannot support this new proposal. It makes no provision which insures proper consideration for the differences that exist in various sections of our country.  

Ramspeck protested that he was not interested in geographical differentials, but differentials based on the local facts of living and production. But the structure and membership he sought for the Labor Standards Board belied his protests.  

Worse for Norton, her effort to salvage public bargaining did not win over the AFL and its supporters in Congress. The AFL asked Representative Dockweiler of California to offer an amendment containing its proposal for a national forty-cent minimum wage and a national forty-hour workweek. Progressive Democrats like Representative Griswold of Indiana, who actually offered the
amendment, and Representatives Boileau of Wisconsin and Healey of Massachusetts rallied around the AFL’s alternative. Griswold, a sharp-tongued orator, lashed out in thinly veiled language at the middle-class advocates of Bargaining Fairness:

I know what long hours and low pay mean in a factory. . . . I know these things not because I have obtained my knowledge from a book, not because I have heard parlor pinks, social workers, and others who make a profession of being friends of labor talk, but because I have had the experience—because the life that labor leads was mine.

But Representative Healey best captured the shift in philosophy by congressional advocates for workers in his endorsement of Competitive Fairness. On the one hand, “a family composed of a man and his wife with even only one child cannot hope to exist on the most frugal scale on $800 a year” provided by the AFL/Dockweiler proposal. On the other hand, industries leaving Massachusetts cost his state 120,000 jobs from 1923 to 1933:

Labor costs in the competing interstate industries through the United States must be made uniform. The only way this can be done is through Federal legislation. The wage and hour bill is a noteworthy start in this direction, and its speedy enactment may ultimately prove the solution of the national problem of industrial insecurity.

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690. See 82 CONG. REC. H1397 (daily ed. Dec. 13, 1937) (statement of Rep. Griswold). This was introduced as H.R. 8580. See id. It eliminated differentials, described in specific terms the offense and fixed the penalties, and eliminated the Labor Standards Board. See id.


[it] wisely recognizes that the passage of this bill may easily sound the death knell of the organized labor movement in the United States, for what will be the incentive to join a union if the Government is going to set wages and hours and other conditions of employment, and who is there who contends that labor’s interests will be in better
Conceptions of Fairness

Healey articulated the trade off he was willing to make. He would sacrifice the living wage in order to protect jobs in his home state.\(^{694}\)

In the end, the combatants battled each other to a standstill. With Norton leading the opposition, Ramspeck’s substitute restoring the original Labor Standards Board was defeated by a vote of 134 to 77.\(^{695}\) The Griswold/Dockweiler amendment was defeated 162 to 131.\(^{696}\) With all sides unhappy, and the AFL lobbying for recommittal, the passage of Representative Hartley’s motion to recommit the bill by a vote of 216 to 198 would appear in retrospect to have been a foregone conclusion.\(^{697}\)

3. The Second House Committee Bill and Final House Version: Competitive Fairness Ascendant

In early 1938, FLSA-supporter Lister Hill won the Alabama Democratic primary to replace newly elected Supreme Court Justice Hugo Black in the Senate. Claude Pepper of Florida, another FLSA supporter, also won his Senate primary. In addition, the Institute of Public Opinion found in a nationwide poll that 59% of Americans wanted Congress to pass a wage and hour bill.\(^{698}\) In the South, 56% of those polled supported the bill.\(^{699}\) In New England support rose to 74%, with 62% supportive in the mid-Atlantic, 58% in the East Central, 50% in the West Central, 61% in the Rocky Mountains, and 59% on the Pacific Coast.\(^{700}\) Minimum wage advocates in the House quickly interpreted these electoral and polling results as a stern warning to those who had kept the FLSA from passing during the special session.\(^{701}\)


\(^{696}\) See PAULSEN, A LIVING WAGE, supra note 524, at 111.

\(^{697}\) See PAULSEN, A LIVING WAGE, supra note 524, at 111-12. Paulsen suggests that, while the main causes of the bill’s temporary defeat were the split in the Democratic Party, the recession, and the opposition of the AFL, analysis later showed that the some key votes came from switches in the Louisiana delegation because of rivalries within the New Orleans political machine and the New Jersey delegation because Mayor and party boss Frank Hague sought to strike a blow against the CIO which continued to support the bill. See id. at 112.


\(^{699}\) See id. at H7284.

\(^{700}\) See Brandeis, Organized Labor, supra note 533, at 227-28; see also 83 CONG. REC. H7292 (daily ed. May 23, 1938) (statement of Rep. Maverick).
In fact, it was Norton who heeded the warning of the special session. She understood that a bill premised on Bargaining Fairness would not become law. With Roosevelt pushing hard in his annual State of the Union address for some wages and hours bill, Norton asked Ramspeck to chair a subcommittee of the House Labor Committee to negotiate a further compromise with the AFL. Roosevelt contributed to the effort by delivering a pointed speech in Ramspeck’s home state of Georgia on March 23, 1938:

Georgia and the lower South may just as well face facts—simple facts presented in the lower South by the President of the United States. The purchasing power of the millions of Americans in this whole area is far too low. Most men and women who work for wages in this whole area get wages which are far too low. On the present scale of wages and therefore on the present scale of buying power, the South cannot and will not succeed in establishing successful new industries. Efficiency in operating industries goes hand-in-hand with good pay and the industries of the South cannot compete with industries in other parts of the country, the North, the Middle West and the Far West, unless the buying power of the South makes possible the highest kind of efficiency.

Preliminary discussions between Ramspeck and the AFL suggested that the two sides might reach an agreement, and Ramspeck revealed that his subcommittee had agreed on a minimum wage of twenty or twenty-five cents increasing over time towards forty cents. The sides became deadlocked, however, over the question of whether an administrative body would be permitted to vary the increases in relation to the cost of living and other factors. When Green made clear that the AFL could support a thirty-cent minimum only if it were coupled with mandatory annual increases, Ramspeck’s negotiations broke down.

In April 1938, Ramspeck reported a new bill to the Labor Committee providing for a “weighted average” wage floor and a forty-

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703. Address at Gainesville, Georgia (March 23, 1938), in 7 ROOSEVELT PAPERS, supra note 792, at 167.

704. See PAULSEN, A LIVING WAGE, supra note 524, at 118.

705. See id.

706. See id.
Conceptions of Fairness

eight-hours ceiling on the workweek.\textsuperscript{707} A five-member board would be geographically selected and empowered to fix the “weighted average” wage based on the number of workers in each wage group.\textsuperscript{708} The board could not raise wages more than five cents per year or exceed a forty-cent cap.\textsuperscript{709} The Board would take into account the wages being paid, the number of employees involved, wages paid by employers maintaining standards voluntarily, the cost of living, local economic conditions, and differences in manufacturing costs occasioned by varying local natural resources.\textsuperscript{710} The bill earned immediate opposition from the AFL.\textsuperscript{711}

Early in April, Ramspeck’s bill was placed before the Labor Committee.\textsuperscript{712} Norton knew from the disastrous series of votes taken at the end of the special session, confirmed by a new Democratic caucus straw poll, that a bill preserving the Labor Standards Board could not survive the opposition of the oddly coupled AFL and anti-FLSA southern Democrats and Republicans.\textsuperscript{713} She offered her own proposal which was “entirely different in form, method of administration, and philosophy from that presented to you at the special session.”\textsuperscript{714} It eliminated the board and sharply restricted the Administrator’s role.\textsuperscript{715} The bill provided no opportunity for regional differentials in labor standards, a point Norton repeatedly emphasized.\textsuperscript{716} A uniform national minimum wage of twenty-five cents would be set for the first year after the bill’s enactment ascending to thirty cents in the second year, thirty-five cents in the third year, and forty cents in the fourth year.\textsuperscript{717} Maximum hours would also be set at a uniform, national level of forty-four hours per week in the first year, descending to forty-two hours in the second year, and forty hours in the third year and thereafter, along

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  \item \textsuperscript{707} See id. at 119.
  \item \textsuperscript{708} See id. at 119-20.
  \item \textsuperscript{709} See PAULSEN, A LIVING WAGE, supra note 524, at 119.
  \item \textsuperscript{710} See id.
  \item \textsuperscript{711} See id. at 120; see also 83 CONG. REC. H5919-H5920 (daily ed. Apr. 28, 1938) (statement of Rep. Norton’s description of why the subcommittee and committee approved of the bill); 83 CONG. REC. H7373-78 (daily ed. May 24, 1938) (including Rep. Ramspeck’s description of his alternative to the bill).
  \item \textsuperscript{712} See PAULSEN, A LIVING WAGE, supra note 524, at 119-20.
  \item \textsuperscript{714} 83 CONG. REC. H7275 (daily ed. May 23, 1938) (statement of Rep. Norton) (“I cannot help but feel that many Members voted for recommittal because the bill contained differentials and because they honestly believed that that was not the proper type of wage and hour legislation.”); see also CONG. REC. at H7280 (statement of Rep. Norton reiterating her point that her proposal was entirely new); PAULSEN, A LIVING WAGE, supra note 524, at 120.
  \item \textsuperscript{715} See PAULSEN, supra note 524, at 121; H.R. REP. No. 83-2182 at 6 (1938).
  \item \textsuperscript{716} See, e.g., 83 CONG. REC. H7280 (daily ed. May 23, 1938) (statement of Rep. Norton).
  \item \textsuperscript{717} See 83 CONG. REC. H5920 (daily ed. Apr. 28, 1938).
\end{itemize}
with an eight-hour day. Green, disappointed by the low rates in Norton's proposal and preferring thirty cents and forty hours, reluctantly urged members of Congress to support the proposal. The CIO also supported Norton's bill. Ramspeck's alternative was defeated 8 to 10 in the committee. Norton's proposal was adopted 14 to 4.

But Norton also knew from the votes taken at the end of the special session that a bill imposing a minimum wage significantly higher than actual wages in many parts of the country, most notably the South, would not become law. Relying upon, or perhaps hiding behind, a constitutional due process argument drawn from testimony at the joint hearings, Norton explained that the new minimum wage levels would be well below the living wage for most workers in the United States:

Where a single minimum wage is prescribed by the Congress for all localities in the United States, as is the case in the proposed bill, under the doctrine of the Parrish case, it should only be necessary to show that the wage established in the statute is not in excess of that which is required by costs of living for the region of the United States where living is the cheapest. In other words, if the cost of living for industrial workers engaged in interstate commerce is cheaper in Alabama than in any other State in the Union, and the cost of living in that State requires a wage rate of 40 cents an hour to provide the necessities of life, such a wage rate for the entire country would appear to be reasonable and valid. No employer could show that he was aggrieved.

Norton then cited a BLS-Works Progress Administration study entitled "Intercity Differences in Cost of Living in March 1935, 59 Cities" which compared the amount of money required to meet exclusively physical needs, the so-called "emergency level," for a family of four in various cities throughout the United States. The lowest cost of living level was found in Wichita, Kansas at about $810 per year. Thus, the forty-cent per hour cap in Norton's bill, or $832 in wages for full-time,

719. See Brandeis, Organized Labor, supra note 533, at 223-24.
721. See PAULSEN, A LIVING WAGE, supra note 524, at 120.
722. See id. at 120; see also 83 CONG. REC. H7392 (daily ed. May 24, 1938) (statement of Rep. Fish telling Rep. Boileau that the bill has the support of both the AFL and the CIO).
723. See PAULSEN, A LIVING WAGE, supra note 524, at 123, 125.
725. Id. at H5921.
726. See id.
Conceptions of Fairness

full-year workers, was not only constitutionally sound, but constitutionally mandated.72 Ramspeck responded with testimony from Assistant Attorney General and later Justice Robert Jackson and Roosevelt Administration lawyer Ben Cohen to challenge Norton’s constitutional analysis. Norton responded, in turn, with a letter from Jackson stating that he had no opinion on the question of whether the new bill would pass constitutional muster because no precedent existed.728 Plainly, the politics of securing a majority for her proposal played a greater role in Norton’s calculations than did the Constitution.

Norton had struck the necessary compromise: low wages for southern employers and uniform, national standards for northern employers and the AFL. Representative Fish, speaking for many partisan, pro-labor Republicans, grudgingly joined the pro-FLSA Democrats in supporting the new bill: “This is the first bill I have openly supported in the last year or more that the President of the United States has been for, and this makes me think that possibly I may be wrong.”729 When the Rules Committee again refused to move the bill forward by a vote of 8 to 6 with three Republicans joining the five Southern Democrats, Norton initiated a petition drive which collected 218 signatures for discharge in three hours and thirty-two minutes.730 The motion to discharge the Rules Committee was adopted 322 to 73.731 The next day, Ramspeck’s alternative was the first amendment considered.732 It was rejected by a vote of 70 to 139.733 Representative Connery offered an amendment to increase Norton’s starting minimum wage of twenty-five cents to forty cents immediately; it, too, was defeated.734 Finally, a motion to recommit the bill was offered and soundly defeated.735 The FLSA, codifying the conception of Competitive

728. See 83 CONG. REC. H7306 (daily ed. May 23, 1938).
730. See PAULSEN, A LIVING WAGE, supra note 524, at 122-23; 83 CONG. REC. H6395-96 (daily ed. May 6, 1938) (discharge petition filed).
731. See 83 CONG. REC. H7278 (daily ed. May 23, 1938); PAULSEN, A LIVING WAGE, supra note 524, at 123.
733. See PAULSEN, A LIVING WAGE, supra note 524, at 124; see 83 CONG. REC. H7389 (daily ed. May 24, 1938).
Fairness, passed the House of Representatives on May 24, 1938 by a vote of 314 to 97. 736

4. The Conference Committee and the Final Form of the FLSA: Competitive Fairness Prevails

The differences between the Senate and House bills required a conference committee for their resolution and one last opportunity for the Bargaining Fairness forces to modify the bill. 737 In order to avoid a filibuster by Southern Senators, Senate Democratic Leader Barkley agreed to give “proper” representation on the committee and some flexibility on standards and differentials. 738 Senators Pepper and Ellender were added to the conference to represent southern senators. Ramspeck was the only House southerner.

Early agreement was reached on the basic wage of twenty-five cents. 739 The sticking point, once again, was whether the bill should create an administrative entity with discretion to vary wages and hours according to local conditions. 740 Senator Walsh proposed annual increases of three cents until forty cents was reached. The Southerners objected because there would be no flexibility. 741 Senator Elbert Thomas, who had replaced Hugo Black as chair of the Senate Labor and Education Committee, suggested a seven-year plan beginning at twenty-five cents with annual two and one-half-cent increases to thirty cents and boards appointed thereafter to determine the rate at which wages should be increased to forty cents by the seventh year. 742 After the seventh year, the boards and any administrative discretion would disappear. 743 The Southerners again balked, unwilling to designate a time certain for arriving at forty cents and seeking to retain some flexibility between thirty and forty cents. 744

736. See id.; PAULSEN, A LIVING WAGE, supra note 524, at 125.
737. See generally 83 CONG. REC. 57560 (daily ed. May 26, 1938) (Senate seeks conference committee and appoints Senators Thomas, Walsh, Murray, Pepper, Ellender, Borah, and La Follette as conferees); 83 CONG. REC. H7770 (daily ed. May 31, 1938) (House agrees to conference committee and appoints Reps. Norton, Ramspeck, Griswold, Keller, Dunn, Welch, and Hartley as conferees).
738. PAULSEN, A LIVING WAGE, supra note 524, at 125-26.
739. See id.
740. See id.
741. See id.
742. See id.
743. See PAULSEN, A LIVING WAGE, supra note 524, at 125-26.
744. See id. at 126-27.
The final compromise gave only a small additional nod to the southerners and an equally small concession to Bargaining Fairness. Neither concession sullied the complete victory for the proponents of Competitive Fairness. The bill established a new Administrator in the Labor Department empowered to create “industry committees” with an equal number of worker and employer representatives and disinterested parties. Secretary Perkins called this provision “a compromise with Ramspeck and me.” The minimum wage would be set at twenty-five cents, increasing to thirty cents in the second year for five years thereafter, and forty cents in the seventh year after enactment. The policy of the Act was to prevent “substantial curtailment of employment [and have] higher minimum rates not exceeding 40 cents an hour to be fined industry by industry.” Thus, acting on an industry committee’s recommendation, the Administrator could accelerate the increase in the minimum wage or, if a forty-cent minimum wage would “substantially curtail employment in the industry,” set a lower rate in the seventh year. Representative Norton made clear that these would be “exceptional circumstances” without which the forty-cent per hour rate would apply “automatically.” The final compromise set maximum hours at “44 hours for the first year, 42 hours for the second year, and 40 hours for the third” and thereafter, with fifty percent premium pay for any time worked in excess of the maximum.

Little solace could be found for the advocates of a living wage. Thomas conceded that $800 for a full year of work “certainly does not provide in any part of the country an excessively high standard of living.

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745. *See Perkins, supra note 509, at 264-65.*
746. *See Paulsen, A Living Wage, supra note 524, at 126-7* (discussing the compromises during the debates).
748. *Id. at 265.*
752. *Id.*
for an American family in the twentieth century.\footnote{754} Another senator used the BLS-WPA study relied on by Norton to be more precise about Congress' failure to assure a living wage.\footnote{755} The maintenance level for a family of four in the U.S. was $1,261 and the emergency level was $903.\footnote{756} The revised final bill assured a beginning annual minimum wage of $572 rising only to $832.\footnote{757}

Nonetheless, the votes lay elsewhere. Hillman expressed his support for the bill. Green also supported it, albeit less enthusiastically, because of "cumbersome" and "undesirable" methods of administration and an understanding that the low rates would have little effect on the skilled trades that dominated the AFL. The CIO, committed to the idea that the exercise of power through the political process could effectively advance bargaining in mass production industries, supported the bill, although Lewis lost interest because of the low wage rates and ceded leadership to Hillman.\footnote{758}

Thomas's compromise was adopted 12 to 4 in the conference committee. The Senate passed the FLSA by voice vote on June 14, 1938.\footnote{759} The bill passed the House on the same day by a vote of 291 to 89.\footnote{760} President Roosevelt signed the FLSA into law on June 25, 1938 with little fanfare.\footnote{761}

Eleven million workers were covered when the bill became law, including 300,000 receiving wages below twenty-five cents per hour and more than 1,384,000 working longer than forty-four hours each week.\footnote{762} Roosevelt was able to proclaim:

After many requests on my part the Congress passed a Fair Labor Standards Act, commonly called the Wages and Hours Bill. That Act—applying to products in interstate commerce—ends child labor, sets a floor below wages and a ceiling over hours of labor.... [w]ithout question it starts us toward a better standard of

\footnote{754} See 83 Cong. Rec. S9163 (daily ed. June 14, 1938) (statement of Sen. Thomas). Paulsen properly pointed out that the beginning of the end of the living wage principle in the FLSA came when the Senate Committee's bill strictly limited the scope of public bargaining with a forty-cent ceiling and a forty-hour floor. See Paulsen, A Living Wage, supra note 524, at 96-97.


\footnote{756} See id.

\footnote{757} See id.

\footnote{758} See id.

\footnote{759} See Paulsen, A Living Wage, supra note 524, at 257, 261-63.


\footnote{761} See id. at H9266-67.

living and increases purchasing power to buy the products of farm and factory.\footnote{763}

The Bureau of Labor Statistics confirmed in a later study that the FLSA’s minimum wage and overtime provisions were two of the many forces at work in the industrial economy between 1932 and 1940 that resulted in substantially larger weekly earnings to the average factory worker.\footnote{764} The FLSA passed constitutional muster with a more pliant Supreme Court in \textit{United States v. Darby}.\footnote{765}

\section*{VI. STOLENING THE VICTORY: FAIRNESS IS AN IMPLIED CONTRACT}

Congress’s codification of Competitive Fairness settled the broad debate over which conception of fairness would define the Fair Labor Standards Act’s regulatory framework. Section 206 requires every employer in every labor market, other than those specifically excluded by Congress, to pay the prescribed minimum wage “to each of his employees who . . . is engaged in commerce or in the production of goods for commerce.”\footnote{766} Section 207 contains an almost identical requirement for the payment of overtime premiums, except that the word “any” was substituted for the word “each.”\footnote{767} Broadly inclusive definitions are given for “[c]ommerce,” “enterprise engaged . . . in the production of goods for commerce . . .” and “produced.”\footnote{768}

Since our constitutional system vests courts with the authority to apply congressional mandates to particular cases, however, the FLSA’s entry into the statute books did not finally answer the question of which workers are entitled to the Act’s minimum wage and maximum hours protections. In fact, the courts have narrowed the scope of coverage

\footnotesize{\begin{itemize}
\item\footnote{763} Fireside Chat (June 24, 1938) in \textit{7 ROOSEVELT PAPERS, supra} note 702, at 392.
\item\footnote{764} \textit{See} ALICE OLENIN \& THOMAS F. CECORAN, \textit{HOURS AND EARNINGS IN THE UNITED STATES, 1932-40}, U.S. BUREAU OF LABOR STATISTICS, at 2 (Bulletin No. 697 1942).
\item\footnote{765} 312 U.S. 100 (1940). The Supreme Court’s endorsement was sealed not only by Justice Roberts’s vote in \textit{Parrish}, but by FDR’s elevation of eight new appointments between 1937 and 1941, including such minimum wage stalwarts as Hugo Black, Felix Frankfurter, and Robert H. Jackson. \textit{See} BAER, \textit{supra} note 8, at 168.
\item\footnote{766} 29 U.S.C. § 206(a) (1994).
\item\footnote{767} \textit{Id.} at § 207(a) (1).
\item\footnote{768} \textit{Id.} at § 203(b), (j), (t) (2) (C) (s) (I). Competition in several labor markets is expressly excluded from the rules set by the FLSA. \textit{See id.} § 213. These exemptions actually reflect the political power of the exempted industries, but superficially represent Congress’ view that wage floors and hours ceilings either were not appropriate to the circumstances of that labor market or were not necessary to assure fair competition in those markets. \textit{See id.} This list of exempt occupations and industries was substantially longer in the FLSA as enacted in 1938. \textit{See} 83 CONG. REC. S9161 (daily ed. June 14, 1938) (§ 13 as originally enacted).
\end{itemize}
while Congress has sought to expand it. As a general matter, Congress has brought previously exempt industries and occupations within the FLSA's coverage. At the same time, judicial interpretations of the FLSA have established a threshold that excludes some workers from coverage purportedly because they are not "employees" for the purposes of sections 206 and 207.

The courts have relied on the facial circularity of the statutory definitions of "employer," "employee," and "employ" to justify their intervention. The FLSA defines an employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee . . ."; an "employee . . . [includes] any individual employed by an employer"; and to "[e]mploy includes to suffer or permit to work." Courts have been quick to point out that there is nothing in the legislative history or in subsequent amendments that provides any further explanation of how Congress intended "employer," "employee," or "employ" to be interpreted. So, courts have felt empowered to

769. See NORDLUND, supra note 753, at 99; Goldstein et al., supra note 131, at 983.
770. See generally NORDLUND, supra note 753, at 71-77, 97-108, 109-16, 124-43 (discussing amendments to the FLSA that changed the coverage provisions).
771. See Goldstein et al., supra note 131, at 1105.
772. See id. at 1103-04.
773. 29 U.S.C. § 203(d), (e) (1), (g); see also id. § 202(a) (stating the purpose of the FLSA in the language of Competitive Fairness); see also Darby, 312 U.S. at 109-10 (citing 29 U.S.C. § 202(a)). The apparent circularity of the three definitions has been addressed by Goldstein and his co-authors in their comprehensive history of the phrase "suffer or permit to work" which the FLSA uses to define "employ." See Goldstein et al., supra note 131, at 1136-38. If a judge employs a strict textualist philosophy of statutory interpretation then this history lends support to their conclusion that employers, particularly those in the garment and agriculture industries, should not be permitted to escape liability for minimum wage, maximum hours, and child labor violations by their subcontractors. See Goldstein, et al., supra note 131, at 1136. For a judge interpreting a statute according to its purpose, a single phrase within a statute gains its meaning principally from the role it plays in effecting the statute's broader purposes, absent compelling evidence that Congress intended some other interpretation when it included the phrase in the statute. See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169, 1169-71 (William N. Eskridge Jr. & Philip P. Frickey, eds., The Foundation Press, Inc. 1994).
774. The definitions contained in the cited subsections have not changed materially since the conference committee agreed on the bill. See 83 CONG. REC. S9159 (daily ed. June 14, 1938); 83 CONG. REC. H9246-47 (daily ed. June 14, 1938) (including Conference Committee reports). For example, Congress amended the definition of "employee" in 1974 from "the term 'employee' means any individual employed by an employer" to "'[e]mployee includes any individual by an employer." The amendment had no apparent substantive effect. See Dunlop v. Carriage Carpet Co., 548 F.2d 139, 142 (6th Cir. 1977). An effort in the late 1950s to change the definition of "employee" to match the narrower common law definition failed. See Goldstein et al., supra note 131, at 1104-05.

When courts have reviewed the legislative history of the FLSA for some insight into the definition of "employee," Hugo Black has often been cited for his declaration early in the
decide that, apart from the Act’s express exclusions, those workers within the boundaries of "employee" benefit from the law’s protections and all others do not.

A. Giving Effect to Competitive Fairness

Before examining the conception of fairness courts have implied in the FLSA, it is worth considering how a judge with a philosophy of statutory interpretation which fully respected Congress’ purpose for enacting the FLSA would decide coverage questions under Sections 206 and 207. As discussed at length in the preceding section, the goal of Competitive Fairness, and therefore the purpose of the FLSA, was to limit unfair price competition in product markets through the regulation of wages and hours in labor markets. The means Congress selected to accomplish this end was uniform, national standards that would take certain low wages and long working hours out of competition in labor markets regulated by the statute. The expected result was that competition in national product markets would focus more on

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legislative debate that the definition of "employee" in the FLSA is "the broadest definition that has ever been included in any one act." See, e.g., United States v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945) (quoting 81 Cong. Rec. S7657 (daily ed. July 27, 1937)). But see Goldstein et al., supra note 131, at 1097 (debating the definition of "employee" only in the context of a discussion of the coverage of farm labor). Apart from this quote, the legislative history lacks deeper discussion of the general definition of "employee," a detail that appeared to be wholly unimportant to the sponsors and critics of the legislation. See, e.g., S. REP. No. 75-884, at 6 (1937) ("'Employee' is defined to include all employees with the exception of persons employed in a bona-fide executive, administrative, professional, or local retailing capacity, persons employed as seamen or fishermen, railroad employees subject to the Hours of Service Act, and persons engaged in agriculture and such processing of agricultural commodities as is ordinarily performed by farmers as an incident of farm operations."); 81 CONG. REC. S7750 (daily ed. July 28, 1937) (showing senator Walsh entering into the record a Department of Labor analysis of the original Senate bill giving the plain definition of "employee."); 81 CONG. REC. H8205 (daily ed. Aug. 4, 1937) (entering into the record a similar analysis by Rep. Martin of Colorado); H. REP. No. 75-1452, at 11 (1937) (House Labor Committee) ("Employee" is defined to include any individual employed or suffered or permitted to work by an employer, but does not include any person employed in a bona-fide executive, administrative, professional or local retailing capacity [excluding salesmen]. Seamen and fishermen, railroad employees, common carrier employees, and agricultural employees are also excepted from the definition); H. REP. No. 76-2182, at 8 (1938) ("Employee" is defined to include any individual employed or suffered or permitted to work by an employer." The exemptions had been moved to a separate section of the statute); 83 CONG. REC. S7112 (May 19, 1938) (showing that a "side-by-side" of the bill prepared by the Labor Department also does not suggest a change in the plain meaning of "employee").

775. This philosophy, associated with the methodology of "purposive statutory interpretation," is most often identified with the Legal Process school of the New Deal and the decades immediately following. See generally HART, JR. & SACKS, supra note 773 (widely acknowledged to be the Bible of the Legal Process movement).
productivity and less on labor-cost-cutting.

Respecting Competitive Fairness necessarily means subjecting every employer competing in a product market to the FLSA’s wage and hour standards. If an employer were permitted to reduce wages below the uniform, national minimum or work its employees in excess of the uniform, national work week without paying a premium, then that employer could charge lower prices in the product market than its competitors without losing profits simply by cutting its labor costs. 776 For example, assume two cucumber growers compete to sell their cucumbers to pickle companies. If one cucumber grower could arrange to charge a lower price for its cucumbers by paying its migrant farm workers a lower wage, then it is reasonable to assume that the pickle companies would buy the lower-priced cucumbers and stop buying the second grower’s higher priced cucumbers. The second grower would then be forced to cut its prices and, in order to afford those lower prices and sustain its profit margin, use superior bargaining power in the labor market to drive down the wages of its farm workers. 777 This very fear of cutthroat price competition inspired the defeat of the original version of the FLSA, the version enacted by the Senate, and the version first considered by the House. These proposals would have permitted geographic wage and hour differentials between competitors in the same national product market.

Courts giving full effect to Competitive Fairness in particular cases, therefore, would read sections 206 and 207 as protecting every worker of every employer, unless either the worker or the employer is expressly exempted from coverage by the Act. 778 Coverage would

776. In the alternative, that employer might not take a price advantage in the product market and merely reap a larger profit than its competitors. The consequences in this situation would be more likely felt in the capital market than in the product market.

777. Compare Donovan v. Brandel, 736 F.2d 1114, 1120 (6th Cir. 1984) (stating that migrant farm worker “pickle-pickers” are “independent contractors” and not entitled to the minimum wage) with Sec’y of Labor v. Lauritzen, 835 F.2d 1529, 1545 (7th Cir. 1987) (stating that migrant farm worker “pickle-pickers” are “employees” entitled to the minimum wage).

778. At least two of the typical critiques of “purposive statutory interpretation” do not apply to this analysis of the FLSA. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 26-34 (Harvard University Press 1994). First, this interpretation of the FLSA does not depend upon any rosy notions about legislative reasonableness. It relies on the history of the debate over fairness in wages, including an unromantic review of the realities of the legislative process and the activities of interest groups inside and outside that process. Second, this analysis does not treat the FLSA as though it were intended to serve exclusively public-regarding ends. Rather, it documents the involvement and success of rent-seeking interest groups. But even public choice scholars shrink from the conclusion that all statutes are mere contracts between rent-seeking interest groups. See, e.g., Richard A. Posner, Economics, Politics, and the Reading of Statutes and the Constitution, 49 U. Chi. L. Rev. 263 (1982) (acknowledging that some legislation is public-
operate something like an “on/off” switch. If the FLSA expressly exempts a category of workers or employers, then the coverage switch would be “off.” In all other cases, it would be “on.”

This “on/off” test is quite different from the means suggested by the common law for determining which workers are “servants” and which employers are “masters.” In fact, the Supreme Court tacitly endorsed the “on/off” test in several early decisions fully understanding that they were following a path quite different from the common law. The leading case, \textit{NLRB v. Hearst Publications Inc.}, interpreted the National Labor Relations Act, but nonetheless evidenced the Court’s fealty to giving effect to Congress’s purposes for enacting statutes rather than forcing statutes to conform to the existing common law.

\textit{Hearst Publications} arose out of the refusal of four Los Angeles newspapers to bargain with a union representing newsboys who sold their papers. After a hearing, the National Labor Relations Board concluded that the newsboys were “employees” protected by the NLRA regarding and some is rent-seeking). This history strongly suggests that the FLSA is both a rent-seeking statute and a public-regarding statute. It conferred benefits on employers in high-wage regions of the United States to the disadvantage of employers in low-wage regions. It also raised wages of the lowest wage workers while, if one believes Roosevelt’s gloss on John Maynard Keynes’s theories, battling underconsumption and cutthroat price competition. By including as many workers as possible within the scope of the FLSA’s coverage provisions through a faithful application of the conception of Competitive Fairness, courts would emphasize the public-regarding purposes of the statute and reinforce positive behaviors in Congress. See \textit{ESKRmIDGE, JR.}, supra note 778, at 156-59; Jonathan R. Macey, \textit{Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model}, 86 COLUM. L. REV. 223, 225 (1986).


780. See infra text and accompanying notes 10-11.

781. See \textit{Rosenwasser}, 323 U.S. at 360:

This legislation was designed to raise substandard wages and to give additional compensation for overtime work as to those employees within its ambit, thereby helping to protect this nation ‘from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health’ . . . .

No reason is apparent why piece workers who are underpaid or who work long hours do not fall within the spirit or intent of the statute, absent an explicit exception as to them. \textit{Id.} at 361 (quoting S. REP. 76-884 (1937)); see also Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27, 36 (1987); \textit{Tony & Susan Alamo Found.}, 471 U.S. at 299-300; Powell v. United States Cartridge Co., 339 U.S. 497, 509-17 (1950); Brooklyn Savings Bank v. O’Neil, 324 U.S. 697, 706-07 (1945); Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944). No less an authority than Justice Black, the FLSA’s original sponsor in the Senate, also urged courts to follow the direction taken in \textit{Rosenwasser}: “This Act contains its own definitions, comprehensive enough to require its application to many person and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category.” Walling v. Portland Terminal Co., 330 U.S. 148, 150-51 (1947).

782. 322 U.S. 111 (1944).
and ordered the newspapers to bargain with their union. The Court of Appeals disagreed and set aside the Board’s order and the Board, in turn, sought review by the Supreme Court. The newspapers argued to the Court that the newsboys were “independent contractors” under common law, not “employees,” and therefore excepted from the NLRA’s protections. Common law standards should apply, the employers argued, because Congress did not explicitly define “employee.”

Speaking for the Court, Justice Rutledge rejected the newspapers’ appeal to the common law: “The argument assumes that there is some simple, uniform and easily applicable test which the courts have used, in dealing with such problems, to determine whether persons doing work for others fall in one class or the other. Unfortunately this is not true.” Variations in application could be found across jurisdictions and within a jurisdiction depending upon the law at issue. For the NLRA, Congress plainly meant for a single test to yield the same results regardless of geography or “the attitude of the particular local jurisdiction in casting doubtful cases one way or the other.”

After seemingly dispensing with the common law test for defining “employee,” Justice Rutledge set about constructing a test premised on a classic application of purposive statutory interpretation. The question of how to define “employee” in a statute, said Rutledge,

must be answered primarily from the history, terms and purposes of the legislation. The word is ‘not treated by Congress as a word of art having a definite meaning....’ Rather ‘it takes color from its surroundings... [in] the statute where it appears,’ and derives meaning from the context of that statute, which ‘must be read in the light of the mischief to be corrected and the end to be attained.’

Rutledge concluded that Congress sought a “broad solution” to the

783. See id. at 114-15.
784. Id. at 120. Without expressly reversing this holding, this very argument was accepted by the Supreme Court 35 years later to determine the definition of an employee under ERISA. See Nationwide Ins. Co., Inc. v. Darden, 503 U.S. 303, 318 (1992).
786. Id. at 121-22.
787. Id. at 123.
788. Id. This test was not new beyond the Supreme Court. Judge Learned Hand had applied a similar test three decades earlier in the context of a state workers’ compensation law. See Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 552-53 (2d Cir. 1914), cert. denied, 235 U.S. 705 (1915).
problem of industrial strife by safeguarding the rights of workers to organize and bargain collectively in the NLRA. Judging the statute's scope of coverage by looking to "the immediate technical relation of employer and employee" found in the common law of master and servant would defeat this broad solution. The common law would exclude large numbers of workers from the law's safeguards, said Rutledge, and entangle the administration of the statute in "the same sort of technical legal refinement as has characterized the long evolution of the employee-independent contractor dichotomy in the courts for other purposes."

The statute, Rutledge found, was designed to encourage private collective bargaining in an effort to remedy individual workers' unequal bargaining power in the labor market. The result would be to avert interference with the free flow of commerce caused by strikes and other forms of industrial strife. Rutledge concluded that the interruption of commerce by strikes or unrest could result from labor disputes involving common-law independent contractors as well as common-law employees. Thus, the NLRA's coverage should extend broadly, even beyond the scope of the common law's definition of "employee." The Court restored the decision of the NLRB ordering the newspapers to bargain with their newsboys.

Unfortunately, Justice Rutledge did not choose the shortest distance to his point. Purposive statutory interpretation would have permitted the Court to declare that the newsboys were "employees" simply because the newsboys' right to organize was needed to equalize their bargaining power with that of their employers. But Rutledge digressed. He went on to quote the NLRB's decision and the facts it deemed relevant to the determination of "employee" status:

In this case the Board found that the designated newsboys work continuously and regularly, rely upon their earnings for the support of themselves and their families, and have their total wages influenced in large measure by the publishers, who dictate their buying and selling prices, fix their markets and control their supply of papers. Their hours of work and their efforts on the job are supervised and to some extent

790. Id.
791. Id. at 125.
792. Id. at 126.
793. Id. at 128-29. Justice Rutledge discussed a Senate Committee Report on the NLRA addressing this issue. Id. at 128.
794. *Hearst Publications*, 322 U.S. at 130-32. The Court also addressed the question of the NLRB's selection of the collective bargaining unit, which is not relevant here. Id. at 132-35.
prescribed by the publishers or their agents. Much of their sales
equipment and advertising materials is furnished by the publishers with
the intention that it be used for the publisher's benefit. Rutledge's recital of these facts cast doubt on his commitment to a
purposive methodology for defining "employee." Most problematic,
Rutledge's list of dispositive facts from the NLRB's inquiry closely
resembled the common-law analysis of the master-servant relationship
that *Hearst Publications* appeared to reject. With this short paragraph
dictum, the Court opened a door to a new conception of fairness in
wages that, to this day, excludes some workers from the FLSA's
protections and undermines the conception of Competitive Fairness.

**B. Fairness is an Implied Social Contract**

The starting place for understanding Fairness is an Implied
Contract is the common law of agency. During the New Deal and the
FLSA's early years, the common law considered master-servant
relationships principally to determine whether it would be fair to hold
the master liable to a third party for the tortious acts of a servant. The
touchstone was the extent of the master's "control" over his servant. According to the Restatement of Agency, a worker is a "servant" in any
situation "in which the [worker's] physical activities and his time are surrended to the control of the master." The Restatement listed nine
factors, of which six were considered important indicators of the
requisite degree of closeness: the master controls the details of the
servant's work ("control"); the servant is not employed in a distinct
occupation or business ("opportunity for profit or loss"); the servant's
work does not require special skill ("special skills"); the master supplies
the instrumentalities, tools, and place of the servant's work
("investment"); the relationship with the master is permanent
("permanence"); and the servant's work is a regular part of the master's
business ("integral to business").

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795. *Id.* at 131.
796. Rutledge had earlier identified the Restatement as a definitive source on the common law in this area. See *id.* at 128 n.27.
797. See *RESTATEMENT OF AGENCY* § 220(1), cmt. a (1933).
798. *Id.* at § 220(1).
799. *Id.* at § 220(1), cmt. c.
800. The Restatement also suggests that courts consider whether the servant's work is typically performed under the direction of a supervisor. Logically, this factor is a necessary part of the employer's control of the details of the employee's work. *Id.*
801. See *RESTATEMENT OF AGENCY* § 220(2). The Restatement also lists the method by which
On June 16, 1947, the Supreme Court announced two decisions that rejected Hearst Publications’ approach to statutory interpretation and, instead, sought to reconcile the FLSA with this common law test. In *Rutherford Food Corp. v. McComb*, a unanimous Court established the methodology for determining whether a worker is an “employee” under the FLSA. In *United States v. Silk*, a divided Court addressed the same question under the Social Security Act. Justice Reed spoke both for the narrow majority in *Silk* and the unanimous Court in *Rutherford Food*.

*Silk* consolidated two cases in which employers disputed the Internal Revenue Commissioner’s determination that workers were “employees” for the purposes of employment taxes. The statute and the legislative history were silent on the definition of “employee,” so Justice Reed reiterated the rule of *Hearst Publications*: “The word ‘employee,’ we said, was not there used as a word of art, and its content in its context was a federal problem to be construed ‘in light of the mischief to be corrected and the end to be attained.” Reed described the mischief to be addressed by the Social Security Act as “the burdens that rest upon large numbers of our people because of the insecurities of modern life, particularly old age and unemployment.” Congress selected periodic payments to the elderly and the unemployed funded by employment taxes to redress this mischief. Since “employment” and “employee” were to be construed to accomplish the purposes of the legislation, “a constricted interpretation... would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.” Thus, workers are “employees” if the “economic reality” of their circumstances so dictate.

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the master pays the servant (“method of pay”), and whether the parties believe that a master-servant relationship exists (“subjective belief”), although these factors are considered less important to the result. See *RESTATEMENT (SECOND) OF AGENCY § 220(2) (1) (1957).*

804. *Id.* at 705, 711.
805. *Id.* at 713 (quoting *Hearst Publications*).
806. *Id.* at 710.
807. *Id.*
808. *Silk*, 331 U.S. at 712; cf. *Darden*, 503 U.S. at 326 (stating that the FLSA has far broader interpretation of “employee” than the common law).
809. *Silk*, 331 U.S. at 713. This phrase came to define subsequent applications of the ‘economic realities test’ by courts. See, e.g., Tony & Susan Alamo Found., 471 U.S. at 301;
Reed turned to long-standing Treasury Department regulations that offered a common-law-like test for defining "employee":

Generally, the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. . . . The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee. 810

He also examined the common-law factor of whether the work involved was integral to the employers' business: "Few businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors. The Social Security Act was drawn with this industrial situation as a part of the surroundings in which it was to be enforced."

By giving effect to an express social contract enacted in the Social Security Act, Silk successfully united the common law with Congress' purpose for enacting the Social Security Act. 812 The Social Security Act imposed taxes on an employer to pay benefits to that employer's "employees" during old age, disability, or unemployment. 813 The Court

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810. Silk, 331 U.S. at 714-15 n.8 (emphasis in original).
811. Id. at 714.
812. This striving for horizontal integrity in statutory interpretation took as its principal goal the reconciliation of the statute under review with the body of law, particularly the common law, already in existence. According to this philosophy of statutory interpretation, statutes should be interpreted to "fit" within the path of common-law reasoning or, if they were found to derogate the common law, construed narrowly. In its purest form, a commitment to horizontal integrity is associated with a "formalist" philosophy of statutory interpretation. Formalism, the judicial equivalent of the pre-socio-economic methodology of classical economics, treated law as the objective product of deductively reasoned rules derived from long-established axioms. See generally Roscoe Pound, Common Law and Legislation, 21 HARV. L. REV. 383 (1908) (common law courts have a natural antipathy to statutes).
813. Silk, 331 U.S. at 710-11.
essentially held that Congress intended only that employers knowingly binding themselves to particular workers and receiving the full benefits of the workers’ loyalty and efforts would be responsible for the worker’s economic support when the worker became unable to work. It turned out that those purposes were best served by a definition of “employee” consistent with the common law.814

The so-called “economic realities” test established by Silk employs the same six factors from the Restatement’s “control” test. The employer has “control,” the worker has little “opportunity for profit or loss,” the worker’s “investment” is slight, the relationship is “permanent,” the work requires no “special skill,” and the work is “integral” to the employer’s business.815 No one of these six factors is determinative, say the courts. The totality of the circumstances govern.

Balancing these six factors is a means of assessing whether the worker is sufficiently “dependent” upon the employer to warrant the protections due an “employee.” “Economic dependence” matters most, say the courts: “[T]he final and determinative question must be whether the total testing establishes the personnel are so dependent upon the business with which they are connected that they come within the protection of FLSA or are sufficiently independent to lie outside its ambit.”816 As one court said, the factors should disclose “whether the

814. See id. at 711-12.

815. Some courts include “integral to business” in their list of the relevant factors while others do not. See, e.g., Henderson v. Inter-Chem Coal Co., Inc., 41 F.3d 567, 570 (10th Cir. 1994) (applying six factors); Martin v. Selker Bros., Inc., 949 F.2d 1286, 1293 (3d Cir. 1991) (listing all six factors); Lauritzen, 835 F.2d at 1534-35 (listing six factors); Donovan, 736 F.2d at 1117-20 (listing six factors); Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 754 (9th Cir. 1979) (six factors); Brock, 840 F.2d at 1059 (using five factors, but also announcing that “any relevant evidence may be considered” beyond those factors); Usery, 527 F.2d at 1311 (using five factors, excluding “integral to employer’s business”); Donovan v. Derby Refining Co., 607 F.2d 1376 (3d Cir. 1980) (same five factors). Cf. EEOC v. Zippo Mfg. Co., 713 F.2d 32, 37 (3d Cir. 1983) (applying the five factor FLSA test in a Title VII case). The confusion over whether there are five or six factors is nicely illustrated by Donovan v. DialAmerica Marketing, Inc., 757 F.2d 1376 (3d Cir. 1985), in which the district court applied a five-factor test and the court of appeals applied a six-factor test. Id. at 1383 n.6. See generally MARC LINDER, THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE 198-99 (1989) (making the same comparison in the context of congressional rewriting of the factors to be applied in defining “employee” under the NLRA).

816. Usery, 527 F.2d at 1311-12. “Dependence” had its origins in Bartels v. Birmingham, 332 U.S. 126, 130 (1947), a Social Security Act case building on the precedent in Silk. See also Mednick v. Albert Enterps., Inc., 508 F.2d 297, 299 (5th Cir. 1975) (“[T]he application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service.”) (quoting Bartels, 332 U.S. at 130) The Court also stated that:

Under these decisions [Silk, Rutherford, Bartels, and Hearst], the act is intended to
individual is or is not, as a matter of economic fact, in business for himself. A common description of “dependence” has been that workers must be “dependent upon the business to which they render service.” Workers are “employees” only if they “are dependent on a particular business or organization for their continued employment” in that line of business.

It is not mere happenstance that “dependence” and “control” are derived from the same six factors. Silk established an unstated connection between “dependence” and “control.” If the “employer” makes poor managerial or investment decisions, its “employees” suffer and have no alternative. The employer makes all of the important decisions that govern its and the workers’ economic fate. The employer controls the details of the work. It owns the means of production. It sells the product of the work in the product market and assumes the opportunity for gain or loss. Thus, the employee depends upon the

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protect those whose livelihood is dependent upon finding employment in the business of others. It is directed toward those who themselves are least able in good times to make provisions for their needs when old age and unemployment may cut off their earnings. The statutory coverage is not limited to those [whose work activities satisfy the common law “control” test] but rather to those who, as a matter of economic reality, are dependent upon the business to which they render service.

Id. (quoting Fahs v. Tree Gold Coop. Growers of Fla., Inc., 166 F.2d 40, 44 (5th Cir. 1948)).


818. Selker Bros., 949 F.2d at 1293 (citations omitted); see also Reich v. Circle C Inv., Inc., 998 F.2d 324, 327 (5th Cir. 1993).

819. See Lauritzen, 814 F.2d at 1054 (quoting DialAmerica, 757 F.2d at 1385, which cited Pilgrim Equipment, 527 F.2d at 1311) (emphasis in original). Other courts have framed the same concept somewhat differently. See, e.g., Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1327 (5th Cir. 1985) (“The concept of ‘employee’ under that Act must be instead broadened to include those ‘whose livelihood is dependent upon finding employment in the business of others’) (quoting Fahs, 166 F.2d at 44); Castillo, 704 F.2d at 190. Fahs is not an FLSA case. It arose under the Social Security Act and applied Silk to determine the “employee” question. Fahs and its progeny among the FLSA cases demonstrate the negative consequences of treating three statutes with related, but very different, purposes the same for the purpose of statutory interpretation.

It is also worth noting that courts have concluded that workers who work for more than one employer can be economically dependent. See McLaughlin v. Seafood, Inc., 867 F.2d 875, 877 (5th Cir. 1989); Lauritzen, 814 F.2d at 1054. The same is true for workers who do not rely on a particular employer for their primary source of income. See DialAmerica, 757 F.2d at 1385. Yet, workers’ ability to offer their services to many different customers suggests that they would not be employees. See id. at 1385-86.
employer for the continuation of his employment. The employee has sacrificed the individual bargaining power that comes with skills, decision-making authority, ownership of the means of production, and direct access to the product market, and lashed himself to the employer’s ship of fate “permanently.” Thus, employers’ control breeds employees’ dependence.

But *Silk* did not stop at establishing a connection between “dependence” and “control.” Some necessary relationship between “dependence” and the compensation required by the Social Security Act was necessary to close the logical circle. *Silk* apparently concluded that, since the employee is dependent upon the employer, the employee is entitled to some socially mandated compensation. If the employee subjects his livelihood entirely to the exigencies of the employer’s control, then the employer undertakes the social obligation to provide the employee with the benefits required by the Social Security Act. This social obligation is derived from an implicit contract in which the employer reaps the benefits of the employee’s subsistence through the employee’s labor and the employer pays a wage that supports the employee’s subsistence. But before an employer may be asked to provide compensation and pay the taxes that support that compensation, the worker should be proven to have given his full labors and loyalty to the employer such that he has become dependent. In sum, control breeds dependence and dependence must be compensated.

C. The Shrinking Social Contract

The fateful decision to abandon purposive statutory interpretation of the FLSA came when the Court elected to treat *Rutherford Food* as the third in a trilogy of cases with *Hearst Publications* and *Silk*. As with the NLRA and the Social Security Act, the FLSA’s statutory language did not give conclusive definition to the terms “employ,” “employee,” or “employer,” so Reed and the *Rutherford Food* Court felt empowered to define these terms further. Starting from the fact that the FLSA, like the NLRA and the Social Security Act, was a part of the social

820. Putting aside the third element in the syllogism, this argument is quite close to that used by the socio-economists to support the concept of a living wage. It is also true that John Ryan, purveyor of the conception of Absolute Fairness, argued that employers should serve as “society’s paymasters” in the payment of a living wage. But Ryan’s view was principally rights-based, not contractarian. Ryan posited the existence of an absolute, natural right inherent in every human being who works. The employer’s obligation did not arise primarily out of a contract of exchange. Employers are the repositories for wealth and, therefore, its stewards.
legislation of the 1930s, Reed deduced that the decisions defining the employee-employer relationship under the NLRA and the Social Security Act should govern consideration of the same question under the FLSA. In other words, Reed would look to the judicial interpretations of the other two statutes rather than to the legislative history of the FLSA.

Justice Reed repeated Hearst Publication's purposive test for defining "employee" and concluded that Rutherford Food's workers were "employees" under the FLSA. But he also listed the facts he considered relevant to defining "employee":

the determination of the [employee-employer] relationship... [depends] upon the circumstances of the whole activity. Viewed in this way, the workers did a specialty job on the production line.... The premises and the equipment of Kaiser were used for the work. The group had no business organization that could or did shift as a unit from one slaughterhouse to another. The managing official of the plant kept close touch on the operation. While profits to the [workers] depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor. This list of factors mimicked the list of common-law factors in the Treasury Department's regulation that governed in Silk: "control," "opportunity for profit or loss," "investment," and "integral to business." More important, these factors became the dependence test

821. Rutherford Food Corp. v. McComb, 331 U.S. 722, 723 (1947). Reed reached this conclusion without reference to Rosenwasser, an earlier, on-point interpretation of the FLSA's coverage provisions that relied on the conception of Competitive Fairness. See supra notes 774-821 and accompanying text. After Hearst Publications and Silk, Congress amended both the NLRA and the Social Security Act to assure the courts would employ common-law principles for assessing worker-employer relationships. See Darden, 503 U.S. at 324-25; LINDER, supra note 815, at 196-211. In light of the analysis in this article, Reed's rationale would have accommodated Congress' redefinition of "employee" for these other two statutes.

822. Rutherford Food, 331 U.S. at 730. Reed undertook this fact-laden analysis over the objections of the government's lawyers who urged the Court to acknowledge Competitive Fairness as the governing principle of the FLSA and the answer to the question of which workers are "employees." See Goldstein et al., supra note 131, at 1100-01 (quoting the appellate briefs submitted by the Labor Department's Solicitor's Office).

823. The Court looked to the common law in spite of a specific warning in the Restatement of Law not to do so. See RESTATEMENT OF AGENCY at § 220(1), cmt. (d) ("Statutes have been passed in which the words 'servant' and 'agent' have been used. The meaning of these words in statutes varies. The context and purpose of the particular statute controls the meaning which is frequently not that which the same word bears in the Restatement of this Subject."). A later edition of the
applied by the lower courts. \(^8\) Rutherford Food thereby seemed to reconcile the FLSA's definition of "employee" with both the common law's control test and the Social Security Act's dependence test.

The question the Court did not answer, however, is whether the FLSA could be made to fit within the "control-breeds-dependence-which-must-be-compensated" syllogism that lay at the heart of Silk. Implicitly, the answer must have been "yes" if the NLRA, the Social Security Act, and the FLSA were three statutory peas in a New Deal pod. The justification is the conception that Fairness is an Implied Contract.

The implied contract requires viewing the Social Security Act and the FLSA as establishing two parts of a minimum compensation level for workers. The FLSA establishes a minimum wage and premium pay for overtime for all covered workers while they work. The SSA requires employers, via taxation, to provide economic support to covered workers who cannot work for specified reasons. Superficially, this appears to be a rejuvenation of the socio-economists' argument that employers should be required to pay workers at least a subsistence wage because employers benefit from the labor made possible by the workers' sustenance. Absent such a requirement, employers could and did receive a subsidy from the workers' families, charity, or less dignified sources. Thus, without looking any further, Fairness is an Implied Contract resembles the moral lodestar of Bargaining Fairness—that is, the living wage.

But careful examination exposes something quite different. First, workers paid the statutory minimum wage set by the FLSA do not receive a living wage because the Social Security Act's benefits are also available. This point may be best illustrated by comparing the living wage as defined by John Ryan with the faux living wage of Fairness is an Implied Contract. Ryan promised a wage that would assure workers and their families food, clothing, and housing sufficient to maintain health, comfort, good morals, and faith while they were working, plus security in the event of retirement, sickness, accident, and disability, as

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\(^8\) Restatement expressly cites federal wage and hour law as establishing such a broader definition. See Restatement (Second) of Agency at § 220, cmt. (1) (g).

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well as opportunities for recreation, social intercourse, education, and church membership. Bound by the specific, statutorily determined minimum wage level in the FLSA, Justice Reed’s implied contract offers a minimum wage intentionally set below subsistence by Congress. The Social Security Act’s benefits do not increase the level of the wage workers receive while they are working. In essence, they are deferred compensation for retirement, sickness, accident, and disability. Public subsidies of workers’ wages are still required. In sum, in return for abandoning their bargaining power and making themselves dependent upon their employers, Justice Reed’s implied social contract cannot deliver to workers even the subsistence wage it seems to promise, much less the more generous living wage defined by John Ryan.

Second, even if Fairness is an Implied Contract could deliver a subsistence wage, the dependence test establishes a threshold that excludes some workers from even that protection. Again, Ryan’s conception of Absolute Fairness offers a useful comparison. For Ryan, all work entitled the individual to subsistence. The quality and circumstances of the work were not relevant. For Reed, the employer’s obligation to pay the minimum wage, overtime premiums, and the taxes that finance deferred income was triggered only if the totality of the worker’s employment situation suggest sufficient closeness to the employer. Under Reed’s dependence test, people who are undeniably engaged in work are denied the protections of the FLSA.

In this sense, Fairness is an Implied Contract offers a form of fairness to employers that is very different from the FLSA’s conception of Competitive Fairness. Employers can be asked to pay statutorily mandated direct and deferred wages only to those workers who have demonstrated complete loyalty and given their full labor. This approach is a modern echo of the short-lived conception of Commutative Fairness

825. We may conclude that Congress has continued its policy of keeping the minimum wage below the level of family subsistence by referring to its policy for addressing inadequate wages, that is, to subsidize workers being paid wages insufficient to support a family through the Earned Income Tax Credit and Food Stamps. See, e.g., 26 U.S.C. § 32 (1994) (referring to earned income tax credit); 7 U.S.C. §§ 2001-32 (1994) (food stamps).

826. See, e.g., U.S. DEPARTMENT OF LABOR EMPLOYMENT STANDARDS ADMINISTRATION WAGE AND HOUR DIVISION, MINIMUM WAGE AND OVERTIME HOURS UNDER THE FAIR LABOR STANDARDS ACT: 1998 REPORT TO THE CONGRESS REQUIRED BY SECTION 4(a) (1) OF THE FAIR LABOR STANDARDS ACT 12-13 (June 1988) (showing charts illustrating that a full-time, full-year worker earning the minimum wage has fallen below the poverty level for a family of four since 1966 and for a family of three since 1981, and the declining value of the minimum wage compared with average hourly earnings for all production, non-supervisory workers).
suggested by Justice Sutherland in *Adkins v. Children's Hospital*. It requires equivalence of exchange between worker and employer. But this contractarian view of the obligation to pay a subsistence wage is inconsistent with both the social obligation to pay a living wage that Ryan posited and the efficiency arguments in support of a living wage advanced by the socio-economists.

Third, Fairness is an Implied Contract turns on its head the empirical basis for the living wage campaigns that preceded passage of the FLSA. In effect, the dependence test rejects the premise of the debate over fairness in wages that began with the elimination of slavery. Workers in low-wage labor markets did not have sufficient bargaining power to assure themselves subsistence wages when bargaining with employers. Under the Court’s conception of Fairness as an Implied Contract, however, that conclusion must be supported by proof according to each worker’s individual circumstances. Workers must

827. An argument could be made that this conclusion serves the goal advanced by organized labor and its congressional supporters during the FLSA debates of leaving certain worker-employer relationships unregulated by government so that private collective bargaining can proceed unimpeded. This argument would require concluding that Congress intended to leave certain workers unprotected by the FLSA so that they would redress their insufficient bargaining power in the labor market by organizing unions and bargaining collectively pursuant to the processes in the NLRA. In fact, this argument might be the best hope for extending Justice Reed’s efforts at connecting the NLRA with the Social Security Act and the FLSA.

This argument faces several barriers it cannot overcome. Organized labor’s concerns during the FLSA legislative debates related to public bargaining as competition for private collective bargaining and the danger that any wage arrived at through public bargaining would be adjudged the “legal wage.” Once the mechanisms of public bargaining were removed from the legislation and the minimum wage set by statute, these concerns evaporated and organized labor, if grudgingly, supported the bill. There is no evidence that organized labor sought to exclude individual workers or the workers of an individual employer from coverage in order to increase the likelihood that those workers would turn to the NLRA to improve their wages.

Further, for this argument to succeed, its proponents bear the burden of showing that organized labor had reason to believe that the workers who would be excluded from coverage under the FLSA by the dependence test would be likely to join unions. Even more, if organized labor went to the bother of somehow encouraging such a result, it might be fair to hold proponents of this argument to the higher standard of showing that organized labor believed that the workers excluded from FLSA coverage were more likely to join unions. If we take the dependence test seriously, these are workers with greater individual bargaining power resulting from some combination of greater skills, control of the means of production, and direct access to the product market. As a matter of logic, these are hardly the low-wage workers most likely to join unions. As a matter of fact, union density rates among all workers in low-wage industries and occupations was low at the time the FLSA was enacted and it remains low. See U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT & EARNINGS 221-22 (January 1999) (charts showing union affiliation of employed wage and salary workers by occupation and industry and median weekly earnings of full-time salary workers by union affiliation, occupation, and industry demonstrate that many of the lowest paying occupations and industries—agriculture, service, and retail, for example—have union density rates that are both low in absolute terms and well below
have permanently abandoned their bargaining power before they may reap the benefits of Justice Reed’s implied social contract. Absent this showing, workers are left unprotected by government enforcement of a social contract, with only their individual bargaining power to protect them against exploitative deal-making in the labor market.

Finally, even if Fairness is an Implied Contract could claim the moral and economic arguments that supported the effort to enact a living wage, the legislative history of the FLSA establishes that the proponents of the living wage and Bargaining Fairness lost their fight in Congress. The FLSA did not codify the conceptions of Bargaining Fairness or Absolute Fairness. Competitive Fairness won the legislative debate over fairness in wages. For this reason, the decision to treat the FLSA, the NLRA, and the Social Security Act as three parts of a single whole was error. Congress designed the three statutes to serve different purposes, even though these three laws were enacted during the same era in American political life. By failing to credit these different congressional purposes, the courts have constructed and enforced the stingiest and least worker-protective conception of fairness since Hierarchic Fairness and the Lochner era faded into history.

The consequences for a legal system that values transparent and predictable legal rules are real. The dependence test that enforces Fairness is an Implied Contract fails both comparatively and in absolute terms. The “on/off” test requires only reading the FLSA’s coverage provisions to determine whether Congress expressly excluded a worker or employer from those provisions. Under the “on/off” test, the statutory text would tell a cucumber grower that migrant farm workers are entitled to the minimum wage. Under the dependence test, however, the grower must assess how a court might balance six factors to determine the state of the migrant farm worker’s bargaining power. Further exacerbating the problem, the dependence test’s six factors are susceptible to manipulation. An employer seeking to cut the pay or extend the hours of his workers in search of a product price advantage, or merely to increase profits regardless of competition, can modify the circumstances of employment to tip the balance of factors in the dependence test.

Absurd results have followed, with employers arguing at various times that farm workers, laundry workers, people selling fireworks at road-side stands, gasoline station operators, delivery-truck helpers, and

the national average for the private sector).

Janitors are independent contractors with individual bargaining power, and some courts agreeing. Fairness is an Implied Contract invites the risk that courts examine employer-employee relationships designed to evade a judicial test rather than “economic realities.” Even worse, it inspires litigation by employers that low-wage workers with earnings at or near the subsistence level can ill afford. The dependence test establishes a substantive threshold, a process threshold, and a perseverance threshold that workers may be required to cross before being assured the minimum wage and overtime pay. The “on/off” test does not.

Real v. Driscoll Strawberry Associates, Inc. offers a useful illustration of the differences between the dependence test and the “on/off” test. Donald Driscoll had an agreement with Driscoll Strawberry Associates (DSA) to grow strawberries. In turn, Driscoll entered into individual agreements with a group of farm workers. Driscoll and other employees prepared the land and planted the strawberries. He determined the quantity and proportion of each type of strawberry to be planted and his employees placed marks in the ground signaling how far apart the plants should be spaced. The farm workers agreed to furnish the labor necessary to care for the strawberries, harvest

829. See, e.g., Usery, 527 F.2d at 1315 (reversing district court’s ruling that laundry operators are not “employees”); Donovan v. Sureway Cleaners, 656 F.2d 1368, 1369 (9th Cir. 1981) (district court and appeals court both rejected employer’s argument that dry cleaning workers were not “employees”); Brock v. Mr. W Fireworks, 814 F.2d 1042, 1042 (5th Cir. 1987) (overturning a district court’s ruling that workers at fireworks stands are not “employees”); Selker Bros., 949 F.2d at 1286 (district court and appeals court both rejected employer’s argument that gas station operators were not “employees”); Marshall v. Truman Arnold Distrib. Co., Inc., 640 F.2d 906, 911 (8th Cir. 1981) (same); Derby Refining, 607 F. Supp. at 84 (stating that the district court rejected employer’s argument that gas station operators were not “employees”); Dunlop, 529 F.2d at 302 (stating that delivery truck helpers are not “employees”); Shultz, 432 F.2d at 267-68 (reversing district court’s ruling that janitor is not an “employee”).

Cheating by seeking implied exemptions from the FLSA is not the most egregious means for evading the statute’s requirements. Employers seeking price advantages over their competitors may either move their facilities overseas to unregulated labor markets or violate the law in the United States, often by importing undocumented foreign workers who feel, rightly or wrongly, that they have less ability to solicit government intervention in the labor market on their behalf. The garment industry provides a tragic illustration of these forms of cheating. See Goldstein et al., supra note 131, at 995-99 (discussing the use of undocumented workers and the high rate of violations associated with the sweatshop conditions in parts of the domestic garment industry); id. at 1055-61 (describing the history and structure of the garment sweatshop system); U.S. DEPARTMENT OF LABOR EMPLOYMENT STANDARDS ADMINISTRATION, WAGE AND HOUR DIVISION, 1998 REPORT ON LOW-WAGE INITIATIVES 13-14 (February 1999) (showing overall compliance with the FLSA’s wage and hour provisions in the garment industries of San Francisco, New York, and Los Angeles to be 79%, 37%, and 22% respectively).

830. 603 F.2d 748 (9th Cir. 1979).
the strawberries, and sort, grade and pack the strawberries for marketing by DSA. The farm workers furnished their own hoes, shovels, clippers, and hand carts, and exercised some judgment as to the care of the strawberry plants. Driscoll provided the heavier equipment, such as irrigation pipes. The farm workers were paid a set percentage of the net proceeds received from Driscoll’s sale of the berries to DSA. The agreements offered no guarantee that the payments would satisfy the FLSA’s minimum wage requirements. 831

On these facts, the district court granted summary judgment to DSA and Driscoll after finding that the farm workers were “independent contractors” rather than “employees.” The court of appeals, reviewing the same facts and applying the same dependence test, found a genuine issue of material fact, reversed the summary judgment, and remanded for trial. 832 The dependence test is broad and indeterminate enough for one court to decide that farm workers are not entitled to the minimum wage and for a second court to conclude that a genuine issue existed as to whether they are protected by the FLSA. Under the “on/off” test, the district court would merely look at the statute, find that farm workers are not expressly excluded from the minimum wage coverage provisions, and issue a summary judgment that the workers are entitled to the minimum wage. No strawberry grower could increase profits or gain a price advantage from lower wages because all farm workers tending and harvesting strawberries, wherever located, would be entitled to the minimum wage. If it was necessary at all, litigating Real under the “on/off” test would have taken weeks or months, not years. 833

Admittedly, non-English-speaking farm workers who are paid below the minimum wage after being made to sign a seventeen-page legal document written in English offer a sympathetic case for the “on/off” test. 834 More difficult questions would arise around workers who most modern observers would describe, at least colloquially, as “independent contractors.” For example, a plumber who performs home plumbing repairs in the evenings after he has completed his day job at a plumbing contracting firm would offer a harder case. Undeniably, plumbing is a “special skill.” The plumber “controls” the details of his

831. Id. at 750-52.
832. Id. at 755-56.
833. The decision of the U.S. Court of Appeals for the Ninth Circuit requiring a trial at the district court level was issued in 1979. The decision suggests that the agreements may have been entered into in 1976. See id. at 751. Thus, the farm workers were forced to litigate the question of the FLSA’s coverage for three years without receiving a final disposition of their case.
834. See id. at 750 n.1.
own work. He bears all the “opportunity for profit and risk of loss” from his moonlighting employment. He “invests” in his own tools. The plumber’s relationship with the house’s owner is certainly not “permanent.” Under the dependence test, the plumber would almost certainly be adjudged an independent contractor. Under the “on/off” test, the plumber is an employee of the owner of the house entitled to the minimum wage and premium pay should he work overtime.  

But why should a plumber with obvious individual bargaining leverage—controlling the means of production, possessing a significant level of skill, and maintaining direct access to the product market (i.e., the market for plumbing services) receive the protection of the FLSA? The answer came during the legislative debates over the FLSA.

Competitive Fairness is not concerned with remedying unequal bargaining power in labor markets. It is concerned with competition in product markets. When this plumber moonlights, he competes against his co-workers at the plumbing contracting firm just as though he was another plumbing contracting firm. Congress’ goal was to assure that the wages of the plumber’s daytime co-workers would not be slashed below a certain specified level so that the owner of the plumbing contracting firm could match the moonlighting plumber’s nighttime prices. The rules must apply to every competitor; therefore, courts employing the “on/off” test in an honest effort to satisfy the conception of Competitive Fairness would not recognize any worker in a covered labor market as an “independent contractor.”

In sum, Competitive Fairness would include more workers within the FLSA’s coverage and protect the least paid workers in our society from needless, costly litigation over the minimum wage. Ultimately, Fairness is an Implied Contract undermines Competitive Fairness and the forces that used their political bargaining power to produce it. Fairness is an Implied Contract facilitates the creation of individual

835. There is an exception in the FLSA for very small employers that would almost certainly exclude the plumber from coverage. The current thresholds for coverage require that the individual worker be engaged in interstate commerce and that the employer have an aggregate annual revenue of $500,000 or more. See 29 U.S.C. § 202(s) (1) (A). Similarly, the Congress that enacted the FLSA had good reason to doubt whether the Commerce Clause permitted them to reach commerce at the intrastate level. See Hearings, supra note 102, at 41-42 (Robert Jackson testified that the FLSA was a direct challenge to Hammer v. Dagenhart, the prevailing Commerce Clause decision preceding the FLSA’s enactment). These considerations are being put aside for the purposes of this hypothetical.

836. Of course, it is unlikely that reasonably skilled workers like a plumber would be paid at or near the minimum wage. But there is some danger that the plumber, if he is able to find enough hours in the week, could waive his overtime premium pay to gain a cost advantage over a plumbing contracting firm.
exceptions to the uniform, national standards that were at the heart of the heated struggle over the FLSA. Even the versions of the FLSA that would have codified the conception of Bargaining Fairness would not have permitted individual exceptions, and these Bargaining Fairness proposals were rejected by Congress because their fact-based differentials undermined the conception of Competitive Fairness. Rather than basing differentials on empirical evidence regarding living costs and working families' budgets as Bargaining Fairness would have required, differentials arising from the dependence test are the consequence of an individual employer's appetite for litigation and its hunger for an advantage over its competitors. As a result, Fairness is an Implied Contract deprives the forces supporting the FLSA, particularly the workers excluded from its coverage, the benefits of the legislative victory their temporarily enhanced political bargaining power won for them in 1938.

VII. CONCLUSION

The history of the debate over fairness in wages is, in large part, the story of the dynamic and comparative political bargaining power of

837. Some readers may understandably infer from this article an argument for the judicial reversal of the conception that Fairness is an Implied Contract. But before any such reversal may take place, courts must engage in a thorough consideration of the exigencies of stare decisis with respect to the judicially constructed definition of "employee" in the FLSA.

Further, nothing in this article is intended to suggest that Competitive Fairness as codified in the FLSA serves its intended purpose in the new economy of increasingly global product and labor markets. Competitive Fairness presupposes rules of competition that apply to all competitors. By limiting itself to employers operating within the United States, the FLSA necessarily challenges its own conception of Competitive Fairness. Where living standards differ across borders and jobs can be relocated to lower wage countries, workers and employers have good reason for concern about losing out to wage-cutting competitors outside the United States. It is worth noting, however, that the problem of cutthroat international competition has existed since William Connery sought to address it in 1937 with respect to foreign competitors who are not subject to the FLSA's wage and hour provisions.

While valid, this criticism can be overstated. At least a sizable plurality of workers subject to the FLSA's minimum wage provisions are employed in industries like agriculture, construction, government, and services that are largely site specific. U.S. DEPARTMENT OF LABOR EMPLOYMENT STANDARDS ADMINISTRATION, WAGE & HOUR DIVISION, MINIMUM WAGE AND OVERTIME HOURS UNDER THE FAIR LABOR STANDARDS ACT: 1998 REPORT TO THE CONGRESS REQUIRED BY SECTION 4(d) (1) OF THE FAIR LABOR STANDARDS ACT 23 (June 1998) (chart showing estimated number of employed wage and salary workers by industry). Until a fast-food hamburger can be delivered through the Internet or a cucumber picked by a digital assistant, these site-specific jobs are unlikely to chase lower wages outside the United States. Nonetheless, the problem of international labor standards remains a significant part of the debate within the United States over fairness in wages for many workers whose jobs can be exported.
workers and their advocates. There was little dispute over the empirical evidence that unregulated wage deals between employers and workers in the United States' post-Industrial Revolution labor markets resulted in some workers' wages being driven below the level needed to sustain a family. Rather, the debate was organized around competing normative visions of what, if anything, should be done to remedy this consequence of unequal bargaining power in labor markets. The conception of Hierarchic Fairness, holding that society's interests are best served when nothing is done, prevailed in the first three decades of the twentieth century as workers and their advocates were largely unable to overcome their inferior political bargaining position. But economic and social crises caused by wrenching strikes, catastrophic industrial accidents, and the labor supply crisis of World War I, along with savvy political organizing by the living wage movement and reformist intellectual and empirical scholarship, shifted the balance of political bargaining power during limited periods of these three decades. As a result, some state legislatures and the federal government adopted the conception of Bargaining Fairness in the form of public bargaining laws to regulate wage deals in the low-wage labor market. The ultimately unattainable substantive goal of these procedural statutes was a living wage as articulated by John Ryan in his conception of Absolute Fairness.

The most significant shift in political bargaining power came with the onset of the Depression. The result was the FLSA. But the long-standing split between natural allies in the labor movement and the living wage movement blunted their collective political bargaining power. The FLSA eventually codified the conception of Competitive Fairness to ameliorate cutthroat competition between employers in increasingly national product markets, rather than assuring Bargaining Fairness and a living wage for all workers. Since the end of World War II, however, courts have refused to give effect to the conception of Competitive Fairness, partly depriving workers and their advocates of the fruits of the limited victory made possible by their temporarily improved bargaining position in the 1930s. Instead, courts have adopted their own conception that Fairness is an Implied Contract which excludes some workers from the FLSA's minimum wage and maximum hour protections, and forces other workers to litigate their way into coverage by the Act.

A substantial question remains as to how courts should interpret remedial statutes like the FLSA given this article's observations that (1) political bargaining power is dynamic, (2) remedial statutes might not
be enacted absent significant economic and social crises that shift political bargaining power, and (3) remedial statutes may serve mixed public-regarding and rent-seeking purposes. While the relevant Supreme Court decisions strongly suggest that an undue commitment to reconciling statutes with the common law and one another produced courts’ current interpretation of the FLSA’s coverage provisions, it is also possible that post-World War II interpretations of the FLSA reflect courts’ judgment that the current state of political power relationships should guide their decisions.\textsuperscript{838} With the end of the Depression and any labor supply crisis that might have accompanied World War II, courts may have concluded that comparative bargaining power in the political market had returned to the conditions which prevailed through much of the first three decades of the twentieth century. Employers sit atop a political hierarchy and low-wage, unorganized workers languish near the bottom. Based on this positive political observation, courts might have decided that post-war Congresses would intend a narrow construction of the FLSA that imposed the minimum possible burden on employers.

One difficulty in applying this sort of analysis to the FLSA is the uncertainty as to whether the dependence test and Fairness is an Implied Contract better serve employers as a class than would Competitive Fairness and the “on/off” test. Competitive Fairness protects employers from certain destructive competitive tactics by other employers as much as it protects workers from employers’ superior bargaining power in the labor market. Returning to the example of our cutthroat cucumber growers, while it is true that the migrant farm workers picking cucumbers for the first grower are deprived of the minimum wage, it is also true that the second cucumber grower and all other growers are deprived of fair competition in product markets. Employers as a class do not necessarily benefit from Fairness is an Implied Contract.\textsuperscript{839} Further,

\textsuperscript{838} This would be one illustration of “institutional dynamism” which is, in turn, an element in a philosophy of statutory interpretation which William Eskridge has dubbed “dynamic statutory interpretation.” See Eskridge, Jr., supra note 778, at 74-80.

\textsuperscript{839} A counter argument might suggest that all cucumber growers benefit from a judicial decision holding that one cucumber grower’s migrant farm workers are not covered by the FLSA because that decision can serve as persuasive authority in litigation where other growers seek to pay migrant farm workers less than the minimum wage. This counter argument assumes several things. First, every cucumber grower must exactly recreate the employer-worker relationship constructed by the successful litigant cucumber grower to satisfy the dependence test. If, for some reason, conditions make it impossible to cede control over cucumber picking or to require workers to provide their own tools, then other cucumber growers might not benefit from the precedent. Second, even if every grower constructs the same “economic reality,” then every court must weigh the dependence test’s factors in the same way. But see supra notes 809-16 and accompanying text
the employers in high-wage jurisdictions that sought and benefited most directly from the rent-seeking aspects of the FLSA are not systematically helped by the geographically random exemptions won through litigation under the dependence test. Only individual litigious employers certainly benefit, and it would be hard to argue that only these employers have sat atop the political power hierarchy since World War II.

Purposive statutory interpretation of the FLSA, informed by an honest historical assessment of the interest group politics that led to enactment of the law, best serves the interests of the statute, the legislative process, and workers. Fairness is an Implied Contract would no longer undermine Competitive Fairness. Courts would give effect to the historical evidence. Courts would act on a common-sense understanding of Congress' actual mode of operation; that is, competing political interests and their congressional allies actually coalesce around legislation's broad purposes. Assuming agreement on a particular, isolated form of words employed in the legislation defies common sense and the realities of Congress. Perhaps most important, workers would receive the full fruits of their temporarily improved political bargaining power by substituting the “on/off” test for the dependence test. Every worker of every employer would be entitled to the minimum wage and premium pay for overtime, unless expressly excluded.

At the same time, courts would acknowledge the role of interest groups in carving themselves out of the statute’s coverage without conferring the same exemptions on individual employers or industries that did not wield sufficient political influence to have themselves expressly excluded. By refusing to shy away from the sometimes messy realities of the legislative process, purposive statutory interpretation could acknowledge that the existence of exceptions or conditions need not make legislative purposes any less valid. But by requiring interest groups to secure their exemptions through specific statutory language, purposive statutory interpretation would frustrate rent-seeking behavior. Members of Congress have an incentive to promote the public-regarding nature of statutes, so full disclosure in the legislative text of benefits to be doled out to particular interests would carry with it a sizable disincentive. 840

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840. See Eskridge, Jr., supra note 778, at 27, 158-59.
At least within the limited context of the debate over fairness in wages and the history of the FLSA, purposive statutory interpretation can be reconciled with positive observation of the political process. It would be fair to say that, in this case, they are inseparable.