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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1922

Nos. 795 and 796

JESSE C. ADKINS, *et al.*, constituting the Minimum Wage Board of the District of Columbia, *Appellants*,

vs.

THE CHILDREN'S HOSPITAL OF THE DISTRICT OF COLUMBIA.

JESSE C. ADKINS, *et al.*, constituting the Minimum Wage Board of the District of Columbia, *Appellants*,

vs.

WILLIE A. LYONS

BRIEF FOR APPELLANTS

Statement of Cases

These are appeals from the Court of Appeals of the District of Columbia, which sustained final decrees of the Supreme Court of the District of Columbia, entered by direction of the Court of Appeals of the District, granting bills by the Children's Hospital and Willie A. Lyons, respectively, (hereinafter called plaintiffs), to vacate an order of the Minimum Wage Board of the District of Columbia, (hereinafter called the Board), and to enjoin its enforcement, because of the unconstitutionality of the

Act upon which the order was based, viz., the District of Columbia Minimum Wage Law (40 Stat. 960).

These bills were originally dismissed by the Supreme Court and the decrees of the Trial Court affirmed by the Court of Appeals. From these decisions "rehearings" were "directed," resulting in reversals of the prior decisions of the Court of Appeals. These reversals are here challenged. The jurisdiction of the Court of Appeals in the "rehearing" proceedings resulting in the present decrees, as well as the constitutionality of the District of Columbia Minimum Wage Law, are in issue.

Facts

The fact, briefly, are these:

1. After hearings by Committees of both Houses of Congress, followed by debate in both Houses, Congress passed the Act of September 19, 1918 (40 Stat. 960). "The purposes of the Act," as defined by Congress, are

> "To protect the women and minors of the District from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain decent standards of living. . ." (Sec. 23.)

The Act establishes a "Minimum Wage Board" as the machinery for determining

> "Standards of minimum wages for women in any occupation within the District of Columbia, and what wages are inadequate to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals" (Sec. 9),

and for enforcing such "standards of minimum wages" promulgated by order of the Board (Secs. 9-12). By Sec. 13 the Act provides

"That for any occupation in which only a minimum time-rate wage has been established, the Board may issue to a woman whose earning capacity has been impaired by age or otherwise, a special license authorizing her employment at such wage less than such minimum time-rate wage as shall be fixed by the Board and stated in the license."

2. Pursuant to the requirements of the Minimum Wage Law, including the report of a Conference on the Hotel, Restaurant and Hospital Industries, such Conference being composed of an equal number of representatives of the employers and employees affected, and after public hearing, the Minimum Wage Board made the following order:

"1. No person, firm, association, or corporation shall employ a woman or minor girl in any hotel, lodging house, apartment house, club, restaurant, cafeteria, or other place where food is sold to be consumed on the premises or in any hospital, at a rate of wages of less than 34½ cents per hour, $16.50 per week, or $71.50 per month. This shall not be construed to include nurses in training.

2. When *bona fide* meals are furnished by the employer to any woman or minor girl employed in the establishments named in Section 1 of this order as part payment of the wages of such employee, not more than 30 cents per meal may be deducted by such employer from the weekly wage of such employee. A record shall be kept of the number of meals furnished each woman and minor girl per week and of the deductions made from the weekly wage for the same; otherwise the full minimum wage rate shall be paid in cash.

3. When lodging is furnished by the employer to any woman or minor girl employed in the establishments named in Section 1 of this order as part

payment of the wages of such employee not more than $2 per week shall be deducted by such employer from the weekly wage of such employee.

4. Tips and gratuities shall not be construed as part of the legal minimum wage." (R.)

3. The plaintiff, The Children's Hospital, is engaged in maintaining a hospital for children in the District of Columbia (R., fol. 4).

The plaintiff, Lyons, is a woman employee of the Congress Hall Hotel Company, a corporation engaged in the business of conducting a hotel in the District of Columbia, working as an elevator operator, at a wage of $35 a month and two meals a day (R., fol. 25).

The plaintiffs did not challenge the facts, as found by the Board, upon which the order was based; nor did either plaintiff seek to review the findings of the Board as arbitrary or unfounded in fact, and therefore without basis in law, which right of review is provided by Sec. 17 of the Act. There was and is no claim that the minimum fixed by the Board, to wit, 34½ cents per hour, or less than $16.50 per week, or less than $71.50 per month, is more than "the necessary cost of living to any such women workers [in the District of Columbia] to maintain them in good health and to protect their morals." Nor did either plaintiff invoke the provision of Sec. 13 of the Act for a "special license" authorizing employment at less than the rate fixed by the Board. On the contrary, without challenging the correctness of the facts found by the Board, nor attempting to avail themselves of the provision for exemption from the Board's order by "license," the plaintiffs brought separate suits, (though in fact one suit, with the same pleadings, filed by the same counsel and supported by the same brief),

to enjoin the enforcement of the order of the Board (R., pp. 2, 19). The complaints were answered, and, after hearing, decrees dismissing the suits were entered by the Supreme Court (R., pp. 13, 26).

4. On appeal to the Court of Appeals the constitutionality of the Law was sustained and the decrees of the Supreme Court were affirmed, on June 6, 1921, in an opinion by Mr. Chief Justice Smyth, with a separate concurring opinion by Mr. Justice Stafford, Mr. Justice Van Orsdel dissenting. (R., pp. 31, *et seq.*). Motions for rehearing were filed on June 14, and on June 22, were overruled. At the same time an order was made withholding the mandates to afford plaintiffs a reasonable opportunity for review by this Court. (Facts set forth by Mr. Chief Justice Smyth, R., pp. 66-70.)

5. At the time these cases were first called for hearing before the Court of Appeals, Mr. Justice Robb was unable to sit in them because of illness. Pursuant to fec. 225 of the Code of Law for the District of Columbia the other Justices designated Mr. Justice Stafford of the Supreme Court to take his place (R., fol. 40). Mr. Justice Stafford sat as a member of the Court of Appeals when the motions for rehearing, on June 14, were submitted, and his right to participate in the disposition of these motions had in nowise been challenged by the plaintiffs when these motions were overruled on June 22, 1921. Thereupon the members of the Court separated for the summer vacation.

Three days after the motions for rehearing had been overruled, on June 25, Mr. Justice Robb, in a letter to the Chief Justice, for the first time called into question the power of Mr. Justice Stafford to sit upon the motions for rehearing. The Chief Justice, in reply, pointed out that

the motions had already been passed upon and suggested "reasons which then occurred to him for believing that Justice Stafford had acted within his authority when he united with the Chief Justice in overruling the motions. To this no answer was made but on July 1 Justice Robb wrote, saying: 'After mature consideration I have decided to vote for a rehearing in the Minimum Wage Cases, and I am advising counsel to that effect, as well as Justice Van Orsdel.' Thereafter, in pursuance of directions from him and Mr. Justice Van Orsdel, the Clerk entered an order granting a rehearing in both cases, the Chief Justice dissenting." (Dissenting opinion, Mr. Chief Justice Smyth, R., p. 66).

On July 10, plaintiffs moved to set aside the denial of the motions for rehearing, and "this was the first time the right of Justice Stafford was questioned by any pleading or other paper filed in the Cases, or by any other method addressed to the Court." (R., fol. 99.) These motions were sustained, Mr. Justice Robb and Mr. Justice Van Orsdel concurring and the Chief Justice dissenting. (R., fol. 99). The Board duly objected to this order setting aside the order of June 22, which overruled the motions for rehearing, and asserted the continued jurisdiction of the Court as constituted at the time of the original decisions of these Cases, including the temporary Justice from the Supreme Court, until the final disposition of the Cases. (R., fol. 88.) Over the protest of the Board the Cases were thereupon heard upon the "rehearing," on October 10, 1921, and on November 6, 1922, the Court of Appeals held the Law unconstitutional, in an opinion by Mr. Justice Van Orsdel, Mr. Justice Robb concurring and the Chief Justice dissenting. (R., pp. 56, *et seq.;* 284 Fed. 613.)

Questions Raised

Two questions are involved in these appeals:

First: The jurisdiction of the Court of Appeals.

Second: The constitutionality of the District of Columbia Minimum Wage Law.

A decision on the merits will, in effect, determine the fate of minimum wage legislation affecting women, which has been in operation, in most cases for about ten years, in various states throughout the country, namely the laws of Arizona, Arkansas, California, Colorado, Kansas, Massachusetts, Minnesota, North Dakota, Oregon, Utah, Washington and Wisconsin. Proposals for similar legislation are now before the Legislatures of such important industrial states as New York, Ohio and Missouri. Therefore, the constitutional power of the States is at stake, as well as the constitutional power of Congress to legislate for the District.

AS TO JURISDICTION OF COURT OF APPEALS

The majority opinion below is wholly silent on the challenge to the Court's jurisdiction, although the grounds of objection are vigorously pressed by the Chief Justice. We shall rest, substantially, on the arguments and authorities presented by the Chief Justice, partly because of their persuasiveness, but also because the relevant facts to which they are applied were largely in the possession of the members of the Court and not known to Counsel until set forth in the Chief Justice's dissent.

Two objections are raised to the jurisdiction of the Court of Appeals upon the "rehearing":

> I. Only the Court of Appeals as a *Court,* and not Mr. Justice Robb as an individual member of the Court, had power to pass on the jurisdiction of Mr. Justice Stafford to participate in the disposition of the original motions for rehearing.
>
> II. Mr. Justice Stafford, by lawful designation, was a member of the Court of Appeals for purposes of these cases, and continued to be such a member until the full and final disposition of the causes, including motions for rehearing, which he was designated "to hear and decide".

I. Only the Court of Appeals as a Court, and not Mr. Justice Robb as an individual member of the Court, had power to pass on the jurisdiction of Mr. Justice Stafford to participate in the disposition of the original motions for rehearing.

In light of the facts set forth by Chief Justice Smyth it appears that a majority of the Court of Appeals failed to observe that a Court is a corporate body, which deliberates and decides as a collectivity. "Court" is not the sententious label for its individual members, acting as scattered individuals, without collective deliberation or decision. Yet, in these cases, Mr. Justice Robb decided by himself that prior orders of the Court of Appeals, denying rehearing in these cases, were to be nullified by disqualifying Mr. Justice Stafford. Let Chief Justice Smyth speak for this aspect of the question:

> "Before discussing the constitutionality of the act, it is necessary to consider matters not referred to in the majority opinion, and which are essential to a correct disposition of the cases.

"These cases were decided on the 6th day of June, 1921, and motions for rehearing denied on June 22, same year. In my opinion both cases were finally disposed of then, and the court is without jurisdiction to render the present decisions.

"At the time the causes were first called for hearing Mr. Justice Robb was unable to sit in them because of illness. Pursuant to section 225 of the Code, the other justices designated Mr. Justice Stafford of the Supreme Court to take his place. The order designating him provided that he should "sit as a member of this court in the absence of Mr. Justice Robb in the hearing and desision of the following cases," among which were those now under consideration. Mr. Justice Stafford took his seat on the bench, participated in the hearing of the cases, and in their consideration and final disposition by the court. On June 6 the court sustained the constitutionality of the act, and affirmed the decrees of the trial court. The opinion was by the Chief Justice, Mr. Justice Stafford announcing a short concurring opinion and Mr. Justice Van Orsdel dissenting. A motion for rehearing in each case was filed by the appellants on June 14, and on June 22 was considered and overruled by a majority of the court, consisting of the Chief Justice and Mr. Justice Stafford, Mr. Justice Van Orsdel being absent. Section 225 of the Code provides that where one member of the court is absent or disqualified, a majority may rule on motions. At the time the motions for rehearing were overruled, an order was made that the mandates be withheld until the appellants had a reasonable opportunity to apply to the Supreme Court of the United States for a review. About this time the members of the court separated for the summer vacation. The motions for rehearing did not challenge in any way the right of Mr. Justice Stafford to participate in the disposition of them, and the question as to his right to do so was not before the Chief Justice and Mr. Justice Stafford at the time they overruled the motions, and

never was submitted to them, nor had any member of the court been asked to pass on it prior to the overruling of the motions, so far as I know.

"June 25, three days after the motions for rehearing had been overruled, Mr. Justice Robb wrote to the Chief Justice, as follows: 'Within fifteen days after the decision was announced in the Minimum Wage cases counsel sent me their application for a rehearing, and insisted, and still insist, that I vote thereon. While I incline to the view that Justice Stafford no longer has any jurisdiction in these cases, I wish to look up the authorities, if any there be, before deciding definitely.' In answer the Chief Justice said the motions had already been passed upon and he ventured to suggest reasons which then occurred to him for believing that Justice Stafford had acted within his authority when he united with the Chief Justice in overruling the motions. To this no answer was made, but on July 1 Justice Robb wrote, saying: 'After mature consideration I have decided to vote for a rehearing in the Minimum Wage cases, and I am advising counsel to that effect, as well as Justice Van Orsdel.' Thereafter, in pursuance of directions from him and Mr. Justice Van Orsdel, the clerk entered an order granting a rehearing in both cases, the Chief Justice dissenting.

"About ten days after Mr. Justice Robb had notified the Chief Justice of his intention to vote, motions were filed to set aside the order made by Justice Stafford and the Chief Justice. These motions were based upon the ground that the order was not passed by a majority of the court as constituted at the time the order was made. This was the first time the right of Justice Stafford was questioned by any pleading or other paper filed in the cases, or by any other method addressed to the court. These motions were sustained July 13, Mr. Justice Robb and Mr. Justice Van Orsdel concurring and the Chief Justice dissenting.

"It would seem from the foregoing that the ap-

pellants, finding themselves defeated, sought a justice who had not sat in the case but who, they believed, would be favorable to them, and induced him, by an appeal directed to him personally, to assume jurisdiction and join with the dissenting justice in an attempt to overrule the decisions of the court. I shall not characterize such practice—let the facts speak for themselves.

"What arguments, if any, were advanced to Mr. Justice Robb by counsel for appellants when they made their application to him, I do not know, nor am I aware of the basis on which he rested his conclusion that he had a right to vote on the motions. But from what I have said, it is manifest, I think, that he proceeded upon the assumption that he alone had the power to decide the question; in other words, that it was not a matter for consideration by the court. I am unable to agree to this. Whether or not he had such power involved a construction of the Code authorizing the calling in of a substitute justice. Of course, where the question is as to whether or not a judge is prejudiced against one of the parties, or interested in the subject of the litigation, it is usual for him to decide the matter for himself, except in cases controlled by section 20 of the Judicial Code. But the question here involved relates not only to the power of Justice Robb, but also to that of Justice Stafford. Acting by virtue of the statute, two members of this court had designated Justice Stafford to sit 'in the hearing and decision of these cases,' which, of course, included the disposition of the motions for rehearing, for the cases would not be decided finally until those matters were ruled upon. Mr. Justice Robb attempted to set aside that order and displace Justice Stafford. I submit he was without power to do so. The question was for the court—not for one member of it only." (R., pp. 66-68.)

II. Mr. Justice Stafford, by lawful designation (R., fol. 40), was a member of the Court of Appeals for purposes of

these cases, and continued to be such a member until the full and final disposition of the causes, including motions for rehearing, which he was designated to "hear and decide".

If Mr. Justice Stafford properly participated in disposition of the original motions for rehearing in these cases, because he was designated to, and did, sit as a member of the Court that originally decided them, the orders of June 22, denying such motions, finally disposed of the cases. As Mr. Justice Robb indicated in his letter to Chief Justice Smyth, the crucial question is Mr. Justice Stafford's continued power to sit upon the motions for rehearing. This, it would seem, is one of those questions which is answered by its statement. The power to "decide" means to decide finally. Fairness to litigants and fairness to Courts—due regard for the administration of justice—require that all the judges, who constituted the Court when a case was decided, (if still alive and in office), should have the right as well as the duty to consider a motion for a rehearing of the decision in which they participated. Certainly, so far as the Court of Appeals of the District is concerned reason, the Code, precedents and the practice of the present members of that Court in all other cases, except the two here, unite to support the jurisdiction of Mr. Justice Stafford to participate in the disposition of the original motions for rehearing, and, in consequence, establish the want of jurisdiction of the Court of Appeals in the proceedings which give rise to these appeals.

We shall again let Chief Justice Smyth state the argument in detail:

> "But had Justice Stafford jurisdiction of the cases when he voted on the motions? The Code section to which reference has already been made pro-

vides that the substitute justice shall temporarily fill the vacancy created by the absence of the regular justice and shall sit in the court 'and perform the duties of a member thereof while such vacancy or vacancies shall exist.' When does the vacancy cease to exist? When the regular justice is able to return to his duties, when he actually does so, or when the substitute justice has completed the work which he had properly entered upon before the return of the regular justice? It seems to me the latter must be the time. Unless this view is taken, great inconvenience would follow, and the business of the court would be much retarded. Suppose that at the time the regular justice returns to the court, the substitute justice had participated in the hearing of twenty-five cases then under advisement, can it be that his authority to further act, so far as those cases are concerned, would be thereby brought to an end? If so, the cases would have to be restored to the docket for reargument before a court comprising the three regular members. I do not believe the act means this. My opinion is that, while the substitute justice may not enter upon any new work after the return of the regular justice, he has the authority, and it is his duty, to complete the work undertaken while the regular member of the court was absent. This has been the practice, without a single exception, save the present case, since the organization of the court. Shore v. Splain, 49 App. D. C., 6, 258 Fed., 150, 47 Wash. Law Rep., 328. After the motions for rehearing were granted in these cases, Mr. Justice Robb refused to consider a motion for rehearing in a case in which he had not sat (Clement v. Roberts, 273 Fed., 757), and it was necessary to send for Mr. Justice Hitz, who took part in the hearing and decision of the case, to vote on the motion, there being a division of opinion among the other justices. At this moment a substitute justice is considering cases in the hearing of which he participated, though the justice whose place he took has

returned to the court and is engaged in the discharge of his duties.

"Recently the court, after a very careful consideration of the authorities, unanimously decided a similar question (Shore v. Splain, *supra*), and the ruling is in accordance with the views I have just expressed. An act of Congress approved February 17, 1909 (35 Stat., 624, c. 134), authorized the Chief Justice of the Supreme Court of the District to designate a judge of the Municipal Court to sit in the police court during the 'sickness, vacation, or disability' of one of the regular judges. A judge designated pursuant to this act tried a criminal case. The defendant having been convicted moved for a new trial. The judge took the motion under advisement, and sometime later, after the regular judge had returned and taken his seat on the bench, overruled the motion and sentenced the defendant. It was contended that he had no power to do so, and a writ of habeas corpus was sought to test the question. In rejecting the contention we said: 'It was undoubtedly the intention of Congress in providing for a temporary judge, that he should perform the duties of the position during his incumbency and complete any work entered upon by him before he withdrew from the place; otherwise, as in the case of a trial, much of his effort might come to naught if the return to duty of the regular judge had the effect of terminating his authority, and thus the purpose of Congress in providing for a substitute judge would be defeated in many cases.' To support our views of the law we cited State v. Stevenson, 64 W. Va., 392; State v. Bobbitt, 215 Mo., 10, 30; Bohannon v. Tabbin Ky., 76 S. W., 46, 49; Bedford v. Stone, 43 Tex. Civ. App., 200, 95 S. W., 1086; State ex rel. v. Williams, 136 Mo. App., 330, 336, 117 S. W., 618; Mayer v. Haggerty, 138 Ind., 628, and Fisher v. Puget Sound Brick, etc., Co., 34 Wash. 578.

"In State v. Stevenson, a criminal case involving the death sentence, the defendant pleaded guilty be-

fore a special judge who took time thereafter to consider of his judgment. While he was doing so the regular judge returned, assumed the bench, and sentenced the prisoner. The statute under which the special judge was appointed provided that he should serve in the absence of the regular judge. It was argued that the moment the regular judge appeared, the authority of the special judge ceased; therefore, that the sentence by the regular judge was valid. But the court, after reviewing the decision of its own state and others upon the question, ruled, 'That the return of the regular judge would not oust the special judge of jurisdiction to try and finally dispose of any case begun before him.' The court in Bohannon v. Tabbin expressed a like view. It said: 'The fact that the regular judge returned before the case was finally disposed of by the special judge in no wise nullified the jurisdiction of the latter. It would create inextricable confusion if, after a special judge, elected because of the absence of the regular judge, had commenced the trial of a case, his jurisdiction to further try it should be ousted by the return of the regular judge. It needs no argument to demonstrate the hardship and expense to litigants which would arise upon the adoption of such a principle.'

"In addition to the authorities cited in the Shore case, the following are pertinent: Dupoyster v. Clarke, 121 Ky., 694; State v. Tomlinson, 74 N. W., 995; State v. Towndrow, 180 Pac., 282; State ex rel. v. Fidelity & Deposit Co., 117 S. W., 618, 620; Johnson v. State, 97 Pac., 1059, 1064. In State ex rel. v. Fidelity & Deposit Co. the court said that the substitute judge having tried the case, 'his jurisdiction and authority over it continued until the motions consequent upon the trial were disposed of.'

"Cases where a judge's term of office had expired and his successor acted upon unfinished business, or where a special judge withdrew leaving work to be done, have no application. In such cases public policy

required that the unfinished work be disposed of, but here no question of that kind existed, for Justice Stafford had completed the work for which he had been assigned before Mr. Justice Robb had decided to act.

"The Shore case is directly in point. Why was it not followed? No explanation is offered. If we are not to respect our own decisions, their publication is an idle ceremony and must have a tendency to mislead the profession.

"Under the Organic Act this court consists of only three judges. No litigant has a right to have his case adjudged by a greater number, but the appellants, by the projection of Mr. Justice Robb into the case, have secured the judgment of four judges. There is no authority in the statute for such a thing.

"Considering the law, then, as it is, I am convinced that Mr. Justice Stafford's authority and jurisdiction continued until the motions for rehearing had been disposed of, that both cases were finally adjudicated on June 22, 1921, and that the court has no jurisdiction over them at this time." (R., 68-70.)

ON THE MERITS.

The plaintiffs brought these suits solely upon claims of unconstitutionality under the Fifth Amendment, to wit, that in passing the District of Columbia Minimum Wage Law Congress deprived the plaintiffs of "liberty" and "property" "without due process of law." And the constitutionality of the Law and like laws throughout the country, is the broad question before this Court. It has been here before, resulting in a decision by a divided Court (*Stettler* v. *O'Hara,* 243 U. S., 629).

The Issue.

But there is no general theory of wage-fixing by legislation involved, no question of "the initial step toward

unlimited Federal price-fixing legislation" before this Court. Those were the issues that the second majority of the Court of Appeals insisted on framing for itself, in disregard of the actual situation presented by specific gressional legislation.[1] For the cases present a specific state of facts, depending upon a specific scheme of legislation solely applicable to women and minors. Our discussion will be focussed on this specific controversy—none other is before the Court. The following, we believe, accurately formulates the precise issue:

> *After hearings as to the practical necessity for such legislation, an Act having been passed by Congress "to protect the women and minors of the District from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain decent standards of living" which seeks to attain these objects through the requirement of standards of minimum wages for women, adequate to supply the necessary cost of living to women workers in respective occupations and to maintain them in health and to protect their morals, to be ascertained by a Minimum Wage Board; and such minimum wage for hotel, restaurant and allied industries having been ascertained and fixed by the Board at thirty-four and one-half cents per hour or $16.50 per week, or $71.50 per month, an amount concededly not in excess of said living necessities, and so fixed in accordance with the findings of a Conference of the particular industry in which both the employers and employees were represented and had full opportunity for hearing; and said Act having a provision that even these minimum requirements should not be required if the Board issues "to a woman whose earning capacity has been impaired by age or otherwise, a special license authorizing her employment at such*

[1] The futility of abstract considerations in so-called "police power" cases, and the necessity of adjudicating them on the facts and circumstances of each case find striking application in the recent decision of *Walls* v. *Midland Carbon Co.*, 254 U. S. 300, 314.

wage less than such minimum time-rate wage as shall be fixed by the Board and stated in the license"; and said Act having a provision that "there shall be a right of appeal from the Board to the Supreme Court of the District of Columbia from any ruling or holding on a question of law included or embodied in any decision or order of the Board; and on the same question of law, from such court to the Court of Appeals of the District of Columbia"; and the plaintiff, The Children's Hospital, having continued to employ women workers not alleged or shown to be women "whose earning capacity has been impaired by age or otherwise" at wages less than the minimum fixed by the Board, without having applied for or been denied such special license from the Board; and the plaintiff, Lyons, having continued to accept from her employer wages less than the said minimum without having applied for or been denied such special license and without now alleging or showing that she is "impaired by age or otherwise"; are they entitled to decrees enjoining the enforcement of the order of the Board on the ground that the Congressional Act is arbitrary, wanton or spoliative, and therefore, in excess of the legislative power of Congress over the District, as limited by the Due Process Clause?

Marshall's Canon.

The controversy, we submit, reduces itself to an application of Marshall's canon of constitutional construction to the concrete facts of modern industrial life, and, more particularly, to those in the District.

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional" (*M'Culloch* v. *Maryland*, 4 Wheat, 316, 421).

Outline of Argument.

We shall contend:

I.—The presumption to be accorded an Act of Congress,—that it be respected unless transgression of the Constitution is shown "beyond a rational doubt",—amply sustains the District of Columbia Minimum Wage Law, particularly in view of the circumstances of its enactment.

II.—Congress by this legislation aimed at "ends" that are "legitimate and within the scope of the Constitution."

III.—The "means" selected by Congress are "appropriate and plainly adapted" to accomplish these "ends."

IV.—No right of the plaintiffs secured under the Constitution "prohibits" the use of these appropriate means so adopted by Congress to accomplish these legitimate ends.

V.—The majority opinion of the Court of Appeals erects notions of policy into constitutional prohibition.

POINT I.

The presumption to be accorded an Act of Congress,—that it be respected unless transgression of the Constitution is shown "beyond a rational doubt," —amply sustains the District of Columbia Minimum Wage Law, particularly in view of the circumstances of its enactment.

In considering this legislation, Congress was dealing with a practical problem which had been pressing upon the attention of many legislatures. Congress was acting upon an experience which had amply justified itself in different parts of the country. Possessed, under Art. I., Sec.

8, par. 17, of the same power for, and charged with the same duty of, legislating within the District as that which States exercise within their respective boundaries (*Shoemaker* v. *United States*, 147 U. S., 282; *Parsons* v. *District of Columbia*, 170 U. S. 45, 52), Congress followed the example of a number of States in passing the Act in question. The legislation had not only justified itself in practice, but it had been uniformly sustained by the courts against attacks of unconstitutionality.

Twelve States—Arizona, Arkansas, California, Colorado, Kansas, Massachusetts, Minnesota, North Dakota, Oregon, Utah, Washington and Wisconsin—have laws relating to a minimum wage for women.* Three States—Ohio, California and Nebraska—have authorized minimum wage legislation by specific constitutional provisions.

Here is a body of legislation coming from States in different parts of the country, States as varied in their conditions as Massachusetts and Washington, Arkansas and Wisconsin. Despite all other differences, ten have adopted a common type of legislation, indicating that it deals with needs common to every variety of State, with problems which concern all industry wherever women and children are employed. If the Federal legislation is bad under the Due Process clause of the Fifth Amendment, then, of course, the legislative and constitutional provisions of fifteen States are bad under the Due Process clause of the Fourteenth Amendment. The extensive enactment of a statute is a fact "of vast significance" (*Halter* v. *Nebraska*, 205 U. S. 34, 40). A far more impos-

*Arizona and Utah (as well as Porto Rico) have a flat rate of minimum wages fixed for all industries by statute. In all the other states there is administrative machinery for determining, after hearing, the minimum wage appropriate for each separate industry. Congress followed the latter type of legislation. Massachusetts, unlike all other states, relies upon the coercive power of public opinion, through publication of the names of offenders, for enforcement of the orders of its Minimum Wage Commission.

ing body of enactments is presented by the minimum wage laws for women than that which very recently led this Court, as to another statute, to find proof of "a wide-spread belief in the necessity for such legislation" (*Prudential Ins. Co.* v. *Cheek,* 259 U. S. ..; decided June 5, 1922).

But Congress had even stronger confirmation for its action than this volume of State legislation. One other case has been before this Court showing a similar wide-spread adoption of a statute by different States. That was the *Coppage Case* (236 U. S. 1). But while the *Coppage* statute was almost uniformly declared unconstitutional by the State Courts,[1] Congress acted upon the uniform validation of minimum wage legislation for women by the State Courts. To paraphrase the language of this Court in the *Coppage Case, supra,* as applied to the facts at bar, "it is not too much to say that such laws have by common consent been treated as constitutional, for while many state courts of last resort have adjudged them valid, there is no decision by such a court invalidating legislation of this character, and no decision by any court, excepting that which is now under review, the same court, differently constituted, having previously sustained it." The legislation has been sustained in these decisions:

> *State* v. *Crow,* 130 Ark., 272;
> *Holcombe* v. *Creamer,* 231 Mass., 99;
> *Williams* v. *Evans,* 139 Minn., 32;
> *Miller Telephone Co.* v. *Minimum Wage Commission,* 145 Minn., 262;

[1] "It is not too much to say that such laws have by common consent been treated as unconstitutional, for while many state courts of last resort have adjudged them void, we have found no decision by such a court sustaining legislation of this character, excepting that which is now under review."—*Coppage* v. *Kansas,* 236 U. S. 1, 21-22.

Stettler v. *O'Hara,* 69 Or. 519; *Simpson* v. *O'Hara,* 70 Or. 261; affirmed by divided Court, in 243 U. S. 629;
Larsen v. *Rice* 100 Wash, 642;
Spokane Hotel Co. v. *Younger,* 113 Wash. 359;
Poye v. *State,* 89 Texas Crim. Rep. 182.*

But Congress did not casually follow State legislation. It was not content to rest upon a body of State laws, uniformly sustained by the courts and vindicated, since 1913, by the trial of experience. The Senate and House Committees on the District of Columbia held hearings on the needs of this legislation, *in view of the conditions prevailing in the District.* (Hearings before Subcommittee of House Committee on the District of Columbia on H. R. 10367, 65th Cong. 2d Sess., April 16, 1918; Hearing before Subcommittee of Senate Committee on the District of Columbia on S. 3993, 65th Cong. 2d Sess., April 17, 1918). No one appeared in opposition to the bill. "A remarkable circumstance which has probably never occurred in any previous legislation hearings on a measure affecting wage legislation in this country was the appearance of the official organized body of employers—the Merchants' and Manufacturers' Association of the District, who sent their representative to make a statement indorsing the bill and urging its passage." (H. Report No. 571, 65th Cong. 2d Sess., p. 2). The Committees of both Houses unamimously recommended the legislation. (H. Report No. 571, 65th Cong. 2d Sess.; S. Report No. 562, 65th Cong. 2d Sess.). The Constitutional question raised by the proposal was frankly considered by the Committees. With full consciousness of the issue, after consideration of the objections now urged,

*This case is included in the interest of completeness, despite its restricted value as authority.

Congress, without opposition in the House, and with only twelve nays in the Senate (not based on constitutional grounds), deemed the legislation here assailed within its constitutional competence and required by the proved needs of the District, (Vol. 56, Cong. Rec. Pt. 9, pp. 8875 ff.; Pt. 10, pp. 10278 ff.; Pt. 12, pp. 604 ff).

In addition to all these grounds which moved and justified Congressional action, the judgment of Congress is now vindicated by the results of over four years of the actual operation of the Law and ten years of extensive experience with such legislation in California, Massachusetts, Minnesota, Oregon, Washington and Wisconsin (Part First, pp. 1-214). In brief, it is overwhelmingly clear that unfair depression in the wages of many women workers has been significantly reduced, without operating adversely to industry or efficiency, and without appreciably diminishing employment for employables. The Legislation has also successfully weathered the severest strains of "hard times." We venture to suggest, with confidence, that no such body of laws, "attesting a widespread belief in the necessity for such legislation," supported by uniform judicial approval (excepting the last opinion of the Court of Appeals), subjected to so long, extensive, fair and favorable a test of actual experience, has ever been before this Court to vindicate the reasonableness of the legislative intervention, and to negative the claim that Congress was guilty of "a purely arbitrary or capricious exercise of that [legislative] power" (*Truax* v. *Corrigan,* 257 U. S. 312, 329).

POINT II.

Congress by this legislation aimed at "ends" that are "legitimate and within the scope of the Constitution."

The first requisite of Marshall's canon is that the end sought by legislation must be "legitimate and within the scope of the Constitution." That this primary requirement is met in this case cannot be, and practically is not, denied. But we proceed briefly to explain the purposes sought by Congress in enacting the District of Columbia Minimum Wage Law.

First.—Charged with the responsibility of safeguarding the welfare of the District of Columbia, Congress was confronted with facts which made it its duty "to protect the women and minors of the District from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain decent standards of living."

We do not invoke the usual and proper presumption to be accorded to Congressional declarations. This Congressional statement of the purposes of the Act is based upon indisputable facts. In summary of the overwhelming array of details set forth in Part Third of this Brief, it is only necessary to say here that the minimum cost in the District, for the rudimentary needs of a woman worker, as disclosed by investigations preceding this legislation and corroborated by many authoritative findings from all over the United States, was:

Cost of Living of Working Women in the District of Columbia in December, 1916.*

Items		Yearly Cost 1916	Weekly Cost 1916
Board and Room	....	$312.00	$6.00
Clothing	....	125.00	2.40
Sundries:			
Laundry	30.00	....	...
Sickness	14.00	....	...
Dentistry	6.55	....	...
Oculist	1.99	....	...
Amusements	7.14	....	...
Vacation	13.16	....	...
Fruit and Candy	5.70	....	...
Insurance	9.65	....	...
Other incidentals	18.45	....	...
Charity	1.79	....	...
Religion	4.54	....	...
Labor organizations	.30	....	...
Other organizations	.49	....	...
School tuition	1.70	....	...
Carfare (to and from work)	10.85	....	...
Carfare (other)	7.84	....	...
Books and magazines......	2.81	....	...
Gifts	14.96	....	...
Total Sundries	....	152.22	2.93
Total	....	$589.22	$11.33

This being the bare living cost for women workers in the District, it appeared before Congress, as disclosed in the Report of the House Committee which proposed the legislation (Rep. No. 571, H. R., 65th Cong., 2nd Sess.) that 46% of 600 women workers interviewed earned less than $8 per week and 64% less than $10 per week. This low wage was not owing to their youth and inexperience, for 72% were twenty-one years of age, or

*This budget appears on page 954 of Part Third of this brief; only the weekly cost, a mere arithmetic computation, is here added.

older, and one-half of those earnings less than $9 per week had been at work for five years and more.* Congress, dealing with the situation it found in the summer of 1918, had, of course, to consider the enormous increase in the cost of living. The actual amount of such increase had been studied and determined by the Bureau of Labor Statistics. The findings of comparative cost increases between 1916 and 1918, made by the Bureau of Labor Statistics, and acted upon by the Minimum Wage Board preceding its order, follow:

*See page 688-695 of Part Third of this Brief.

Comparison of Cost of Living of Working Women in the District of Columbia in December, 1916, and in December, 1918.*

Items	Yearly Cost 1916	% Increase 1916 to 1918	Yearly Cost 1918	Weekly Cost 1918
Board and Room...	$312	50%	$468	$9
Clothing	125	59.4	199.25	3.83
Sundries				
Laundry	30.00		30.00	.58
Sickness	14.00	30	18.20	.35
Dentistry	6.55	11	7.25	.14
Oculist	1.99	76	3.50	.07
Amusements	7.44	58	9.60	.18
Vacation	13.16		13.16	.25
Fruit and Candy.	5.70		5.70	.11
Insurance	9.65		9.65	.19
Charity	1.79		1.79	.03
Religion	4.54		4.54	.09
Labor Organizations	.30		.30	.005
Other Organizations	.49		.49	.01
School Tuition ..	1.70		1.70	.03
Carfare (to and from work)...	10.85	20	13.00	.25
Carfare (other)..	7.84	20	9.40	.18
Books and Magazines	2.81	46	3.45	.07
Gifts	14.96		14.96	.29
Other Incidentals	18.45		18.45	.35
Total Sundries ...	152.22	8.5	165.14	3.175
Total.......	589.22	41.3	832.39	16.005

*This table will be found on page 954, Part Third of this Brief.

These findings as to the cost of the barest necessaries are to be compared with the Report made by the Minimum Wage Board into the wages of women in hotels, restaurants and allied industries (including hospitals) The Board found that

> "1300, or 58 per cent, of the 2209 women for whom wage data were obtained were receiving less than $16 or its equivalent per week. A general average

in this instance tends to conceal the real wage situation. A classification according to type of establishment gives a much clearer picture of the facts. Of the women employed in the industry, 72.2 per cent in hotels, 42.6 per cent in restaurants, 82.3 per cent in hospitals and 100 per cent in apartment houses were receiving less than $16 a week or its equivalent. In the general average the higher rates prevailing in restaurants offset the lower rates in hotels and hospitals. The apartment house employees included in this study were too few in number to affect the general figures."*

It thus appears that Congress, in its responsibility for the District, was confronted with the evils flowing from a deficit between the minimum cost necessary for women workers to live without detriment "to their health and morals," and the wages which were actually being paid *below this minimum* to a considerable percentage of the women workers of the District. The matter was thus put in the testimony of Dr. W. C. Woodward, the Health Commissioner of the District:

"That there is a very definite relation between wages and health, and between wages and morals, I think will be conceded by every one who at any time has had to earn his own living, and who has even the slightest knowledge of hygiene or health. We know that in any organized community we can not get ordinary shelter without paying for it; that to clothe the body costs money; that food costs money; that provision for ordinary protection against illness requires money; and that protection of life—if you will, provision for recreation facilities—requires the expenditure of money; and we know that the wage earner depends on her wage to get that money. It stands to reason, therefore, that

*Bulletin No. 3 of District of Columbia Minimum Wage Board, October 10, 1919, quoted on pages 5-10 of Part First of the Brief.

> inadequacy of wage means either of two things: On the one hand it may mean inadequacy of shelter, inadequacy of clothing, inadequacy of food, inadequacy of recreational facilities on the one hand it may mean any one of those conditions, or it may mean all—with resultant impoverishment of health—or, on the other hand, it means that from some source or other the wage must be supplemented, with possible resort to wrongdoing to accomplish that end. I am very loath, however, to connect up minimum wages with moral questions. The most I care to say there is that when one is tempted the lack of physical stamina and the necessity for maintaining life increase the weight of the inducement certainly make yielding easier."*

Congress, as its reports disclose, found that alarming public evils had resulted, and threatened in increasing measure, from the widespread existence of the deficit between the essential needs for a decent life and the actual earnings of large numbers of women workers of the District. In the judgment of Congress, based on inquiry and sustained by unchallenged facts, the health of a considerable section of the present generation was impaired by undernourishment, demoralizing shelter and insufficient medical care. Inevitably, the coming generation was thereby threatened. Economic efficiency and productiveness were wastefully limited; the fruitful use of economic resources was needlessly restricted. In its immediate effects, financial burdens were imposed upon the District, involving excessive and unproductive taxation, for the support of charitable and quasi-charitable institutions engaged in impotent amelioration rather than prevention.

Here, if ever, was presented a community problem of

*See Hearings before Sub-Committee of the Committee on the District of Columbia, House of Representatives 65th Con. 2nd Sess. on H. R. 10,367, p. 29, quoted in Rep. No. 571 H. R. 65th Con. 2nd Sess. and printed on page 390-1 of Part First of this Brief.

a most compelling kind, calling for legislation "greatly and immediately necessary to the public welfare" (*Noble State Bank* v. *Haskell*, 219 U. S., 104, 111). At least, the judgment of Congress that such legislation was necessary cannot, in reason, be stigmatized as "unreasonable."

Second.—The purpose of the Act was to provide for the deficit between the cost of women's labor—i. e., the means necessary to keep labor going—and any rate of women's pay below the minimum level for living, and thereby to eliminate all the evils attendant upon such deficit on a large scale.

No one claims, surely not the plaintiffs, that Congress, in this legislation, was actuated by a desire to gratify venom, or a feeling of oppression, against individuals, in order to injure them, or indulged in reckless caprice, indifferent to the interests of the District. There is no dispute that Congress was honest, was acting in good faith, after mature deliberation, in avowing the purposes which it did in the enactment of the Minimum Wage Law, to wit:

> "to protect the women and minors of the District from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain decent standards of living."

In a word, the ends towards which this legislation was directed were, within the area of Congressional power, the ends of the very life of the Nation, namely the health and civilized maintenance of this generation, and a healthy and civilized continuance of generations to follow. The only complaint is the want of adaptation of the means chosen by Congress for the attainment of ends which, undisputably, it could pursue. We shall at once consider (Point III) the justification of the choice of

means exercised by Congress. For the moment we are concerned with the question whether Congress could act *at all.* Was the subject-matter—conditions detrimental to the health and morals of women workers—within the field of Congressional legislation for the District? If the subject was within the power of Congress, the specific Act is still open to the challenge that the manner in which Congress exercised its power was "purely arbitrary or capricious." But in order to appraise adequately the means chosen by Congress, it is important to realize with conviction not merely the abstract legitimacy of the ends at which Congress was aiming, but also the concrete situation that confronted Congress in discharging its constitutional duty to legislate for the District.

POINT III.

The means selected by Congress "are appropriate" and "plainly adapted" to accomplish the legitimate ends.

The second part of Marshall's canon states the broad scope of the question:

> "All means which are appropriate, which are plainly adapted to the end. . . ."

Later cases, without changing Marshall's central point of view—"it is *a Constitution* we are expounding"—have phrased it in a slightly different form. "Plainly adapted," they indicate, means "not plainly unadapted". This has been the spirit of the later formulas. The recurring adjectives are "arbitrary," "wanton," "spoliative" and "capricious," and this is the thought that underlies the decisions (*e. g., Jones* v. *Brim,* 165 U. S., 180, 182; *Booth* v. *Illinois,* 184 U. S., 425, 429; *Lemieux* v. *Young,* 211 U. S., 489, 496; *McLean* v. *Arkansas,* 211

U. S., 539, 548; *Grenada Lumber Co.* v. *Mississippi,* 217 U. S., 433, 411-2; *Noble State Bank* v. *Haskell,* 219 U. S., 104, 110-11; *Chicago, Burlington & Quincy Co.* v. *McGuire,* 219 U. S., 549, 567-8; *Central Lumber Co.* v. *South Dakota,* 226 U. S., 157, 160-1; *Schmidinger* v. *Chicago,* 226 U. S., 578, 588; *Erie R. R. Co.* v. *Williams,* 233 U. S., 685, 699, 704; *Coppage* v. *Kansas,* 236 U. S., 1, 11, 14; *Chicago & Alton R. R.* v. *Tranbarger,* 238 U. S., 67, 77; *Tanner* v. *Little,* 240 U. S., 369, 386; *Truax* v. *Corrigan,* 257 U. S., 312, 329; *Chic. & Northwestern Ry. Co.* v. *Nye Schneider Fowler Co.,* decided Nov. 13, 1922; *Sioux City Bridge Co.* v. *Dakota County,* decided Jan. 2, 1923).

These cases, however, do not raise any issue as to possible differences resulting from difference in emphasis between "plainly adapted" and "not plainly unadapted". The controlling powers of negation of this Court are only invoked within the restricted, vital, area of immutable principles, leaving the field of policies to Congress and the legislatures. The Minimum Wage Law clearly satisfies Marshall's requirement of appropriate correlation of means to end.

First.—From among the alternative means which Congress might have adopted for accomplishing these public ends the particular one adopted was reasonable and appropriate.

The object of Congress was, as we have shown, to provide for a disastrous deficit between women's labor cost and their labor pay, so as to eliminate grave public evils and also to promote decent standards of life. The possible alternative courses of action which were open to Congress in this situation may be summarized as follows:

(1) It could have refrained from action, and submit to the evils as inevitable human misfortunes, subject

to no prevention, but only to alleviation through public and private charity.

(2) It could have provided a direct subsidy out of the public treasury to pay a wage equal to the necessary cost of living, just as for other reasons of policy subsidies have been granted or proposed to manufacture and industry.

(3) It could have adopted the Massachusetts method, which seeks to compel for women workers a minimum wage adequate "to supply the necessary cost of living and to maintain the worker in health," through the pressure of public exposure of offending employers; or

(4) It could have taken the method it did take, which involved a prohibition of the use of women's labor for less than its cost, except by special license from the Board.

There was cumulative testimony, both in the belief of those entitled to express an opinion and in the actual record of experience, that these evils are not inevitable human misfortunes. Congress was entitled to disprove that lazy gospel of fatalism, as other English-speaking countries, equally jealous of safeguarding "liberty" and "property" and many American States had disproved it. From the point of view of effectiveness in accomplishing its purposes (which alone is here relevant), the choice of Congress, among the three remedial methods, surely was not "arbitrary" or "unreasonable." It had the support of a great body of public opinion (*Jacobson* v. *Mass.*, 197 U. S., 11, 31, 34-5; *Muller* v. *Oregon*, 208 U. S., 412, 420; *McLean* v. *Arkansas*, 211 U. S., 539, 548, 549; *Tanner* v. *Little*, 240 U. S., 369, 385-6), crystallized in the extensive and successful experience of English countries with such legislation (Part First, pp. 214, *et seq.*), in the fact of such legislation in other States (pp. 533, *et seq.*),

in the successful working of such legislation (*infra*, pp. 1 *et seq.*). In other words Congress rested on the appeal "from judgment by speculation to judgment by experience" (*Tanner* v. *Little*, 240 U. S., 369, 386).

There is now before this Court not only the persuasive volume of accredited opinion and the experience of other States and countries (not unlike our own either in industrial conditions or legal traditions) vindicating the reasonableness, not to speak of the absence of unreasonableness, of the Congressional legislation, but also the proved effectiveness of the experience of the District under this Act (*infra*, pp. 1 *et seq.*). This is now sought to be upset as beyond the power of Congress in coping with evils which are yielding under the enforcement of this Act and these benefits are secured without any adverse effect upon industry. Where a law has been long on the statute books speculative claims of injustice must yield to the results of actual experience. (*Cf. National Union Fire Ins. Co.* v. *Weinberg*, decided Nov. 13, 1922.)

Second.—Therefore, even though this Court might think that some other means would have greater chance of effectiveness, it was open to Congress to try this method unless it was affirmatively prohibited by the Constitution.

POINT IV.

No rights of plaintiffs secured under the Constitution of the United States prohibit the use of the means so adopted by Congress to accomplish these legitimate public ends.

"The ends" then are "legitimate" and "within the scope of the Constitution" and "the means" are "appropriate and plainly adapted" (and *a fortiori* not plainly unadapted) to the ends. The only remaining question

is: are these means "prohibited" and do they "consist with the letter and the spirit of the Constitution?"

It is not the burden of Congress to demonstrate affirmatively that the Constitution explicitly authorizes the use of these appropriate means for accomplishing its public ends; rather it is for the plaintiffs to show some explicit withdrawal of that power from it. The only alleged obstruction to the power exercised by Congress is the Due Process Clause: does Congress "deprive" The Children's Hospital or Lyons of "life, liberty or property, without due process of law?"

There are two questions to every issue under the Due Process Clauses and it will make for clarity if they are kept distinct. (1) Has there been deprivation of "life, liberty or property?" (2) If so, what is the justification, *i. e.*, the "due process" of the deprivation?

On the issue of deprivation, we assume, for the purpose of this discussion, that any interference whatsoever, with even the most capricious wish of an individual, however justified by those considerations of the public welfare covered by the term "police power," is a deprivation of "liberty" (using the word in an unqualified sense and not restricting its meaning so as to limit it to a "liberty" regulated by "due process"). In that absolutist sense we concede there has been deprivation here. So long as there is a deprivation of "liberty," it is immaterial whether there is also a deprivation of "property"; but in so far as unrestrained liberty of business action is to be regarded as also a property right, we likewise assume even a formal deprivation of "property."

The only point, then, for consideration here is whether the deprivation, such as it was, is "without due process of law."

This Court has consistently recognized the futility of attempting an inclusive definition of "due process."

The Due Process Clauses embody a standard of fair-dealing to be applied to the myriad variety of facts that are involved in modern legislation. That is why this Court, it is ventured to infer, has refused to draw lines in advance. The impact of facts must establish the line in each case. For the application of the Due Process Clauses is not a mechanical process. In the last analysis it is a process of judgment by this Court. In the application of the varying facts to the test of fair dealing before this Court the ultimate question is: does legislation, or its actual operation, "shock the sense of fairness the Fourteenth Amendment was intended to satisfy in respect to state legislation"? *Chic. & Northwestern Ry. Co.* v. *Nye Schneider Fowler Co.*, decided Nov. 13, 1922.) During the fifty years of extensive judicial unfolding, the central ideas that inhere in this constitutional safeguard have become manifest. A careful study of the long line of cases involving an interpretation of the Fourteenth Amendment, (that Amendment rather than the Fifth has given most material for determination of what is involved in "due process") beginning with the *Slaughter-house Cases* (16 Wall., 36), shows two dominant ideas conceived to be fundamental principles: (1) freedom from *arbitrary* or *wanton* interference, and (2) protection against *spoliation* of property. "Arbitrary," "wanton" and "spoliation" are the words which are the motif of the decisions under the Due Process Clauses. That is as close as we can get to it; it is close enough, when dealing with the great questions of government. What it means, what all the cases illustrate, is that the Fourteenth Amendment intended to leave the States the free play necessary for effective dealing with the constant shift of governmental problems, and not to hamper the States except where it would be obvious to disinterested men that the action was arbitrary and wanton and

therefore spoliative and unjustified. Of course, exactly the same freedom of action, the same scope for legislation, belongs to Congress when dealing with the District.*

> "The citizen may have the right to make a proper (that is, a lawful) contract, one which is also essential and necessary for carrying out his lawful purposes. The question which arises here is, whether the contract is a proper or lawful one, and we have not advanced a step toward its solution by saying that the citizen is protected by the Fifth, or any other amendment, in his right to make proper contracts to enable him to carry out his lawful purposes. . . .
>
> "Notwithstanding the general liberty of contract which is possessed by the citizens under the Constitution, we find that there are many kinds of contracts which while, not in themselves immoral or *mala in se*, may yet be prohibited by the legislation of the States or, in certain cases, by Congress."
>
> *United States* v. *Joint Traffic Association*, 171 U. S., 505, 572-3.

First.—It is not arbitrary, wanton or spoliative for Congress to require the consent of the Board before allowing a wage contract affecting women at below cost, but a valid exercise of the "police power" because of the actual handicaps of women in industry.

In his recent essay on "American Individualism" (Doubleday, Page & Co.) Mr. Secretary Hoover states, in layman's language, the general considerations upon which legislation like the Minimum Wage Law is based:

> "Individualism cannot be maintained as the foundation of society if it looks to only legalistic justice based upon contracts, property and political equality. Such legalistic safeguards are themselves not enough. In our individualism we have long

*Wherever the scope of the Fourteenth Amendment, limiting the States to Due Process, is discussed in this Brief, it will be assumed that the same considerations apply as to Congress under the Fifth Amendment.

since abandoned the laissez faire of the 18th Century —the notion that it is every man for himself, and the devil take the hindmost. We abandoned that when we adopted the ideal of equality of opportunity—the fair chance of Abraham Lincoln. We have confirmed its abandonment in terms of legislation, of social and economic justice. . . . We have learned that the impulse to production can only be maintained at a high pitch if there is a fair division of the product. We have also learned that fair division can only be obtained by certain restrictions on the strong and the dominant (pp. 10-11)."

This has special application to women workers.

It is idle to cite authorities. Quotation could be piled on quotation. This was one of the principal grounds of the State Courts in sustaining this legislation.

"The legislature has evidently concluded that these conditions prevail even in Oregon; that there are many women employed at inadequate wages; the employment *not secured by the agreement of the worker at satisfactory compensation, but at wages dictated by the employer. The worker in such a case has no voice in fixing the hours or wages, but must accept it or fare worse."* (*Stettler* v. *O'Hara*, 69 Or., 519, 537, italics ours.)

"There is a notion, quite general, that women in the trades are underpaid, that they are not paid so well as men are paid for the same service, and that in fact in many cases the pay they receive for working during all the working hours of the day is not enough to meet the cost of reasonable living. Public investigations by publicly appointed commissions have resulted in findings to the above effect. Starting with such facts, there is opinion, more or less widespread, that these conditions are dangerous to the morals of the workers and to the health of the workers and of future generations as well.

It is a strife for employer and employee to secure proper economic adjustment of their relations so

that each shall receive a just share of the profits of their joint effort. *In this economic strife, women as a class, are not on an equality with men.* Investigating bodies, both of men and of women, taking all these facts into account, have urged legislation designed to assure to women an adequate working wage. The legislatures of 11 states have passed laws having the same purpose as the one here assailed.

It is not a question of what we may ourselves think of the policy or the justification of such legislation. The question is, is there any reasonable basis for legislative belief that the conditions mentioned exist, that legislation is necessary to remedy them, and that laws looking to that end promote the health, peace, morals, education or good order of the people and are 'greatly and immediately necessary to the public welfare?' If there is reasonable basis for such legislative belief, then the determination of the propriety of such legislation is a legislative problem to be solved by the exercise of legislative judgment and discretion. *Holden* v. *Hardy,* 169 U. S., 366, 398, 18 Sup. Ct., 383, 42 L. ed., 780.'' (*Williams* v. *Evans,* 139 Minn., 32, 40-1, italics ours.)

The line of cases upholding State statutes which limit freedom of contract with women in various ways, rest upon realization of the fact that the mass of women employees cannot secure terms of employment needful from the point of view of public welfare without the weight of legislation being thrown into the scale. (*Muller* v. *Oregon,* 208 U. S., 412; *Riley* v. *Massachusetts,* 232 U. S., 671; *Hawley* v. *Walker,* 232 U. S., 718; *Miller* v. *Wilson,* 236 U. S., 373, 380-1; *Bosley* v. *McLaughlin,* 236, U. S., 385; *Dominion Hotel Co.* v. *Arizona,* 249, U. S., 265; and numerous State decisions, of which *Ritchie & Co.* v. *Wayman,* 244 Ill., 521 and *People* v. *Schweinler,* 214 N. Y., 404, are significant examples).

Second.—It is not arbitrary, wanton, or spoliative for Congress to require employers to pay the cost of woman's labor.

Plaintiff's theory, which prevailed upon the "rehearing," is something like this:

For the sake of conserving the health and morals of women workers, and thereby the next generation, Congress wishes them to have more money. In order to provide this, Congress forbids an employer to employ a woman worker unless he gives her this additional money. Inasmuch as (according to his theory) there is no relation between himself and her need of this additional money, his "liberty" is being limited by purely arbitrary conditions, just as if Congress should require this, say, of John D. Rockefeller, who is not her employer, nor concerned with her in any way. This line of thought has pervaded the entire argument of the plaintiffs.

The short answer to this central claim of plaintiffs is that her employer employs the woman and no other person does. He alone has the use of her working energy, to produce which a cost of not less than $16.50 per week is essential.

From this vital difference of relationship, inherent in his peculiar status as her employer, follow the vital consequences which differentiate him from any other citizen, and furnish the justification for the imposition of her minimum living cost upon him, as distinguished from any other person. The legal significance of the relationship of employer and employee has very recently been expressed by the Chief Justice, in *Truax* v. *Corrigan,* 257 U. S., 312, 329.

> "The broad distinction between one's right to protection againt a direct injury to one's fundamental property right by another who has no special

> relation to him, and one's liability to another with whom he establishes a voluntary relation under a statute is manifest upon its statement."

It is the employer, and the employer alone, who receives the benefit of the woman's working energy, which cannot be produced or maintained by less than the reasonably ascertained minimum *cost* of her labor. It provides only for such quantity of food as will preserve her working energy and for such shelter and clothing and maintenance as will save her from deterioration or impairment. This fact is not disputed by the plaintiffs and has been authoritatively and conclusively determined by overwhelming evidence. The significance of this is that the expenditure of a reasonable minimum upon an employee goes to the operation of the industry and merely provides for the cost of that operation. It goes to the maintenance of the energy purchased by the employer and devoted to the industry.

Suppose this minimum wage even allows a pitiably small balance for civilized demands of the human personality over and above the necessities of preserving the working energy in its mere animal aspect. The human being is not mere animal. How is it possible to say that there is no relation between the employer's industry, which uses all the working energy of the worker's life, and the necessary cost of keeping that life, as a civilized being, at work? How is it possible to say that it is "arbitrary," "wanton" or "spoliative" for Congress to require the employer to pay the cost of woman's labor *if he chooses to use it?* Congress does not compel him to use it; all that it says to him is that if he chooses to take its benefit he must pay at least its cost. Even thus limited in its requirement Congress is not rigid. It has made provisions for variations from the normal, it allows for di-

versities among women, and so it grants the employer the right to use labor even at less than its cost, if he can show to the Board a reasonable justification for the issue of a special license.

To legislatures faced with such problems as have confronted Congress and the legislatures of more than a dozen States the requirement that a man pay at least the bare cost of what he uses has been an application of that practical common-sense by which alone human relations can be efficiently adjusted.

Third. The action of Congress was not arbitrary, wanton or spoliative because the direct interest of the District in these particular wage contracts affecting women gave it a special justification for controlling them.

A contract in which a mere living wage for women workers is at stake is not merely the private concern of the employer and the employee, but a tripartite affair involving (1) employer, (2) women employees and (3) the public.

If the employer and women employees, whose wages are below the established minimum, were completely isolated from all reliance upon the outside public no bargain for employment at less than a living wage would be possible, because the deficit between the proposed payment for the labor and the cost of its production and maintenance could not be supplied—or, certainly, could not be supplied for long and maintain American standards of civilization. Without assistance from the public in some form or other no employer could obtain labor below cost nor could any woman give it. In other words, a contract for labor below its cost must inevitably rely upon a subsidy from outside, or result in human deterioration. To the extent of this subsidy, or the deterioration, the public is necessarily concerned; thereby

the public is drawn into the situation; it is not an intermeddler.

This may become still clearer if we frame the implicit terms of the negotiation which the employer demands the unconditional right to make with women employees.

Employer:

> I am to pay to you and you are to receive from me $35.00 a month (and board). You are to give to me and I am to receive from you *all* your working energy.

Woman Employee:

> But, sir, this working energy, of which you are to receive the total, costs at the very least $16.50 a week. How are *we* to get the balance?

Employer:

> We can get it at least in one of three ways: (1) members of your family engaged in other industries will supply it rather than see you starve, or (2) you can "go without" or (3) you can get it from public or private charity.

This is a plain case of relying upon a public subsidy for a private interest, and a State or Congress, acting for the District, has, therefore, a special right to impose conditions upon which the industry or the employee may enjoy the subsidy or even to refuse it absolutely. Congress does not refuse it, but merely imposes conditions upon the grant. It demands to be shown that the subsidy is just and necessary to the satisfaction of a Board acting for the people of the District. Employer has no more Constitutional right to insist upon this grant in aid of his business than a man who undertook to raise bananas in Connecticut would have to demand, as of right, a public subsidy by way of a tariff. Nor has a woman any absolute "right" to give her energies to the employer if

she cannot keep her side of the bargain without public subsidy, or without incurring physical or moral impairment.

There are three possibilities:

(1) If her output really is worth the cost of her labor, then surely there can be no claim for outside assistance.

(2) If her output is not worth its cost because of her inefficiency, such inefficiency usually means that she has not been trained to the best use of her capacities. Surely a State or Congress may induce such training, stimulate efficiency on the part both of employer and employee, and thereby add to the wealth of the community. Experience demonstrates that in fact such efficiency is powerfully stimulated and productivity enhanced by establishing a minimum wage for women. (Part First, pp. 301-334.)

(3) If the worker cannot be trained to yield an output that does pay the cost of her labor, then she can either avail herself of the license conditions imposed by the statute for such cases, or accept the status of a defective to be segregated for special treatment as a dependent. The State or Congress may determine how defectives shall be supported, and not be compelled to grant an indirect subsidy. One of the most baffling problems of the modern state is the treatment of those who are incapable of carrying their own weight. The first step in the solution is to know who is self-supporting and who is dependent. Congress, therefore, may use means, like the present Law, for sorting the normal self-supporting workers from the semi-employables, or the unemployables and then deal with the latter appropriately as a special class, instead of permitting an indiscriminate, unscientific lumping of all workers, with a resulting wasteful confusion of standards.

Fourth.—It is not arbitrary, wanton or spoliative for Congress to require the employer to obtain a license from the Board before he can buy a woman's labor at less than cost, because that is a reasonable means of preventing cut-throat and unfair competition between manufacturers.

If Congress had found that wage contracts involving purchase and sale of women's labor will not be made in any substantial number of cases for less than cost, then Congress could feel that its requirement of prior scrutiny by the Board is unnecessary, because if all wage contracts were for the fair value of the produce they would not affect competitive conditions. Experience, however, proved that Congress could not safely rely on such an assumption, and that legislation, therefore, may fill the gaps caused by the ignorance or helplessness of women workers and the ignorance or avarice of some employers. As against competing employers who accept the dominant standard of dealing towards their female employees, and who have a more enlightened view of the far-reaching consequences upon industry, public health, living standards, etc., of wages below the human minimum, the unscrupulous and narrow-minded employer may obtain at least a temporary advantage by getting women's labor at less than its cost. Such an employer takes advantage of a situation so as to draw upon a public subsidy as a fund which enables him to undersell competitors.

In reply to all this, plaintiff asserts an absolute "freedom of contract," based on a theoretic equality of *all* who enter into contracts, whatever the actual conditions of life may be and however much the facts may disprove such equality. Women to him are men; and to the indisputable testimony of the actual conditions that confront women workers, to the proved handicaps under which they are needlessly suffering, to the differences between men

and women in industry, due to physical differences and to the instability and youth of women workers, Congress must turn a deaf ear because these facts falsify a theory —the theory of abstract equality and of a non-existent "freedom" of choice to work or not to work under the terms imposed by the minority of exploiting or ignorant employers. The plaintiff would avert what Huxley called the tragedy of a fact killing a theory, by putting constitutional sanction behind a false dogma.

For plaintiff's position *is* nothing more than insistence upon a discredited doctrine. In effect, it asserts not merely its individual belief in the doctrine of philosophic anarchy, *i. e.*, that improvement cannot to some extent be achieved by legislation, but it is asking this court to say that such a doctrine of philosophic anarchy is incorporated in the Fifth and Fourteenth Amendments.

Surely it is much too late to yield to such a doctrine. From the very beginning of the subjection of anarchy to law, step by step, legislation has restricted the field of unregulated competition by prohibitions enforced through a great variety of remedies. It has not left right standards to prevail solely through their inherent reasonableness or through enlightened self-interest.

The Chief Justice broadly stated the course of this evolution in *Standard Oil Co.* v. *United States*, 221 U. S., 1.

> "It will be found that as modern conditions arose the trend of legislation and judicial decision came more and more to adapt the recognized restrictions to new manifestations of conduct or of dealing which it was thought justified the inference of intent to do the wrongs which it had been the purpose to prevent from the beginning." (p. 57.)
>
> "It is equally true to say that the survey of the legislation in this country on this subject from the

> beginning will show, depending as it did upon the econnomic conceptions which obtained at the time when the legislation was adopted or judicial decision was rendered, that contracts or acts were at one time deemed to be of such a character as to justify the inference of wrongful intent which were at another period thought not to be of that character. But this again, as we have seen, simply followed the line of development of the law of England." (p. 58.)

Throughout this whole course the State has been putting its power more and more on the side of what the prevailing opinion of the time conceives to be right dealing. "Prevailing opinion" in this case was not a transient or careless expression. A massive body of legislation, conservatively conceived and carefully safeguarded, has now the sanction of time and experience.

The assertion by the state of this power is the history of legislation since the time of Edward I. It is impossible for the state to remain neutral in a contest between men who desire to deal fairly and those who desire to deal unfairly; the state must choose between encouraging unfair conduct by keeping hands off or discouraging it by insisting upon fair play.

There is a substantial mass of legislative recognition both of the illegality of unfair competition in general and of selling below cost, in particular, *e. g.,* The Federal Trade Commission Act; The Clayton Act (Secs. 2 and 3); The Interstate Commerce Act (Sec. 29); State statutes prohibiting price cutting and selling below cost or fair market value collected in the report issued by the Bureau of Corporations in March, 1915, entitled "Trust Laws and Unfair Competition," showing that the following States have adopted such laws: Idaho, Nebraska, South Carolina, Alabama, Mississippi, Tennessee, Texas,

Arkansas, North Carolina; and general laws covering Oklahoma and Wisconsin. (pp. 192 *et seq.*)

That such legislation is constitutionally founded, has of course, been frequently held, in a variety of cases, of which *Central Lumber Company* v. *South Dakota,* 226 U. S., 157, is illustrative:

> "It might have been argued to the legislature with more force than it can be to us that recoupment in one place of losses in another is merely an instance of financial ability to compete. If the legislature thought that that particular manifestation of ability usually came from great corporations, whose power it deemed excessive and for the the reason did more harm than good in their State, and that there was no other case of frequent occurrence where the same could be said, we cannot review their economics or their facts." (p. 161.)

Fifth.—It is not arbitrary, wanton or spoliative for Congress to require the consent of the Board before allowing a woman employee to sell labor below cost, because that is a reasonable means for preventing unfair competition between women employees.

Similar considerations apply to competition between employees, because an employee who sells her labor for less than its cost, availing herself of outside subsidies, is unfairly competing against other seekers for similar employment. Congress might even have prohibited such contracts altogether, because of the effect that such bargains have in dragging down the general standard and encouraging wider and unnecessary dependence upon the subsidies.

Congress, however, did not go to that extreme. It only required that contracts which endangered general standards in this manner must first be approved by the Board. The underlying principle is the same as that

which eliminates prison labor from competition against free labor, and prevents the output of State and charitable institutions to compete without control against self-supporting business.

The essential purpose of the Law is to compel employers to pay the living cost to all their women employees whose product is worth it, and thereby correspondingly protect the efficient against a ruinous competition.

Sixth.—It is not arbitrary, wanton or spoliative for the state to require the consent of the Board before allowing wage contracts of women workers at below cost, because that is a reasonable exercise of power to foster the productivity of industry.

The very preservation of the State and its citizens depend upon the efficiency of its industries to carry the cost of living. That is the primary function of industry. No industry which fails to supply even the bare minimum living requirements of its own workers can possibly be sound. Such an industry instead of aiding in the work of supporting life can be only a burden upon it by precisely the amount of subsidy which it drains from other industries. The fundamental policy represented by this Act is the stimulation of individual enterprise, the prevention of taxation upon sound industries for the artificial support of unsound ones. The aim it encourages is to make industries self-supporting.

In truth this is a measure of conservation and preservation of the human resources of the State, which is of even deeper and more primary importance to human self-preservation than the conservation of the natural resources. And so its constitutionality follows, *a fortiori,* from the line of cases which support statutes passed for

the preservation and effective utilization of natural resources. *Hudson Water Co.* v. *McCarter,* 209 U. S., 349; *Mount Vernon Cotton Co.* v. *Alabama Power Co.,* 240 U. S., 30; *Pacific Live Stock Co.* v. *Oregon Water Board,* 241 U. S., 440; *Walls* v. *Midland Carbon Co.,* 254 U. S., 300.)

Even if the Law had gone beyond the mere protective necessity into the realm of affirmative public welfare, it would still be constitutional within the principle laid down in *Bacon* v. *Walker,* 204 U. S., 311:

> "That power [the police power] is not confined, as we have said, to the suppression of what is offensive, disorderly or unsanitary. It extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people" (p. 318).

Industry under modern conditions has come to be one of the most important fields in which the interrelation of human beings requires supervision by the state. To-day the center of gravity of the state is industry, just as in feudal days it was land. The common law met the demands of the feudal period by working out the incidence of feudal tenure as a body of reciprocal rights and duties between lord and man flowing from the relationship of tenure. In fact, the conception of rights and liabilities as dependent on relationship rather than upon the unregulated desire of individuals is at the very center of the whole common law system. ("If we must find a fundamental idea in the common law it is relation, not will." Dean Pound's "Interpretations of Legal History," Cambridge University Lectures, III, pp. 56, *et seq.* (1923); and see *Truax* v. *Corrigan,* 257 U. S., 312,

329, *supra.*) All that is necessary is to recognize these true common law principles, to recognize the common law concept of relation, and to make the detailed application in the change from an agricultural to an industrial society. This harmonizes modern decisions and legislation, and makes them consistent with a true conception of our inherited common law. (See Dean Pound's "Spirit of the Common Law," Lecture I, pp. 1, 31.)

The ability of the community to modify the legal rules which represented prior community standards must still remain. Millions of women industrial workers—working not for pleasure, but to earn a livelihood—is a new phenomenon. Our Constitution is equal to the problems this raises. It is of the very essence of the common law system—including the minor judicial and the major legislative modifications—to regard the law-making energies of the state as progressive activities to meet needed changes.

> "It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right which they embodied was preserved and developed by progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government.
>
> "This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law. . . . .
>
> "The Constitution of the United States was ordained it is true by descendants of Englishmen, who inherited the traditions of English law and history;

*See "The Occupational Progress of Women", Bulletin No. 27, Women's Bureau, U. S. Department of Labor. Government Printing Office, 1922. Introduction and Summary, pp. 1-6, and Table XIII, p. 33.

> but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. . . . .
>
> "There is nothing in Magna Charta, rightly construed as a broard charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms." (*Hurtado* v. *California,* 110 U. S., 516, 530-1; see also *Holden* v. *Hardy,* 169 U. S., 366, 385-387.)

We are here dealing with an exercise of the same public power as that of the common law in the past. With its exercise in the past we are familiar. Its application to the needs of a changing present gives an illusion of novelty to the new exercise of an old power. This novelty must not be allowed to deceive; the unfamiliar must not now, any more than in the past, be denied as "unconstitutional." New circumstances call for new effort, and the Fifth and Fourteenth Amendments have left unimpeded the power of conscientious statesmanship to grapple with new difficulties.

Seventh.—The so-called "liberties" of which the plaintiffs claim to have been deprived were merely fanciful and theoretical and not substantial. Therefore it was not "arbitrary," "wanton" or a "spoliation" for Congress to allow great public interest to prevail over them.

To be sure, the "liberty" protected by the Fifth and Fourteenth Amendments leaves a man, within limits,

to do what he likes and be sole judge of his wishes and interests. But before these rights can be entitled to constitutional protection they must be susceptible of translation into terms of substance and human satisfaction and not merely theoretical caprices, unrelated to real action in a finite world. In balancing individual rights against the power of Congress or a State the Constitution is not "formal rather than vital," and its limitations are not mere "mathematical formulas having their essence in their form" rather than "organic living institutions transplanted from English soil" (*Gompers* v. *United States,* 233 U. S., 604, 610).

What is the "liberty" which these plaintiffs assert and show to be really curtailed? It is nothing but the "liberty" of not being required to get leave of the Board before making contracts below a living wage.

It is true that plaintiffs claim they have been deprived of the actual liberty of making the contract itself, but this is to assume, without any basis whatever, that the Board would have rejected any applications that might have been made. Neither of the plaintiffs asserts that his case is not within the scope of the license clause (Sec. 13), or that application has been made and refused.

Children's Hospital alleges that "said women employed in said hospital for children, who receive less than $16.50 are incompetent by reason of age, inability or otherwise to earn more" (Children's Hospital, R., fol. 8). Similarly, Lyons makes no allegation that she is not within the class to whom licenses are available under Sec. 13, *i. e.,* those "whose earning capacity has been impaired by age or otherwise." In the absence of proof to the contrary, the Court will, of course, assume that the Board will grant an appropriate request (*Gundling* v. *Chicago,* 177 U. S., 183, 186; *Mutual Film*

Corporation v. *Industrial Commission,* 236 U. S., 230, 245-6; *Lehon* v. *Atlanta,* 242 U. S., 53). Without any showing that applications for licenses would have been fruitless, or were made and denied, plaintiffs are in no position to assert a loss of the right to do what, for all that appears, they might have been permitted to do.

But their claim is still more fragile. Children's Hospital complains that the Act will necessarily restrict it

> "to the employment only of women who are capable of performing labor sufficient to earn said sum of $16.50 per week or more" (Children's Hospital, R., p. 7, fol. 8).

In other words, the so-called "liberty" which Children's Hospital claims is merely a "liberty" to employ less-than-$16.50-women for less than $16.50 instead of $16.50-women for $16.50. It may well be that it is to the advantage of Children's Hospital to employ the more efficient because that may make for greater stability, less labor turn-over and increased effectiveness, and thereby economy, in the management of the Hospital. Nor must it be lost sight of that Congress necessarily must deal with the generality of instances; with business in general, and not with the isolated case of a private hospital. The inclusion or exclusion of the rare case in a general classification is always a difficult matter for legislative discretion. But, necessarily, law is intended for and must be judged by its general operation. And the evidence is overwhelming that the minimum wage laws have made for greater stability for business and increased profits. (See Part First, pp. 301-544.)

Similarly, the "liberty" which Lyons asserts is fictitious, unreal and against her own interest. She makes

the remarkable allegation that $35 a month and two meals a day are

> "the best wages and compensations for her labor that *she is able to receive* for any employment of labor that she is capable of performing," (Lyons R., p. 21, fol. 27, italics ours).

This carefully framed language avoids any allegation that her labor is not worth at least $16.50 or costs her less to produce. Moreover, it is perfectly plain that Lyons presents an "inspired" case, filed not in her own interest but in support of that of The Children's Hospital. The Court will take note of identity of pleadings, identity of counsel in the two suits and the submission, below, of the Lyons case upon the brief submitted in behalf of The Children's Hospital. Palpably, the Court has before it "a friendly suit" to overturn an Act of Congress.

> "The theory upon which, apparently, this suit was brought is that parties have an appeal from the legislature to the courts; and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the

> legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act."*
>
> *Chicago St. Ry. Co.* v. *Wellman,* 143 U. S. 339, 345.

Of course, in determining whether the "liberty" asserted is real, the Court considers the substantiality of the claim in its ordinary operation. In this particular situation, the Court will not be blind to the fact that the only possible financial advantage, which would accrue from the invalidation of the Act, depends upon the hypothesis that it prevents the employer from getting labor at less than the true value of its product. For it is preposterous to suppose that an employer would really exercise or value, in his actual business operation, the "liberty" which he here claims, namely, a "liberty" to employ an inefficient woman in place of an efficient one, if he proposed to pay in either case what the output is really worth.

Clearly, therefore, the claims of "liberty" urged by the plaintiffs do not reach the level of those protected by the Constitution.

Eighth.—The alleged deprivations of "property" are either merely nominal like the so-called "liberties," or hypothetical and unsubstantiated; and therefore, were not dealt with arbitrarily or wantonly or as a spoliation.

As to "property" Lyon shows no deprivation whatever that can be distinguihed from her claim in regard

*Apropos of the allegation by Children's Hospital that "less competent employees will be prevented from laboring for this plaintiff" (Children's Hospital R., p. 7, fol. 8), the following observation from *Holden* v. *Hardy,* 169 U. S. 366, 397, is pertinent:

> "It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor his defence was not so much that his right to contract has been infringed upon, but that the Act works a peculiar hardship to his employees, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency, from the latter class."

to "liberty." Therefore, no further special consideration of her case is necessary on this point.

The Children's Hospital claim is that "to be compelled to pay said wage fixed by said Board to all of its said employees would so increase its cost of operation that it could not attempt to conduct its said Hospital within its income." (Children's Hospital R., p. 7, fol. 8.)

Before considering other decisive answers to this claim, let us point out one which disposes of it at the threshold, namely, that the statute itself provides plaintiff the means of avoiding any property loss by the provision of Section 13 already discussed, in respect to special licenses. Whatever claim may be urged that this requirement of application for licenses amounts to a deprivation of "liberty," however fantastically conceived, it certainly cannot be said that it amounts to any deprivation of "property." The plaintiff cannot possibly suffer a loss if he applies for and obtains a license. The Act itself safeguards the right for which plaintiff asks this Court gratuitously to strike it down. (*Gundling* v. *Chicago,* 177 U. S., 183; *Lehon* v. *Atlanta,* 242 U. S., 53).

Mere prophesies of disaster cannot prevail. Until an adverse experience is shown, plaintiff is without grievance to nullify the legislation of Congress or state. This Court will not overturn the legislative judgment on a mere guess, when, in fact, experience may disprove the guess.

As to this Law experience *has* disproved the guess. The plaintiffs ask this Court to substitute their hypothesis for the vindicated judgment of Congress. A great variety of industries in the District—the printing, publishing and allied industries, the mercantile industry, hotel, restaurant and allied industries, laundry and dry cleaning

industry,—have for some time, and under the crucial test of "hard times," been carrying on under the operation of the Law. There has thus been an opportunity to test by experience the claim of arbitrariness, of spoliation, which is what the claim of unconstitutionality means—and it means nothing short of that. No adverse experience has been disclosed. The facts, of which this Court will take judicial notice, show the beneficial effects of the Law's operation, without hardship to industry or hindrances to employment (Part First, pp. 1, *et seq.*). The prophecies of disaster or injury have been falsified wherever the legislation has been tried—and ten years of such experience is now before this Court (Part First, pp. 481-7, 501).

The general operations of a law must determine whether it "shocks the sense of fairness" enforced by the Due Process Clauses, so long as discrimination is not designedly practised against isolated instances. Here there is no claim of discrimination against the individual instance, but a challenge against a Law, fair and beneficial in its operations, because of a fear of possible hardship in a single case, at best of unusual circumstances. Such individual claim, even if proved, cannot prevail against an Act of Congress passed, as was this, within the scope of its legislative power. But in this case we have a total absence of proof that the operation of the Law puts the plaintiff to loss, *i. e.,* measurable diminution of wealth or arbitrary restriction of enterprise.

Of course equity may be invoked to prevent irreparable injury, before loss. To make such a case, however, the imminence of the injury must be something more than a mere guess, something more than a mere partisan claim of a litigant in a situation which involves so "many elements of uncertainty in the calculation." (*Northern*

Pacific Railway Co. v. *North Dakota,* 216 U. S., 579, 580-1.) If an individual instance can give rise to a constitutional challenge at least the imminence of the injury must be demonstrable as an unavoidable result of the operation of the Law.

The attitude to be observed towards a hypothetical claim of harm towards a speculative assertion of unconstitutionality has thus been indicated in another but applicable case (*Chicago Railway* v. *Wellman,* 143 U. S., 339):

> "The silence of the record gives us no information, and we have no knowledge outside thereof, and no suspicion of wrong. Our suggestion only indicates how easily courts may be misled into doing grievous wrong to the public *and how careful they should be not to declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts.*" (p. 346.) (Italics Ours.)

The present record wholly fails to show any actual existing loss. The plaintiff merely dolefully predicts loss, and the prediction is based upon a construction of the Act which it does not bear, or upon a gloomy theory of industrial economics which all available experience disproves.

The claim of Children's Hospital, quoted above alleges its inability to conduct the Hospital within its income "along the lines the same as now conducted" (Children's Hospital, R., p. 7, fol. 8) if it "be compelled to pay the said wage fixed by said Board to all of its said employees." But the Act imposes no such compulsion; it does not require the Hospital to increase the wages of these particular women. As we have seen, it only forbids continued employment at less than the fixed minimum

without leave of the Board, the granting of which, upon appropriate request, this Court will presume in absence of a showing to the contrary. (*Gundling* v. *Chicago,* 177 U. S., 183, 186, *supra; Mutual Film Corporation* v. *Industrial Commission,* 236 U. S., 230, 245-6 *supra.*) If the terms of the Act had prevented employers from getting employees on a self-supporting basis, or if the complaint had alleged that it is impossible to find such a supply, we might then have had a case at least of certain deprivation of property in the future, the loss of which equity could forestall in a proper case.

There are two short answers to such a claim. In the first place, the Act in no wise imposes such a restriction, and in the second place, Children's Hospital in no wise alleges that its property will be so affected. The reason it makes no such allegation is that it would thereby call into question the basic assumption of our social structure. For, in effect, it would be tantamount to saying that labor cannot earn its cost,—which means that society cannot be self-supporting, even if human energy is adequately employed and properly directed to productive ends.

POINT V.

The majority opinion of the Court of Appeals erects notions of policy into constitutional prohibitions.

Our argument, thus far, has dealt affirmatively with the clear justification of Congress in passing this Law, and thereby has met the relevant considerations of the opinion of Mr. Justice Van Orsdel. A central fallacy, we submit, envelopes his opinion—its failure to consider the specific Law passed by Congress and the only Law be-

fore the Court with its history, its purposes, its operation. Instead of dealing with *the* Minimum Wage Law for women, called into question, illumined by the facts which gave rise to it and to the experience to which it has given rise, Mr. Justice Van Orsdel considered an abstract and not a judicial question: "The general power of Congress to fix wage contracts between private individuals." (R., 58.) No such "general power" has been exercised by Congress, no such power is here involved. The argument means, in essence, that a specific statute aimed at women's —and, therefore, society's—welfare is to be disregarded because some other statute, *not dealing with women* (which neither Congress nor any State legislature has evinced the slightest intention of passing) would be unconstitutional. That is "pressing the broad words of the Fourteenth Amendment to a drily logical extreme" (*Noble State Bank* v. *Haskell,* 219 U. S., 104, 110) with a vengeance. This error permeates, we submit, the opinion of the two justices who reversed their two colleagues.

Specifically:

I. There is no constitutional prohibition against legislation affecting the wage contract as such.

Mr. Justice Van Orsdel assumes a specific constitutional prohibition against interference with a wage contract. Only such a constitutional provision would make relevant his argument:

> "If Congress may establish a minimum wage for women, it may establish a maximum wage, or it may name a fixed wage. If it may regulate wages for women, it may by the exercise of the same power establish the wages to be paid men. The power of

Congress to fix wages between private individuals is either constitutional or unconstitutional. There is no leeway for legislative or judicial discretion. A fundamental principle is involved; and it does not lie in the courts to declare a law fixing the wages of women constitutional and a law fixing the wages of men unconstitutional." (R., 58.)

But, of course, this wholly misconceives the scope and limitations of the Constitution. There is no specific prohibition against dealing with the wage contract as such. There is only the guarantee of fair dealing, the satisfaction of "the sense of fairness" of the Due Process Clauses. And, so we find, that the wage contract *has* been interfered with by legislation with the sanction of this Court—legislation which directly affected the money value of the wage contract, operated to the financial advantage of one side and of alleged cost to the other. Payment in cash as against store orders (*Knoxville Iron Co.* v. *Harbison,* 183 U. S., 13); payment on basis of coal mined before being screened (*McLean* v. *Arkansas,* 211 U. S., 539); semi-monthly cash payments (*Erie R. R.* v. *Williams,* 233 U. S., 685)—all these requirements affected money terms, cash value, all involved legislative interferences with wage contracts, all were sustained because each was found a not unreasonable means to safegaurd a public interest. Each case was decided not on any absolutist assumption of immunity of wage contracts from legislative interference but quite the opposite: the concrete circumstances of each case negatived *arbitrary* restraint. So, by the circumstances which give meaning to the Minimum Wage Law for women *it* must be judged. And those circumstances, as Parts First, Second, and Third show, overwhelmingly prove that Congress enacted a reasonable regulation.

II. Congress may and did protect women in industry because they are women. The political equality of woman is an irrelevant factor.

The great fact that this legislation applies solely to women has no relevance for Mr. Justice Van Orsdel. "If it [Congress] may regulate wages for women, it may by the exercise of the same power establish the wages to be paid men" (R., 58). "No reason is apparent why the operation of the law should be extended to women to the exclusion of men, since women have been accorded full equality with men in the commercial and political world. Indeed, this equality in law has been sanctioned by Constitutional amendment . . ." (R., 61). The argument was long ago anticipated and answered, in classic language, by this Court. Men and women remain men and women eternally.

> "Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. . . . . Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane it would still . . . . justify legislation to protect her from the greed as

well as the passions of men. The limitations which this statute places upon her contractual powers, upon her right to agree with her employers as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer." (*Muller* v. *Oregon,* 208 U. S., 412, 422-23, quoted in *Miller* v. *Wilson,* 236 U. S., 373, 380-81; see also the recent decision in *First Wisconsin Nat. Bank* v. *Milwaukee Patent L. Co.,* 190 N. W., 822; Wis. , decided Dec. 5, 1922.)

III. "Adair v. United States" (208 U. S. 161) and "Coppage v. Kansas" (236 U. S. 1) are wholly inapplicable.

The true significance of these cases brings into sharp relief the considerations of public health, morals and general welfare which are the very basis and immediate aims and accomplishment of the Minimum Wage Law for women *and which were not asserted or presented by the statutes involved in the earlier cases.* Their meaning was only recently summarized, by the Justice who wrote for the Court in the Coppage case:

"*Adair* v. *United States,* 208 U. S., 161, 174-175; *Coppage* v. *Kansas,* 236 U. S., 1, 17, dealt with statutes—the former with an Act of Congress making it criminal for a common carrier in interstate commerce to discharge an employee because of his membership in a labor organization; the latter with a state law making it criminal to prescribe as a condition upon which one might secure or retain employment that the employee should agree not to become or remain a member of any labor organization while so employed; and this in the absence of contract between the parties, coercion on the part of the employer, or incapacity or disability on the part of the employee. In accord with an almost unbroken current of authority in the state courts holding stat-

utes of that character to be invalid, this court came to a like conclusion. In the latter case there was a direct interference with freedom in the making of contracts of employment *not asserted to have relation to the public health, safety, morals or general welfare beyond a purpose to favor the employee at the expense of the employer, and to build up the labor organizations,* which we held was not properly an exercise of the police power." (*Prudential Ins. Co. of America* v. *Check,* 259 U. S., ; decided June 5, 1922. Italics ours.)

IV. Neither in reason nor in experience does the Minimum Wage Law for women imply power "to fix the prices of all commodities entering into the determination of an equitable wage." (R., 59).

The contention of the majority opinion is conclusively met by Mr. Chief Justice Smyth:

"It is argued that in order that a fair minimum wage may be fixed, it is necessary to ascertain the cost of rent, clothes, food, and recreation. Not at all. As well say that a railroad rate can not be determined by the Interstate Commerce Commission until the price of iron, steel, land, coal, clothing, etc., used by the railway has been found. No such course has ever been followed in fixing a railroad rate, nor is it necessary that it should be. The body charged with fixing the rate may assume that the prevailing prices with respect to the other things are reasonable, in the absence of any showing to the contrary." (R., 78.)

V. No basis whatever for claim that "experience has demonstrated that a fixed minimum wage means, in the last analysis, a fixed wage; since the employer, being compelled to advance some to a wage higher than their earning capacity, will, to equalize the cost of operation, lower the wage of the more competent to the common basis." (R., 64).

Whatever "the last analysis" may prove "experience," with all respect to Mr. Justice Van Orsdel, demonstrates just the opposite of what he suggests. The proof is absolutely conclusive and uniform, as a result of long trial under all kinds of circumstances—"good times" and "hard times"—in many jurisdictions.

On all these questions we appeal from "judgment by speculation" to "judgment by experience". (*Tanner* v. *Little,* 240 U. S., 369, 386.) Experience will be classified as follows:

Part First.—The Successful Working of Minimum Wage Legislation.

Part Second.—The Minimum Wage Laws.

Part Third.—The Need for Minimum Wage Legislation in the District of Columbia and Generally in the United States.

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