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HEALTH AND SAFETY VS. FREEDOM OF CONTRACT: THE TORTURED PATH OF WAGE AND HOURS LIMITS THROUGH THE STATE LEGISLATURES AND THE COURTS

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ABSTRACT

The paper examines changes in wage and hour labor regulation between 1898 and 1938. Many see the 1905 Lochner Supreme Court decision striking down hours limits for men as the beginning of 30 years in which labor regulation was stymied by the doctrine of "freedom of contract." That issue played a role but judges often weighed it against safety issues. As a result, hours limits for men in dangerous industries were found to be constitutional. The debates over minimum wages for women also centered on these issues. These laws passed muster in state supreme courts and initially at the U.S. Supreme Court. In 1923 a majority of Supreme Court judges emphasized freedom of contract in declaring a female minimum wage unconstitutional. Seeing close votes and substantial turnover of judges on the Supreme Court, many states continued promulgating advisory minimums and passed new laws. Ultimately, turnover on the Court and a renewed emphasis on the role of minimum wages in ensuring health and safety of women and children during the Depression led the Court to declare minimums for women constitutional. This opened the door for federal minimum wage legislation for all workers.

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1 Introduction

During the early 1900s the worker-employer relationship was defined by implicit contracts in which some of the parameters of the contracts were determined by labor regulations. Most of the prescriptive regulations were targeted at safety issues, and the courts appear to have supported them as constitutional. The controversial regulations were hours maximums for men and wage minimums for women. With respect to hours and wage limits, the judges' decisions identified tensions between the freedom to contract and the protection of health and safety of workers. Where the judges drew the line on which regulations were constitutional or not often was determined by their beliefs about the workers' outside options when negotiating with employers and how much health and safety was affected by hours and wages. A large number of judges ruled on these issues and the constitutionality of the wage and hours restrictions appeared to be in flux as various state laws were addressed by the courts over four decades. On the U.S. Supreme Court there was quite a bit of turnover and many of the decisions in this area were close. As a result, many states shifted their existing laws to become advisory rules that they continued to update. Since they enforcement of laws had never been well funded, the states continued to rely on publicity and the employers' own willingness to follow rules as their means of "enforcement." Seeing close votes and substantial turnover of judges on the Supreme Court, a number of states began passing new minimum wage laws in the early 1930s when the Depression began threatening the standard of living of many working families. Ultimately, turnover on the Court and a renewed emphasis on the role of minimum wages in ensuring health and safety of women and children during the Depression led the Court to declare minimums for women constitutional. This opened the door for federal minimum wage legislation for all workers.

2. Shifting Restrictions for Labor Contracts

Circa 1900 the relationship between worker and employer was an "at will contract" in which both sides could end the agreement. Most of these "contracts" were unwritten, as each worker had continuous negotiations with the employer about wages, hours, and working conditions. State governments enacted nearly all workplace regulations with an exception for railroad workers on inter-state trains. The state laws typically passed constitutional muster if they related to safety and health conditions in the workplace because these areas were thought to fit within the police power of the state government.

There was significant uncertainty about the survival and thus enforceability of laws that set maximum hours and minimum wages or and dealt with workers signing non-union pledges. This uncertainty came from the back and forth of rulings by state courts and ultimately the U.S. Supreme Court. Legal scholars often argue that the 5-4 decision by the Supreme Court in *Lochner v. New York* in 1905, which struck down a maximum hours law for bakers, was the beginning of a 30-year period in which judges routinely made decisions to preserve "freedom of contract" for employers.

A closer study of the interactions between state laws and court decisions suggests that the situation was more complex. The Supreme Court decisions often involved close votes, there was significant turnover of judge during the period, and the court sometimes ruled in favor of maximum hours for men and minimum wages for women, as seen in Tables 1 and 2. When a Supreme Court decision struck down a law, a number of states passed new laws that they thought might avoid the feature found unconstitutional. Meanwhile, a number of states just continued

enforcing their existing laws. As one example, the 1937 *West Coast Hotels v. Parrish* decision that affirmed the constitutionality of the women's minimum law addressed a Washington law that had been in place since 1913, ten years before the Supreme Court's *Adkins* decision that had ostensibly determined a minimum wage was unconstitutional.

The possibility that interpretations might shift was heightened by the roughly even division of Justices with different attitudes on the highest court. "Freedom of contract" Justices (FC Justices) believed that employers and workers both had bargaining power. In economic terms they seemed to believe that workers were mobile and had a choice of employers and could use their outside options effectively when negotiating. "Health and Safety Justices (HS Justices) often agreed that freedom of contract was important but believed that workers had few options and employers had such an advantage in bargaining that workers needed regulatory protection or collective bargaining to protect them from accepting wages that were too low and hours that were too long to be healthy. These views drew increasing strength in the 1930s as the Great Depression deepened.

2.1 The Rules and How They Varied Across States?

In 1900 except for union contracts, the relationship between worker and employer typically involved an unwritten "at will" contract that allowed either side to terminate the relationship at any time. The states and the common law were the primary regulator of these relationships and set rulings or enacted laws that set restrictions on the contracts. For example, they set the parameters for how workers would be compensated when the worker was injured at work. Over the course of the 19th century the common law evolved to a position that called for the employer to compensate injured workers for damages from workplace accidents when the

accident was caused by employer negligence, as long as the employer could not invoke one of three defenses. The employer did not have to compensate the injured worker when the worker had agreed to assume the risk (assumption of risk), when a fellow worker had caused the accident (fellow-servant), or when the worker's own actions had contributed to causing the accident (contributory negligence). By 1900, however, 30 states had enacted laws that eliminated at least one of the defenses for workers in general and another 24 had done so for railroads or street railroads. By 1908 25 states prevented employers from signing contracts that waived suits for negligence damages prior to the accident occurring, often after a number of court decisions had struck them down. Richard Epstein (1982 described these contracts as private ways of structuring the equivalent of workers' compensation contracts. Between 1911 and 1940, every state except Mississippi had enacted a workers' compensation law that required employers to cover medical costs and up to two-thirds of wage losses for all workers injured in accidents arising out of or in the course of employment.

Most of the state regulations dealt specifically with safety or health in the workplace. Before the Civil War, the states began establishing restrictions to promote railroad safety, as much to require the railroads to protect passengers as to protect their workers. By 1924 45 states and the federal government had established a series of safety regulations concerning railroad equipment and practices, and 30 had them for street railroads. Between 1869 and 1880, mining states adopted regulations requiring the filing of mine maps and basic ventilation. Nearly all mining states had safety regulations that expanded in scope during the early 20th century (Fishback 1992, 2006). Meanwhile, at the behest of the nascent union movement, many states established bureaus to collect labor statistics in the 1880s; 28 had them by 1894 and 44 were in

place by 1924.[2] By the 1880s some states had begun to establish specific regulations of workplace conditions, typically with respect to safety, and access to bathrooms and time off for lunch. Between 1895 and 1924 sanitation/bathroom regulations spread from 11 to 35 states, the number of states with ventilation laws rose from 10 to 26, for machine guards from 12 to 35, for fire escape access from 23 to 37 states, and from 5 to 24 states for building regulations. The building, fire escape, and boiler regulations were also established at the city or county levels. By 1924 14 states had regulations banning sweatshops, while 32 states had enacted bakery regulations, 20 of those were enacted after the Lochner decision struck down bakery hours regulations. Teeth were added to these laws by the establishment of inspectors for factories (rising from 15 in 1895 to 41 in 1924), child labor inspectors (13 to 41), mine inspectors (23 to 33, largely matching the number with significant mining), and boiler inspectors (15 to 17). Reporting of accidents for mines was required in 1924 by 32 states, for railroads by 39, and for factories by 23.

2.2 Hours Restrictions and Freedom to Contract

There was much greater uncertainty about what the state governments could do about restrictions on wages and hours. States set regulations that influenced the nature of wage payments. By 1924 30 states required wage payments in cash, and 37 required that wages be paid either fortnightly or monthly, while 12 put restrictions on repayments of advances made to the worker by the employer.[3] Setting minimum wages and maximum hours was another matter.

[2]The information on state laws throughout the paper was compiled by Rebecca Holmes (2003, 2005) for her award-winning dissertation on the development of state labor legislation. Holmes, Fishback, and Allen (2008), and Fishback, Holmes, and Allen (2009) have developed summary indices and explored a number of correlations with various measures of labor markets during the period.

[3] Cushman (1998, 57-58) cites a series of Supreme Court decisions related to these issues and affirming the legislation.

2.2.1 Hours Restrictions for Males

Weekly and daily hours were a constant source of negotiation between workers and employers in the early 1900s. Average hours per day in manufacturing fell from 10 around 1890 to around 9.7 by 1905 and 9.2 in 1914, while average weekly hours fell from 60 in 1890 to 57.7 by 1905 to 53.6 during World War I and to 50.3 by 1926 (Carter, et. al., 2006, series Ba4552, p. 2-302 and Ba4568, p. 2-303). These changes were determined to a limited degree by changes in hours legislation (Whaples 1990). By 1905 7 states had enacted hours limits for textiles, 9 for manufacturing, 16 for railroads, 11 for mines, 11 for street railroads, 22 for public work, and 4 for other types of workers (including a law for New York bakers).

The key to the constitutionality of hours regulations for males was whether judges considered the hours limits to be necessary to protect the health and safety of workers. In 1898 in *Holden v. Hardy* (169 US 366, 1898) the Supreme Court upheld a Utah mining law setting a maximum of 8 hours per day for miners and ore smelting and refining as a valid exercise of police power because their safety was at risk if they worked more than 8 hours. Seven years later the court reaffirmed the *Holden* decision by upholding a similar Missouri law in *Cantwell v. Missouri* (199 US 385, 1905) on safety grounds (Cushman 1998, 247n58). Table 1 shows that only Rufus Peckham and David Brewer dissented in the *Holden* case, while I have been unable to find votes for the *Cantwell* case.

In contrast, the Supreme Court struck down a New York state law limiting the hours of male bakers in *Lochner v. New York* (198 U.S. 45, 1905). Justice Rufus Peckham wrote for the 5-4 majority that the law was a violation of freedom of contract. The bakers were able enough "to assert their rights and care for themselves without the protecting arm of the State." He argued that the limits were not related to a public health issue that might have constituted a

legitimate exercise of police power. The four dissenting justices made a health and safety argument in favor of the laws. They argued that the legislature was in a better position than the courts to assess whether there were sufficient threats to the bakers' health from long hours to use the police power to impose a limit to protect the bakers.

The two types of decisions seem to have led to two different paths for hours legislation for men. In 1916 the federal government enacted the Adamson Act in 1916 setting a maximum of 8 hours per day with added pay for overtime for interstate railway workers. It was upheld in another 5-4 Supreme Court decision in 1917 in *Wilson v. New* (243 US 332, 1917). By 1924 the number of states regulating hours for intra-state railroads had risen from 16 to 27. The number regulating hours for other types of workers had risen from 4 to 11. Most of these settings seem to have met the requirement that the workers' or their customers' safety were at risk. Meanwhile, the states were active in limiting hours when they were the employer, as the number of states regulating hours for public work rose from 8 in 1900 to 30 in 1924.

On the other path the number of states with hours laws for textiles, manufacturing, and street railroads listed by the BLS as active in 1924 had not changed or had fallen. It might be that these also survived because they promoted safety, they had not been challenged, or they were not enforced. Alternatively, the state regulators may have taken heart in the Supreme Court's decision in *Bunting v. Oregon* (243 U.S. 426, 1917) to uphold a 10-hour day law for men and women in Oregon. As seen in Table 1, Justice McKenna had supported the hours limits in 1898 in *Holden* and in *Wilson* in 1917 for the Adamson Act but voted against the 1905 baker's law in *Lochner* (see Table 1). In *Bunting* he argued that the plaintiff had *not* met the burden of

proof that there was *no* safety reason for the law.[4] Later, Chief Justice William Howard Taft suggested that the *Bunting* decision had implicitly overruled *Lochner* (Cushman 1998, 61).

2.2.2 Allowing Paternalistic Hours Restrictions for Women and Children

As part of the campaign to limit child labor and protect their safety in workplaces, the states generally imposed restrictions on child labor through minimum ages, as well as hours limits for the child workers above those ages. The number of states imposing minimum ages rose from 17 in 1894 to 42 in 1924. The number imposing general restrictions rose from 20 to 44. The hours restrictions varied on child labor varied across types of employment. The number imposing general restrictions on hours rose from 7 to 35, restrictions on mechanical employments rose from 18 to 28, from 6 to 22 in mercantile jobs, and from 15 to 26 in textiles, where the whole family had often worked in southern mills. A number of studies have found weak effects of these laws on child labor activity. Fishback (1998) argues that many of the Progressive Era labor laws did not pass until after a group of employers joined reformers to pass laws that codified what those employers were already doing. The reformers still saw this as useful because the new laws brought the straggling employers into conformity.

On similar paternalistic grounds states imposed hours restrictions on women's labor. Between 1895 and 1924, the number of states with hours restrictions in general rose from 2 to 28, the number for mechanical female employment rose from 12 to 28, for textiles the rise was from 8 to 27 and for mercantile work the rise was from 3 to 27. The expansion was supported

[4] In an odd contrast in Table 1, Justice William Day voted against the railroad hours limits in *Wilson* even though he had supported the hours limits in *Lochner, Muller,* and *Bunting,* as well as the minimum wage in *Stettler*.

by a series of Supreme Court decisions, starting with *Muller v. Oregon* (208 US 412, 1908).[5] The court argued that women needed more protection than men against long hours of work and that it was important that they maintain their health so that they could have "vigorous" offspring; therefore "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" (quoted in Cushman 1998, 54). Goldin (1988) found that the laws had relatively small impacts on the hours worked by women, but the restrictions appear to have lowered the hours of work by men. This might have been why the women's hours laws continued to face challenges in the courts. Although six Justices had been replaced after the 2008 *Muller* decision, the U.S. Supreme Court reaffirmed the women's hours maximums in a series of cases in 1914 and 1915.[6]

3 Minimum Wage Laws

The next major issue in the 1910s was minimum wages for women, and the FC and HS Justices disagreed about the impact of wages on health and safety. These disagreements led to a pair of close decisions in 1917 that allowed hours limits and requirements of overtime pay for *men and women* in dangerous work. Further, the initial decision on a women's minimum wage law affirmed the state court's support for the minimum in a split decision with new HS Judge Louis Brandeis recusing himself because he had represented the state in the lower court decisions. When the women's minimum wage came up again in 1923 in *Adkins v. Children's*

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[5]Prior to *Muller*, state courts in Massachusetts, Nebraska, Oregon, and Washington had supported the constitutionality of the limits on women's hours, while in Illinois it was declared unconstitutional. See *Commonwealth v. Hamilton Mfg. Co.*, 120 Massachusetts 383; *Wenham v. State*, 65 Nebraska 394, 400, 406; *State v. Buchanan*, 29 Washington 602; *Commonwealth v. Beatty*, 15 Pa.Sup.Ct. 5, 17; against them is the case of *Ritchie v. People*, 155 Illinois 98.

[6]Cushman (1998, 247n59) cites *Bosley v. McLaughlin* (236 US 385 1915), *Miller v. Wilson* (236 US 373, 1915), *Hawley v. Walker* (232 US 718, 1914), and *Riley v. Massachusetts* (232 US 671, 1914).

Hospital, the regulation was struck down in a 5-3 decision with Brandeis again recusing himself. The majority argued that the minimum wage had a much more indirect effect on the health and safety of women than the maximum hours laws. During the Great Depression attitudes toward minimum wages began to shift. A number of states passed new minimum wage laws. Hoover jawboned industry to maintain wage rates and the New Deal introduced the National Recovery Administration (NRA), in which industry leaders negotiated wage, hours, and price agreements on codes that had the force of law. As seen in Table 2, four FC Justices who had voted against the minimum wage law in *Adkins* in Willis Van Devanter, James McReynolds, George Sutherland, and Pierce Butler maintained their stance against minimum wages before retiring in the late 1930s. Meanwhile, HS Justice Louis Brandeis, who had recused himself from *Adkins*, was joined by new HS Justices Harlan Fiske Stone, Benjamin Cardozo, and Chief Justice Charles Evan Hughes. In 1936 Justice Owen Roberts opposed one version of the minimum wage that sought to circumvent the *Adkins* decision and then in 1937 supported a version that asked to overturn it on the grounds that wages that were too low created a health and safety risk. When the Court supported the constitutionality of the Fair Labor Standards Act of 1938 that limited hours and set minimum wages and rules for overtime pay for women and men in interstate commerce, the uncertainty surrounding the issue was largely settled.

3.1 *The Initial Laws and Court Decisions*

Between 1912 and 1919 15 states and Washington, D.C. adopted minimum wage laws for women.[7] The laws were found to be constitutional in the state supreme courts in Arkansas,

[7] The states were Massachusetts and Ohio in 1912; California, Colorado, Minnesota, Nebraska, North Dakota, Oregon, Utah, Washington, and Wisconsin in 1913; Arkansas in 1915, Arizona in 1917; D.C. in 1918, and Texas in 1919. Ohio passed a constitutional amendment but never enforced the law and Nebraska never put it into operation. All of the rest except Colorado set specific rates, generally through commissions. Violations were treated as misdemeanors in which the court could award back wages in most states. Massachusetts differed in that it reported

Massachusetts, Minnesota, and Oregon, and Washington (Clark 1921, 33), but there remained uncertainty until the Supreme Court ruled on minimum wages. At the national level three Supreme Court rulings in 1917 seemed to support some wage regulation, although Cushman (1998, 60-65) argues that the Justices focused mostly on the hours issues and minimized the wage restrictions in their opinions. The *Bunting v. Oregon* (23 US 426 1917) and *Wilson v. New* (243 US 332, 1917) hours law cases also involved paying overtime wages, and men were among the workers in both settings. In the *Bunting* case the plaintiffs pressed an argument that the laws involved wage regulation and that "insufficiency of wage does not justify legislative regulation. The wage had no bearing on health." "The effect is to take money from the employer and give it to the laborer without due process or value in return," and thus was a "taking" that was not "neutral" (Cushman quoting the decision, 1998, 60). The judges treated the case as a case about hours and not about wages. FC Justice McKenna argued that the overtime pay acted like a fine designed to deter employers from having workers work beyond the hours maximum.

In the *Wilson v. New* case the Adamson Act had included overtime pay and also subject to a commission report planned to reduce the hours per day while requiring daily pay to stay the same. The Justice Department argued that the wage minimum was health-related because "physical efficiency is impossible without proper living conditions…which can not be secured without payment of an adequate wage. An adequate wage, therefore, is essential to safe, regular, and efficient service in interstate commerce" (quoted in Cushman 1998, 62). Chief Justice White wrote for the majority stating that railroads were involved in public service and could be regulated in ways not applicable to private business (Cushman 62-64).

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the names of violators in newspapers instead. Nebraska in 1919 repealed the law but then adopted a constitutional amendment in 1920 that authorized legislation, while Texas in 1921 repealed its law. See Clark (1921, 10-12) and Smith (1932) for descriptions of the laws at various times.

The most direct decision about minimum wages for adult women wage standards came when the Oregon Supreme Court ruling on the Oregon law was appealed to the Supreme Court. The Oregon court had used the same reasoning as in *Muller v. Oregon.* In *Stettler v. O'Hara* (243 US 629 1917) the Court split 4-4 with HS Justices McKenna, Holmes, Day, and Clarke supporting the statute and FC Justices White, Van Devanter, Pitney, and McReynolds opposing. HS Justice Brandeis recused himself because he had been a lawyer for the state in the litigation. These apparent affirmations of wage regulation made it easier for Arizona in 1917, D.C. in 1918, and Texas in 1919 to adopt minimum wage laws for women. However, Texas in 1921 later repealed its law (Clark 1921).[8]

The constitutionality of minimum wages for women was struck down in *Adkins v. Children's Hospital* (261 US 525, 1923). The decision declared unconstitutional the efforts by Congress to set up minimum wages for women in Washington, DC in 1918. In the ensuing court challenge Justice Felix Frankfurter, who later joined the Supreme Court, defended the minimum as essential to protecting the health of women and their children and to prevent them from requiring poverty relief at the expense of taxpayers. The plaintiffs argued that the minimum was a taking, was similar to price-fixing, the activities did not affect the public interest, and that "wages, unlike hours affected health only 'indirectly or remotely'" (Cushman 1998, 67). Justice Sutherland wrote for the 5-3 majority and accepted the hospital's argument, while also affirming the "freedom of contract" doctrine. Chief Justice William Howard Taft dissented (with Edward Sanford joining) using arguments from dissents in the *Lochner* case and the majority in the *Bunting* case. He argued that it was not clear that wages had a more indirect impact on health than hours, and the legislature was in a better position than the judges to determine the issue

[8] See Elizabeth Brandeis (1935, 499-539) for discussions of the application of the laws.

(Cushman 1998 69). Oliver Wendell Holmes dissented separately and expressed dissatisfaction with the "liberty of contract" doctrine, while arguing that the legislation had the proper goal of removing conditions that led to "ill health, immorality, and the deterioration of the race" (quoted by Cushman 1998, 69).

3.2. *State Responses to the Adkins' Decision Over the Next Decade*

After the 1923 decision it might have seemed settled that laws limiting women's hours in general and men's hours in dangerous jobs were constitutional but that hours maximums for most males and minimum wages for men and women were not. Certainly, the initial decisions that followed appeared to confirm that belief. Over the next few years the Supreme Court ruled the Arizona and Arkansas laws void in *Murphy v. Sardell* (169 U.S. 366, 1925 and *Donham v. West-Nelson Mfg. Co. (*273 U.S. 657, 1927). State Supreme Courts in Kansas in 1925 and Minnesota in 1925 declared their minimum wage laws unconstitutional. The Minnesota decision reversed several of their earlier decisions declaring the law constitutional.[9]

Contemporary interest groups and state legislators and governors, however, had seen a series of decisions on each law that had switched back and forth as they move up through the courts. At the Supreme Court level the votes had often been close, and there was turnover on the court. Eight Justices had been appointed after 1920, and three of those had resigned by 1932. Only five of the Judges from the 1923 court that had decided *Adkins* were still on the court in 1933. Seeing this history, one can imagine that interest groups on both sides of the issues would be pressuring state governments to pass or oppose new laws.

[9]See U.S. Bureau of Labor Statistics, "Minimum Wage Legislation in the United States." *Monthly Labor Review* 37 (1933): 1344-1354. The Kansas case was *Topeka Laundry Col v. Court of Industrial Relations (119 Kans. 13)* and the Minnesota case was *Stevenson v. St. Clair (161 Minn. 444).*

Despite the *Adkins* ruling, a number of states continued to maintain minimum wage laws on an advisory basis. In North Dakota, Massachusetts, and Washington the commissions seem to have carried on as before because their state supreme courts had declared their laws constitutional.[10] Wisconsin rewrote its law in 1925 and changed the basis of its legislation from requiring the "necessary cost of proper living" to a more negative idea that "no wage shall be oppressive, and it passed muster in federal court.[11] A Women's Bureau Study in 1932 reported that California, Colorado, Massachusetts, Minnesota, North Dakota, Oregon, South Dakota, Washington, and Wisconsin were still listed as having minimum wage laws. North Dakota set specific rates in the statutes, while commissions or agencies within the other states established rates, although Colorado had no appropriations to operate the law. Violations were generally treated as misdemeanors in which back underpayments could be collected. Massachusetts had no fines, and instead published the names of violators in the newspaper (Smith 1932, 11 and supplemental charts), although a Massachusetts court ruling in 1924 stated that the Minimum Wage Commission *could not require* a newspaper to publish the list.[12] It is not clear from the study how well the laws were being enforced. The BLS (1931, 449) suggested that it was understood in California and Washington and likely also in North Dakota, Oregon, and South Dakota that public opinion would help enforce the rates they set.

In many ways the situation for women's minimum wage laws was similar to the situation for most laws at the time period. For example, the fines for violating mine safety regulations

[10] See U.S. Bureau of Labor Statistics, "Minimum Wage Legislation in the United States." *Monthly Labor Review* 37 (1933): 1344-1354. In Washington see *Larsen v. Rice (100 Wash. 642 in 1918;; Spokane Hotel v. Younger (113 Wash. 359 in 1920; Sports. v. Moritz (141 Wash. 417).* In North Dakota it was *Northwestern T.E. Co. v. Workmen's Compensation Bureau (47 N.D. 397).* In Massachusetts the case was *Holcombe v. Creamer (231, Mass 99) in 1918.*
[11] See U.S. Bureau of Labor Statistics. *Handbook of Labor Statistics, 1931, Edition. Bulletin No. 541, 1931, p.* 448. The ruling is *Folding Furniture Works v. Industrial Commission (300 Fed. 991, 1924, U.S. District Court, W.D., Wisconsin).*
[12]"Legislative Notes." *American Labor Legislation Review* 14 (1924), p. 203.

were generally low and enforcement was costly because inspectors in many states had to go to court to enforce the law in many states (see Fishback 2006 and Graebner 1976, 97-100). Thus, enforcement largely relied on public opinion and the mine owners' respect for the law.

The wage declines during the Depression and the election of Roosevelt appear to have emboldened seven states to pass new minimum wage laws for adult women between 1933 and 1935, including Connecticut, Illinois (1933), New Hampshire (1933), New Jersey (1933), New York (1933), Ohio (1933), and Utah (1933 after 1929 repeal).[13] Several of the laws were based on a standard bill sponsored by the National Consumers' League. The BLS (1933b, 1346) stated they were "drawn by the legislatures in view of the objections raised in the *Adkins* case and it is evident that the laws were so worded as to overcome the major difficulties. During the recent period of economic depression it has become apparent that unfair wage standards not only undermine the health and well-being of the workers but threaten the stability of industry itself." "The experience of the past few years should add much force and weight to the reasoning in the opinion in *Stettler v. O'Hara* holding that the enactment of such laws is a valid exercise of the police power and that they are not only a valid but necessary means of protecting the public health, morals and welfare."

3.3 Restrictions Imposed by the National Recovery Administration

Worries about industry stability and declining wages led both the Hoover and Roosevelt administrations to try several ways to maintain higher wages during the Depression. President Hoover had tried "jawboning" leading manufacturers into volunteering for work-sharing arrangements in which they would reduce hours per week, increase the number employed, and

[13] U.S. Bureau of Labor Statistics (1933a, 1933b).

hold hourly earnings roughly the same (Rose 2010; Neumann, Taylor and Fishback 2013). The New Dealers promoted a similar idea as part of the National Industrial Recovery Act of June 16, 1933. In addition to allotting money to hire workers to build large public works through the Public Works Administration, they called for employers, workers, and consumers to meet together and negotiate "Fair Codes of Competition." The Codes were to include agreements to set minimum wages and maximum hours in the industry and set prices and quality of goods and the codes were to be enforced through prosecutions by U.S. district attorneys in U.S. district court.[14]

Section 7a of the NIRA stated that every code gave employees collective bargaining rights, banned yellow dog contracts, and required that employers shall comply with maximum hours of labor, minimum rates of pay, and other conditions of employment "approved or *prescribed* by the President." The Codes were to include agreements to set minimum wages and maximum hours per week in the industry and set prices and quality of goods and the codes were to be enforced through prosecutions by U.S. district attorneys in U.S. district court.[15]

[14] Section 3d of the NIRA gave the president the authority to hold hearings and set up codes of fair competition "if complaint is made to the President that abuses inimical to the public interest and contrary to the policy herein declared are prevalent in any trade or industry or subdivision thereof, and if no code of fair competition therefor has theretofore been approved by the President." Violations were misdemeanors with fines of up to $500 for each day an offense occurred. Section 3e gave the right to impose trade restrictions on foreign imports that violated the codes.

[15] Section 3d of the NIRA gave the president the authority to hold hearings and set up codes of fair competition "if complaint is made to the President that abuses inimical to the public interest and contrary to the policy herein declared are prevalent in any trade or industry or subdivision thereof, and if no code of fair competition therefor has theretofore been approved by the President." Violations were misdemeanors with fines of up to $500 for each day an offense occurred. Section 3e gave the right to impose trade restrictions on foreign imports that violated the codes.

In the absence of a code Section 7c gave the President, after hearings and investigations, the "authority to prescribe a limited code of fair competition fixing such maximum hours of labor, minimum rates of pay, and other conditions of employment...as he finds to be necessary," and the codes were to be enforced like a regular code.

Only a handful of industries had created codes by late July of 1933. As a stopgap measure Roosevelt issued an Executive Order on July 27 allowing firms to display the Blue Eagle if they voluntarily signed President's Reemployment Agreements (PRAs). The stated goal was to "raise wages, create employment, and thus increase purchasing power and restore business" in a plan that "depends wholly on united action by all employers." The conditions of the PRAs included maximum hours of 40 per week for office workers and 35 per week for factory workers and minimum weekly earnings of $15 per week in cities with more than 500,000 people, $14.50 per week where population was between 250,000 and 500,000, and $14 hours per week in cities with 2500 to 250,000 people. In smaller towns the firms were to increase all wages by not more than 20 percent with a target of $12 per week. The minimum hourly wage was set at 40 cents per hour unless the wage rate for the same class of work in 1929 was less than 40 cents, and then the minimum was to be the larger of $30 cents per hour or the prevailing hourly rate in July 1919. No compensation that was currently above the minimum was to be lowered. No children below 14 years of age were to be employed and those 14 to 16 were to work no more than 3 hours per day, and these were required to be between 7 a.m. and 7 p.m. Implicit was the expectation of an increase in employment, as employers were "not to use any subterfuge to frustrate the spirit and intent of this agreement which is, among other things, to increase employment by a universal covenant, to remove obstructions to commerce and to shorten hours and to raise wages for the shorter week to a living basis." Price increases were

allowed only based on actual costs, and firms were "to support and patronize establishments" that were also National Recovery Administration (NRA) members. Finally, they were "to cooperate to the fullest extent in having a Code of Fair Competition submitted by his industry at the earliest possible date" with an expectation that the Codes would be created by September 1, a date that few industries met.

The PRA and the industry Codes were not regulations per se because the firms were voluntarily signing the PRA or joining in the industry codes. If the firm/employer did not sign the code or agreement, however, they were not subject to the minimum wage or the maximum hours. Thus, the PRA and NRA minimums were based on bargaining, unlike a statutory minimum wage. The government made signing the PRAs attractive by developing a massive advertising campaign to get consumers to buy from firms that displayed the Blue Eagle symbol associated with the NRA. The campaign included parades in every major city as well as 20,000 canvassers going door-to-door to 20 million households to get people to sign pledges to support the NRA by buying only from firms displaying the Blue Eagle. A large number of firms signed the pledges and average hours worked in manufacturing dropped from around 41 hours per week in July 1933 to 33.8 hours in November 1933 (Taylor, Neumann, and Fishback 2013, 108).

Jason Taylor (2019, chapter 4) and Royal Meeker (1933, 467-8) both suggested an undercurrent of coercion as well. The administration sought to make firms believe that non-compliance would cost them dearly with unspoken threats of boycotts. In August 1933, the mercurial NIRA head General Hugh Johnson announced, "the time is coming when someone is going to take one of those Blue Eagles off of someone's window in a clear cut case and that is going to be a sentence of economic death (Anonymous 1933)."

Codes were created in hundreds of industries, although the enforcement of the codes was relatively weak, and violations were not uncommon. The problems with violations followed the typical patterns found in settings related to cartel enforcement with more heterogeneous sectors and codes that were less precise being violated more often (Taylor 2011 and 2019).

The NRA legislation was set to expire in June 1935, and Vittoz (1987) argues that there were a number of Congressmen who were inclined to allow them to expire. The issue became moot in May 1935 when the Supreme Court unanimously struck down the NRA codes on May 27, 1935 in *L. A. Schechter Poultry Corp. v. United States* (295 U.S. 495, 1935). Chief Justice Hughes argued that the codes were not "voluntary" but had become the equivalent of regulations created by market participants although approved by the President and that the delegation of this power was unconstitutional. In his own words:

> Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead, it authorizes the making of codes to prescribe them. For that legislative undertaking, it sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion found in § 1. In view of the broad scope of that declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the ountry, is virtually unfettered. The code-making authority thus sought to be conferred is an unconstitutional delegation of legislative power.

3.4 The Path to a Constitutional Minimum Wages

Although the *Schechter* ruling supported freedom of contract, the decision was more about the improper delegation of regulatory authority by the legislature.[16] Cushman (1998, 71-83) argues that shifts in the composition of the court in the late 1920s and early 1930s led to a series of decisions that expanded the scope for public interest to be used to support the police power of the state and thus weaken the "freedom of contract" doctrine.[17] Further, he argued that "a bevy of contemporary Court watchers" anticipated that minimum wages would eventually be declared constitutional after the 5-4 Supreme Court decision on *Nebbia v. New York* (291 US 502 1934). A number of contemporaries thought cutthroat price competition was driving firms out of business during the Depression. When New York law establishing a minimum price for milk reached the Supreme Court, Justice Roberts wrote for the majority that the law was constitutional because the minimum price law insured that the public had adequate access to milk, which was necessary for the health of the population. He argued that "the use of private property and the making of private contracts are, as a general rule free from government interference; but they are subject to public regulation when the public need requires (p. 291)."

[16] Cushman (1998) suggests that a similar statement might be made about the 5-4 Supreme Court ruling in *Carter v. Carter Coal Co.* (298 US 238 1936), which struck down the attempt in the Bituminous Coal Conservation Act of 1935 to reestablish a version of the NRA bituminous coal code that set prices, wages, and hours. The majority ruled that the excise tax in the act was a "penalty" designed to coerce compliance, Congress did not have the power to control wages, hours, and working conditions because it has "no general power to regulate for the promotion of the general welfare" and cannot control production within a state before the coal is sold in interstate commerce (p. 298)..

[17] Cushman (1998, 77) states that these included a unanimous decisions in *Tagg Brothers & Moorhead v. United States* (280 US 420, 1930) to allow the Secretary of Agriculture to set commissions for brokers in stockyards and a 5-4 majority decision on *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251 (1931),written by Brandeis to limit commissions for agents selling fire insurance in New Jersey. In the insurance case the claim was that insurance rates were already regulated and that the commissions were a large enough share of insurance rates that they could be regulated as well to prevent insurers from being driven out of their public service business. Justice Van Devanter's dissent joined by McReynolds, Sutherland, and Butler argued that the state had the right to regulate the business but "it may not say what shall be paid to employees or interfere with the freedom of the parties to contract in respect of wages" (Cushman 1998, 77).Van Devanter did acknowledge that there might be special circumstances that would allow the freedom of contract to be abridged, but they had not occurred in the *O'Gorman* setting (Cushman 1998, 77).

When the court struck down a New York minimum wage law with a 5-4 vote in *Morehead v. New York ex. Rel. Tipaldo* (298 US 587, 1936) their predictions looked less accurate. The lawyers representing the state of New York went to great pains to identify differences between the D.C. law in *Adkins* and their own law to try to avoid asking the justices to overturn *Adkins*. Justice Butler wrote the majority opinion and still applied the freedom of contract doctrine in *Adkins.* Yet Chief Justice Hughes dissented saying that he could not agree that *Adkins* was a controlling case because the construction of the statutes in the two cases was different. "I can find nothing in the Federal Constitution which denies to the state the power to protect women from being exploited by overreaching employers through the refusal of a fair wage as defined in the New York statute and ascertained in a reasonable manner by competent authority" (p. 619). In his dissent Justice Harlan Fiske Stone, joined by Brandeis and Cardozo, argued that since the *Adkins* decision "we have had opportunity to learn that a wage is not always the result of free bargaining between employers and employees; that it may be one forced upon employees by their economic necessities and upon employers by the most ruthless of their competitors," further that insufficient wages place burdens on society as a whole (p. 635). "We should follow our decision in the *Nebbia* cases and leave…the solution of the problems to which the statute is addressed where it seems to me the Constitution has left them, to the legislative branch" (p. 636).

The minimum wage became constitutional when Owen Roberts switched sides and voted to uphold the Washington state minimum wage law for women in *West Coast Hotel v. Parrish* (300 US 379, 1937). The situation illustrates some of the uncertainties about the interactions between court decisions and statutes. Remember that the Washington state minimum wage law had been passed in 1913, long before the *Adkins* decision in 1923. The Washington Supreme

Court had ruled it constitutional in three earlier cases and supported it again in the case appealed to the U.S. Supreme Court. In a later memorandum Roberts claimed that he had joined the majority in the *Morehead* decision that struck down the New York minimum wage because New York had specifically *not* asked the court to overrule *Adkins* on the grounds that the law in the two laws were very different. When Roberts could find no real difference in the laws, he decided to stick with the *Adkins* precedent and declare the New York law unconstitutional. In *West Coast Hotel* he claimed he was asked directly to overrule *Adkins*; therefore, he applied his reasoning from the *Nebbia* case and agreed with the majority that the Washington minimum wage law was constitutional. Roberts believed that women were "especially liable to be overreached and exploited by unscrupulous employers," which, in turn, was "not only detrimental to the health and wellbeing of the women affected, but casts a direct burden for their support upon the community."[18] One can easily imagine how distraught the New York state lawyers who had worked so hard to avoid *Adkins* in their *Morehead* briefs were when they discovered Roberts' reasoning.

A common story about this process is that President Roosevelt tried to pack the Supreme Court with new justices after the 1936 election because of he was dissatisfied with the court striking down the AAA and the NRA and worried about them continuing to find the other laws unconstitutional. Therefore, in 1937 he declared his court-packing plans to add a new justice for each justice over the age of 70 on the Supreme Courts and in lower courts. Seeing the 1937 dates on decisions to support the minimum wage, the National Labor Relations Act, and the Social Security Act, people have claimed that the Justices supported the decisions to prevent the

[18]See Cushman 1998, 94-95. When reading Cushman about the New York case, it can be confusing because he refers to the case as *Morehead* and as *Tipaldo.*

court-packing plan. A popular phrase describing the change has become a "switch in time, saves nine" justices. Cushman (1998) and others since have argued that this is inaccurate. Roberts voted to support the minimum wage in December well before the court packing plan was announced and Congress offered stiff opposition to the attempts to pack the court and many members of Congress talked with and corresponded with the Justices to let them know that there was little chance the court packing plan would go through.

Soon after the ruling Arizona, Nevada, New York, and Washington D.C. passed new laws and Colorado, Connecticut, Minnesota, and Wisconsin strengthened existing laws (Trafton 1937, 1938). The decision also opened the door for Congress to pass the Fair Labor Standards Act of 1938, which established a minimum wage, maximum hours, and overtime pay *for men* as well as for women, while establishing federal regulation of child labor. By the time a challenge to the Act reached the Court in *United States v. Darby Lumber* (312 US 100, 1941), none of the FC Judges who had ruled against the minimum wage in *West Coast Hotel* in 1937 were still on the bench. Harlan Fiske Stone wrote the unanimous opinion supporting the constitutionality of the regulations for firms involved in interstate commerce.

4. Concluding Remarks

Prior to the New Deal state governments had the primary responsibility for regulating labor markets. Congress occasionally stepped in with statutory regulation in clear cases of interstate commerce, as with the railroads. The federal courts also played a role by making decisions about the constitutionality of state labor laws. Between 1900 and 1940 there was a great deal of uncertainty as to whether the states could limit men's hours and establish a minimum wage for women. The U.S. Supreme Court decisions on these issues were often close

because the judges had different opinions about how to balance freedom of contract and protection of health and safety of workers. Even though the identities of the judges changed in three waves, there was always close to an even split in the number of judges on each side of the issue. Meanwhile, some state governments continued with their existing laws or passed new ones with language designed to avoid the constitutional pitfalls found in prior statutes. The declines in wages and high unemployment during the Great Depression appear to have ultimately shifted the balance in favor of the health and safety arguments, as the federal government and some states enacted statutes that created wage regulations. The deciding vote on the Supreme Court was cast by Justice Owen Roberts in 1937 when he decided to overturn the 1923 *Adkins* decision and declare the Washington law from 1913 constitutional in *West Coast Hotel v. Parrish* in 1937. The decision paved the way for the Fair Labor Standards Act of 1938 that set minimum wages and applied overtime rules for both men and women.

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Table 1: Votes of Supreme Court Justices on Constitutionality of Statute in Major Labor Law Cases, 1898-1917

Case	1898 Holden v. Hardy	1905 Cantwell v. Missouri	1905 Lochner v. New York	1908 Adair v. U.S.	1908 Muller v. Oregon	1915 Coppage v. Kansas	1917 Bunting v. Oregon	1917 Wilson v. New	1917 Stettler v. O'Hara	1917 Hitchman Coal & Coke v. Mitchell	Start	End
Issue	Men Hours	Mens Hours	Men's Hours	Prevent Firing of RR Union Workers	Women's Hours	Stop Yellow Dog Contracts	Men/ Women Hours Over-time Pay	RR Men Hours, Wages, Over-time	Women's Wage	Stop Yellow Dog Contract		
Vote (For-Against)	7-2	?-?	4-5	2-6	9-0	3-6	6-3	5-4	4-4 affirmed	3-6		
Justice												
John Marshall Harlan	Yes		Yes	No-op	Yes						1877	1911
Horace Gray	Yes										1882	1902
Melville Fuller	Yes		No	No	Yes						1888	1910
David Brewer	No		No	No	Yes						1890	1910
Henry Billings Brown	Yes		No								1891	1906
George Shiras	Yes		Yes								1892	1903
Edward Douglas White	Yes			No	Yes	No					1894	1910
Rufus Peckham	No		No-op	No	Yes						1896	1909
Joseph McKenna	Yes		No	Yes	Yes	No	Yes	Yes	Yes	No	1898	1925
Oliver Wendell Holmes				Yes	Yes	Yes	Yes	Yes	Yes	Yes	1902	1932
William Day			Yes		Yes	Yes	Yes	No	Yes	No	1903	1922
William Moody				not. Part	Yes						1906	1910
Charles Evan Hughes						Yes					1910	1916
Edward Douglas White							No	Yes-op	No	No	1910	1921
Willis Van Devanter						No	No	No	No	No	1911	1937
Joseph Lamar						No					1911	1916
Mahlon Pitney						No-op	Yes	No	No	No-op	1912	1922

James McReynolds						No	No	No	No	No	1914	1941
Louis Brandeis							Recused	Yes	Recused	Yes	1916	1939
John Clarke							Yes	Yes	Yes	Yes	1916	1922

Table 2: Votes of Supreme Court Justices on Constitutionality of Statute in Major Labor Law Cases, 1898-1917

	1917 Bunting v. Oregon	1917 Wilson v. New	1917 Stettler v. O'Hara	1923 Adkins v. Children's Hospital	1930 Tagg Bros & Moorhead v. U.S.	1931 O'Gorman & Young v. Hartford Fire Ins.	1934 Nebbia v. New York	1935 Shecter Poultry	1936 Carter v. Carter Coal Co.	1936 Morehead v. New York ex. Rel. Tipaldo	1937 West Coast Hotel v. Parrish	1937 Jones & Laughlin Steel v. U.S.
	Men/ Women Hours Over-time Pay	RR Men Hours, Wages, Over-time	Women's Wage	Women's Wage	Ag Interstate Reg. of Commission Rates	Regulate Insurance Broker Commission Rates	Milk Min. Price	NRA	Code like NRA in Coal	Women's Minimum Wage	Women's Min. Wage	Nat'l Labor Relations Act
Vote (For-Against)	6-3	5-4	4-4 affirmed	3-5	9-0	5-4	5-4	0-9	4-5	4-5	5-4	5-4
Justice												
Joseph McKenna	Yes	Yes	Yes	No								
Oliver Wendell Holmes	Yes	Yes	Yes	Yes								
William Day	Yes	No	Yes									
Edward Douglas White	No	Yes-op	No									
Willis Van Devanter	No	No	No	No	Yes	No	No	No	No	No	No	No
Mahlon Pitney	Yes	No	No									
James McReynolds	No	No	No	No	Yes	No	No	No	No	No	No	No
Louis Brandeis	Recused	Yes	Recused	Recused	Yes-op	Yes-op	Yes	No	Yes	Yes	Yes	Yes
John Clarke	Yes	Yes	Yes									
William Howard Taft				Yes								
George Sutherland				No-op	Yes	No	No	No	No-op	No	No	No
Pierce Butler				No	Yes	No	No	No	No	No-op	No-op	No
Edward Sanford				Yes								
Harlan Fiske Stone					Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
Charles Evan Hughes					Yes	Yes	Yes	No-op	Yes	Yes	Yes	Yes-op
Owen Roberts					Yes	Yes	Yes-op	No	No	No	Yes	Yes

Benjamin Cardozo	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes

Notes. Horrace Lurton was on the court from 1910 through 1914 but did not participate in these cases.