THE OREGON MINIMUM-WAGE CASES[1]

FOR the present, at least, employers and employees in Oregon must obey the minimum-wage law of that state. The Oregon supreme court held that the statute violated neither the state nor the federal constitution.[2] A writ of error was taken to the Supreme Court of the United States to review the decision of the Oregon court on the federal question. A brief on behalf of the state was submitted by Mr. Louis D. Brandeis. After the argument and before a decision was rendered, the personnel of the bench was changed, and Mr. Brandeis became an associate justice. A reargument was ordered. A second brief on behalf of the state was submitted by Professor Felix Frankfurter of the Harvard Law School. Mr. Justice Brandeis was disqualified from sitting by reason of having previously been of counsel. Of the remaining eight members of the court, four were in favor of sustaining the decision of the Oregon court and four were opposed. Since it requires a majority of an appellate tribunal to reverse the judgment of a lower court, the judgment of the state court was undisturbed. Under the rules of the Supreme Court, no opinion was rendered and no announcement was made as to judges who favored the statute and those who were opposed. There is therefore no precedent in the Supreme Court which can be regarded as authoritative when the same problem is again presented for decision. Under these circumstances the brief which was influential in preventing the reversal of the decision of the state court sustaining the statute is of more than usual importance, and the National Consumers' League has done a welcome service in reprinting it and making it available for general distribution.

The brief follows the model set by Mr. Brandeis in the brief on behalf of the state in Muller *v.* Oregon.[3] In addition to the strictly legal

[1] Oregon Minimum Wage Cases. By Felix Frankfurter and Josephine Goldmark. New York, National Consumers' League, 1916.—vi, A 54, 783 pp. This volume is a reprint of the brief presented to the Supreme Court of the United States in behalf of the Oregon Industrial Welfare Commission in the cases of Stettler *v.* O'Hara and Simpson *v.* O'Hara, nos. 25 and 26, October Term, 1916.

[2] Stettler *v.* O'Hara (1914) 69 Oregon 519, 139 Pac. 743; Simpson *v.* O'Hara (1914) 70 Oregon 261, 141 Pac. 158.

[3] (1908) 218 U. S. 412. In this case the Supreme Court upheld the constitutionality of an Oregon statute limiting to ten hours a day the hours of women employed in laundries.

argument, which occupies 54 pages, there are 76 pages giving all the statutes in the United States and elsewhere which deal with the subject of a minimum wage, and 647 pages presenting the experience on which this legislation is based. The second and third parts of the brief are compiled by Miss Josephine Goldmark and are similar to the work she has done in collaboration with Mr. Brandeis in previous briefs on the constitutionality of various forms of labor legislation. Among the topics to which consideration is given are the evils of low wages, and the benefits which have ensued to employers, employees and the public generally from the minimum-wage legislation now in force. The proof adduced consists largely of statistical information and excerpts from the writings of economists and physiologists.

The bearing of this proof on the strictly legal argument is manifest. If the Oregon minimum-wage law is a proper exercise of the police power, it thereby meets the requirements of due process of law which the Fourteenth Amendment imposes on every state statute depriving any one of liberty or property. For a statute to be a proper exercise of the police power, it must tend to promote some end which is public and not private merely, and it must be a reasonable and not an arbitrary method of serving this end. With regard to the legitimacy of specific ends and means, the Constitution itself is not informing. "Due process of law" does not tell us what ends are public ends, nor what means are reasonable and what means are arbitrary. Any judgment on such matters must be based on knowledge of actual conditions, on prognostications of the probable effect of any legislation on such conditions, and on views of what is desirable. In acquiring this knowledge and making these prognostications, and in forming judgments of what is desirable, recourse must be had to other sources than judicial precedents. Judges cannot know as part of general knowledge the facts as to the actual conditions of employees in industry. And when they are informed as to the facts, their special training does not qualify them as experts in drawing inferences from the facts or in forecasting the effect on the facts of new legislative expedients. Nor does it qualify them as experts in forming judgments as to what effects are most to be desired. In the various aspects of such matters, the expert is the man trained in physiology, economics or statistics. It is unfortunate that our judicial system fails to give judges the aid of auxiliary officials who are experts in the various fields in which courts must pass authoritative legal judgments.[1] The absence of such official experts

[1] See Parke-Davis & Co. *v.* H. K. Mulford Co. (1911) 189 Fed. 95, at p. 115, where, in concluding an opinion involving the validity of a patent, Judge Learned

attached to the courts throws on the attorneys for contending litigants the burden of guiding the judges to the expert knowledge essential to the wise solution of the problems before them. This is the burden which Miss Goldmark accepts, and her voluminous compilation fulfils most satisfactorily the task devolved upon her.

The material collected by Miss Goldmark is used by Mr. Frankfurter chiefly in the first two of the three points of his argument. In his analysis of the issues involved in determining whether a statute is a proper exercise of the police power, he takes as a basis the familiar canon of Chief Justice Marshall for the construction of the clause giving Congress power "to make all laws which shall be necessary and proper for carrying into execution" the specifically enumerated powers:

> 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.[1]

Hand observed: "I cannot stop without calling attention to the extraordinary condition of the law which makes it possible for a man without any knowledge of even the rudiments of chemistry to pass upon such questions as these. . . . How long we shall continue to blunder along without the aid of unpartizan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some such advance."

[1] Though Marshall's canon of construction was formulated as an aid in interpreting the "necessary and proper" clause, it may logically be used as an aid in interpreting the "due process" clause, since the test of what is due process, like the test of what is necessary and proper, is a test of reasonableness. Despite this logical justification, the transfer of the formula to the new use may lead to a wrong implication, for in so using it Mr. Frankfurter apparently accepts the burden of proving the minimum-wage law constitutional and does not insist that the burden is on his opponent to prove it unconstitutional. The formula was invented by Marshall as an aid in determining whether a statute of Congress, not authorized by any specific grant of the Constitution, was within the non-enumerated powers. The question to be determined in the minimum-wage cases was whether the state statute was positively prohibited by the Constitution. Oregon does not have to look to the federal Constitution for any authority to pass its statute. Those who object to the statute have to show in the federal Constitution a positive prohibition against it. Theoretically there is a presumption in favor of the constitutionality of all statutes, and the presumption is stronger in the case of statutes passed by a state in the exercise of undoubted reserved powers than in the case of statutes passed by Congress without specific grant of authority. This distinction is doubtless in Mr. Frankfurter's mind when he says that, if Marshall were speaking today, "instead of saying 'plainly adapted' he would have said 'not plainly unadapted'."

Whether any of these presumptions in favor of constitutionality has any determin-

The first point of the argument is that the end aimed at by the Oregon minimum-wage law is legitimate and within the scope of the Constitution. The end of the law, as declared in the preamble, is to protect women and minors "from conditions of labor which have a pernicious effect on their health and morals." The preamble further states that "inadequate wages . . . have such a pernicious effect." The support given by the brief to this statement of the preamble consists of tables showing the cost of living for woman factory-workers in Oregon and elsewhere, and the extent to which wages paid to these workers were less than the cost of living.

The second point of the argument is that "the means selected by Oregon 'are appropriate' and 'plainly adapted' to accomplish the legitimate end" of providing 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 so to eliminate all the evils attendant upon such deficits on a large scale." The proof on this point is based on the public opinion cited in favor of minimum-wage legislation and on the actual experience with such legislation. On this is grounded the claim that "Oregon's choice as among the three remedial methods of effort surely was not 'arbitrary' or 'unreasonable'." The other methods referred to are a direct subsidy out of the public treasury to pay a wage equal to the necessary cost of living, and the Massachusetts method of seeking to compel wage increases by pressure of public opinion after published findings of the difference between wages and the cost of living. Here the brief relies on the familiar principle that a state has a choice of means and that the court

ing effect on the actual course of judicial decision is, however, open to serious question. If a statute deprives any one of liberty or property, the courts in fact require some justification for such deprivation in order to hold it not without due process. In deciding whether there is sufficient justification, they seldom, if ever, rely solely on the presumption in favor of constitutionality. What weight, if any, they actually give it, cannot be known. They often assert that a statute will not be declared unconstitutional unless its unconstitutionality is free from doubt. Yet not infrequently five judges declare a statute unconstitutional, in spite of the fact that four of their colleagues are firmly convinced that it is entirely valid. The majority cannot find in the opposing convictions of the minority even the basis of a reasonable doubt. It would seem, therefore, that Mr. Frankfurter has made an accurate analysis of the practical task of convincing a court that a statute is a proper exercise of the police power, when he accepts the burden of showing that the end aimed at by the statute is legitimate, and that the means selected are appropriate and plainly adapted to accomplish those ends. Yet the burden exceeds what could consistently be required by any court whose decisions are actually controlled by the principle that a statute will be annulled only when its unconstitutionality is free from doubt.

cannot declare the means selected unreasonable merely on the ground that it thinks that some other means would have been preferable.

Thus far the brief raises no serious questions. That it would be constitutional to pass a minimum-wage law provided no one suffered any injury therefrom is hardly open to debate. The determining test in applying the due-process clause is whether the public benefits to be anticipated from the statute counterbalance the resulting burdens cast on individual interests. This is the subject dealt with in the third point of the brief, to which is prefixed the caption: "No rights of plaintiffs secured under the Constitution of the United States prohibit the use of the means adopted by the state of Oregon to accomplish these legitimate public ends."

Mr. Frankfurter wisely wastes no time in contending that the statute involves no deprivation of liberty or property. He frankly concedes that "even the slightest interference with even the most capricious wish of an individual is a deprivation of liberty." And he concedes also that "in so far as unrestrained liberty of business action is to be regarded as also a property right" the statute imposes also a deprivation of property. But he points out that the Constitution does not unqualifiedly forbid deprivations of liberty and property. It forbids only those deprivations which are wanting in due process of law. Thus the brief comes to the crucial question whether the deprivation is with or without due process. This method of analyzing the constitutional question is superior to that adopted by some judges who profess to find a distinction between statutes which merely "regulate" property and those which amount to a "deprivation" of property. It accords with common sense to say that if a man is forbidden to do as he pleases, he is deprived of liberty; if he is caused a money loss, he is deprived of property, even though the loss is of expected gain rather than of existing assets. But the extent and the importance of the liberty or property involved is significant when the deprivation is compared with the public advantages promoted thereby. And a law for the future conduct of one's business which may interfere with anticipated profits may well require less justification of public advantage than does a law which takes away from an individual something to which he already has title.

In opening the argument, Mr. Frankfurter emphasizes the fact that the issue before the court is the constitutionality of a specific scheme of legislation, and that the validity of this legislation is dependent on the signficance of specific facts as to wages and cost of living. He warns the court that it is not called upon to pass judgment on "a

general or vague theory of wage-fixing by legislation." This is a warning sadly needed by a number of judges, who are so prone to think in generals that they are not unlikely to assume that they could not sustain moderate wage-fixing under certain specific circumstances unless they could sustain all wage-fixing under all circumstances. This habit of thought seems to have dominated Mr. Justice Pitney in his dissenting opinion in Wilson *v.* New[1] on the constitutionality of the Adamson Law. "The right to hire employees," he says, "to bargain freely with them about the rate of wages and from their labors to make lawful gains—these are among the essential rights of property." And there was no qualification that it might make a difference under what circumstances or to what extent a legislature sought to interfere with free bargaining about wages. The majority, on the other hand, took the view that the special circumstances under which the Adamson Law was passed and the fact that its impositions were limited in extent and in time, were material in deciding the question before the court. They saw a difference between an inch and an ell. They realized that the court was deciding a specific issue between two contending litigants and not hypothetical issues between hypothetical litigants. We have developed elaborate judicial procedure for narrowing the issues in trials of questions of fact and for excluding all evidence except that which bears upon the issue. It is equally important that judges in deciding questions of the constitutionality of statutes shall narrow the issue to the precise problem presented for decision and refrain from holding that a specific statute cannot constitutionally be applied to a specific state of facts, if the underlying reason for their decision is their opinion that some other statute could not be constitutionally applied to some other state of facts.

The Oregon minimum-wage cases originated in two suits brought respectively by Stettler, an employer, and by Simpson, one of his woman employees, against the Oregon Industrial Welfare Commission to vacate and annul and enjoin from enforcement an order of the commission forbidding the employment in any manufacturing establishment in Portland of any experienced adult woman worker, paid by time rates of payment, at a weekly wage of less than $8.64, the order containing the recital, "any lesser amount being hereby declared inadequate to supply the necessary cost of living to such women factory workers and to maintain them in health." The amount thus declared to be the

[1] Decided March 19, 1917. No. 797, October Term, 1916. U. S. Adv. Ops 1916, p. 298, 37 Sup. Ct. Rep. 298.

necessary cost of living was determined by a conference composed in part of representatives of employers, whose report was approved by the commission. The statute provided that on questions of fact the findings of the commission should be conclusive, but that on questions of law an appeal could be taken to the courts. The plaintiffs did not seek to avail themselves of this right of appeal. They did, however, question in the state court the constitutionality of vesting the commission with authority to make a final determination of fact, but without success.[1] The writ of error brought this question before the Supreme Court. Mr. Frankfurter's brief devotes only a short paragraph to the contention, in view of the series of cases in the Supreme Court which have disposed of similar objections.

Before passing to the major issue dealt with in the brief, consideration should be given to two minor points connected with the particular allegations made by the plaintiffs who object to the statute. The employer alleges that the employees whom he pays less than the minimum "are incompetent by reason of age, inability or otherwise to earn greater wages than they are being paid." The employee alleges that $8 is the best wage she is able to get for any labor she is capable of performing, and that the enforcement of the statute will deprive her of her present employment. In answer to these allegations the brief refers to a provision in the statute allowing the commission to issue "to a woman physically defective or crippled by age or otherwise," a special license authorizing her employment at a wage less than the cost of subsistence. Neither Stettler, the employer, nor Simpson, the employee, made application for such special license. Mr. Frankfurter urges against them the familiar principle that they are not entitled to seek judicial relief until they have first exhausted their administrative remedies. The point seems well taken, though it has no bearing on the constitutionality of the statute and would serve only to postpone a judicial settlement of the issue.

Another allegation of Stettler's to which attention is devoted is his complaint that the statute will necessarily restrict him "to the employment of women who are capable of performing labor sufficient to earn said sum of $8.64 or more, and said less competent employees will be

[1] Eakin, J., 69 Oregon, at p. 540: "Due process of law merely requires such tribunals as are proper to deal with the subject in hand. Reasonable notice and a fair opportunity to be heard before some tribunal before it decides the issues are the essentials of due process of law. It is sufficient for the protection of his [Stettler's] constitutional rights if he has notice and is given an opportunity at some state of the proceedings to be heard."

prevented from laboring for the plaintiff." This is called a claim to the liberty of employing $8 women for $8, instead of $8.64 women for $8.64.

A short answer to any such claim would be that Stettler has no way of knowing that Simpson or any other woman can "earn" $8 in his factory, but cannot "earn" $8.64, any more than he could know that a ton of coal he burns could "earn" $8, but not $8.64. To run his factory he has to have his land, his building, his machines, his fuel, his raw materials, his management, his labor. To sell his product after it is made, he has to have a demand for it, a medium for getting in touch with that demand, and a means of transporting his product to where the demand is. At the end of a year, he may get back his costs and something more, or he may not. If he does not get as much as he would like, what is the reason? Because he paid more for his coal than it gave him back? Or his land, or his building, or his machines? Because he made mistakes in management? Because he advertised too little, or advertised too much? Because the railroads were congested, or freight rates were too high? Because users of boxes were getting tired of paper boxes and preferred some other kind? Or because he paid sixty-four cents a week too much to some of his help? Stettler blames it on the woman. But no system of cost accounting can show just how much each one of these various factors contributed to Stettler's balance or deficit at the end of the year, when each is essential and each operates in conjunction with all the others.

For the purpose of answering Stettler's allegation, Mr. Frankfurter apparently accepts his assumption that it is possible to know just how much each individual employee contributes to the results of the year's operations. He says that Stettler cannot value "a liberty to employ an inefficient woman in the place of an efficient one, if he proposes to pay in either case what the output is really worth." His real grievance is said to be that the statute prevents him from "getting labor at less than the true value of its product." As a reply to Stettler, this seems fair enough. But, whatever Stettler may think about it, his real grievance is that the statute makes him pay more for labor than he would have to pay if left free to drive the hardest bargain he could. Whether before or after the statute he pays less or more than the labor produces must remain uncertain. The statute makes no attempt to deal with such uncertainties. Its theory is, not that the employer must pay what the labor produces for him, but that he must pay what it costs to produce the labor.

This theory of the statute is adopted by Mr. Frankfurter in his

argument on the major issue whether the deprivations complained of are with or without due process of law. The test of what deprivations are with due process is recognized to be somewhat vague, but the controlling ideas which have dominated the interpretation of the phrase are said to be: "(1) freedom from *arbitrary* or *wanton* interference, and (2) protection against *spoliation* of property." It is insisted that "it is not arbitrary, wanton, or a spoliation for the state to require Stettler to pay the cost of Simpson's labor if he chooses to use it." Stettler's claim to the contrary is said to be based upon a denial of responsibility for the results of Simpson's not receiving enough to support her. He is not the cause of the ensuing evils. This, Mr. Frankfurter does not deny. But he insists that proof of fault is not essential to the constitutionality of legislative imposition of liability, and that certain relationships, of which that of employer and employee is one, involve responsibilities which the law may enforce. Possibly a better phrasing of this point would be that certain relationships justify the legal imposition of liability. Mr. Frankfurter cites a number of decisions sustaining statutes imposing liability without proof of negligence. One of these statutes made municipalities liable for acts of mobs. This seems hardly in point, since manifestly an individual may claim greater freedom from legislative coercion than would be accorded to a subordinate governmental agent of the state. The other cases relate to liability for acts in the nature of tort rather than to impositions of a contractual liability. Is this distinction a material one? It is a constitution we are expounding, as Chief Justice Marshall reminded us a long time ago. It seems frivolous to read into "due process of law" a notion that a state has less power to impose contractual liability where there is no fault than to impose tort liability where there is no fault.

But another distinction between the cases cited and the case before the court is more serious. The statutes already sustained apply to circumstances where, but for some positive act on the part of the defendant, the loss and injury would not have happened. We cannot say that Simpson would not have suffered from lack of proper living conditions if she had not entered the employ of Stettler at less than a living wage, as we can say that a farmer would not have had his cows killed by the operation of a railroad if the railroad had not been built. If the road stops its operations, the cows are safe from danger from trains. But if Stettler closes his factory, Simpson is not safeguarded from want. The injury Simpson suffers is not from anything Stettler does, but from his failure to do something, his failure to pay higher

wages. The injuries which induced the minimum-wage statute were not caused by any undertaking on the part of employers, but were merely rendered possible by their failure to undertake more than they chose to undertake. Moreover, the minimum-wage statute imposes, not a liability for injuries after they have occurred, but an obligation to conduct one's business so that injuries may be prevented. These distinctions seem sufficient to deprive the cases cited by Mr. Frankfurter of any controlling weight as authority for his contention. They indicate that the minimum-wage statute presents a novel problem.

A statute, however, is not unconstitutional merely because it does something which has not been done before. One of the chief objects of statutes is to change the common law. If there is some reasonable ground for making Stettler pay Simpson for her labor what it costs to furnish it, a law compelling him to do this should be valid, even though no such law has been passed before. The reasonable ground which Mr. Frankfurter urges is that some one must support Stettler's employees if he is to have their labor, and that he gets the benefit of that support. If he does not furnish it, he profits from the acts of others. He is subsidized, either by public or private charity or by something worse. His objection to the statute is that it deprives him of this chance to get a subsidy. He is made liable, not for injuries caused by him, but because of benefits enjoyed by him. If his employees did not live, they could not work for him. The statute says that, if he chooses to take the benefit, he must bear the burden. Four judges held such a law unconstitutional. Yet they must be familiar with elementary principles of quasi-contract which impose liability for voluntary acceptance of benefits.

This would seem in itself a sufficient ground to dismiss Stettlers' objection to the statute. He may, it is true, be unable to conduct his particular business if he cannot get labor at less than cost. If this is the case, he is claiming a constitutional right to be a parasite. If it is not the case, he is claiming a constitutional right to impose part of the costs incurred for the benefit of his business on some good or bad Samaritan who may be induced to contribute to them. Such rights seem to be of an inferior order when weighed in the balance against a public interest.

The discussion thus far has been on the assumption that the minimum-wage statute costs employers a net loss of the amount it increases their pay-roll. But this assumption, the brief urges, is in large measure disproved by experience. It cites the testimony gathered by Miss Goldmark to the effect that higher wages have proved a stimulus to in-

dustrial efficiency on the part of both employers and employees. To the extent that this is true, the employers' objection to minimum-wage legislation is minimized in weight and is therefore more heavily counterbalanced by the justification of public advantage.[1]

In the argument in favor of the public advantage of minimum-wage legislation, Mr. Frankfurter does not confine himself to the point already noted that it protects employees from inadequate wages which have a pernicious effect on their health and morals. In addition, he urges that it prevents unfair competition between manufacturers by depriving employers who pay wages less than the cost of subsistence of such temporary advantage as they might have over their competitors who voluntarily pay a living wage. The constitutionality of legislation to prevent unfair competition by buying below cost is supported by the various anti-trust acts which have prohibited the unfair competition which takes the form of locally or temporarily selling below cost.[2] Another form of unfair competition dealt with by the statute is said to be that indulged in by employees who on the strength of outside subsidies sell their labor below cost to the detriment of competing employees who are wholly dependent on their wages.

A still bolder ground is taken in the contention that the statute is saved from being "wanton, arbitrary or a spoliation," because it seeks to remedy the actual inherent inequality of bargaining power between employers and employees. This is the ground of constitutionality which Mr. Justice Pitney declined to sanction in Coppage *v.* Kansas,[3] and which Mr. Justice Holmes declared sufficient.[4] Mr. Frankfurter

[1] In considering the possibility of money loss to Stettler from the operation of the statute, it must be borne in mind that we do not have a case of an increase of operating costs to Stettler alone. His competitors within the state are similarly affected. They too must pay a wage equal to the cost of living. If it be objected that not all of Stettler's competitors are located in Oregon, and that neighboring states do not have similar statutes, this is but to say that the economic unit is not coterminous with the political unit. Stettler may possibly suffer for a time because we have a federal rather than a unitary system of government. The situation may be unfortunate, but the remedy is obvious. A familiar example appears in child-labor legislation. The several states were permitted to adopt their local restrictions against the employment of children, notwithstanding the fact that competing employers in other states might still be left without similar restraints. When it appeared that this penalized employers in the states with higher standards, Congress intervened and deprived employers in the states with lower standards of any market outside the state in which they were located.

[2] See Central Lumber Company *v.* South Dakota (1912) 226 U. S. 157.

[3] (1915) 236 U. S. 1.

[4] 236 U. S., at pp. 26–27. "In present conditions a workman not unnaturally

insists that many of the statutes which have been sustained were necessitated by the inequality of bargaining power between employers and employees, and that their justification rests upon that principle. Among such statutes are those relating to the methods of determining the amount of compensation due employees,[1] the times and manner of payment,[2] statutes prohibiting the assignment of wages,[3] forbidding and penalizing the exaction of usurious interest, prohibiting the advance payment of wages to seamen,[4] and regulating employment agencies.[5] A time-honored instance of this justification for legal interference with the freedom of contract is found in the use of equity powers to defeat coercive contracts.

This section of the brief strikes at the root of the doctrine on which courts have so frequently declared statutes unconstitutional —the doctrine that the due-process clause embodies the theory of *laissez faire* as a limitation on legislative action. It was the rigid insistence on this doctrine by Mr. Justice Harlan in Adair *v.* United States[6] which prompted the searching analysis of it by Roscoe Pound in his article on "Liberty of Contract"[7] in which he answered these questions set forth on his opening page:

> Why, then, do courts persist in the fallacy? Why do so many of them force upon legislation an academic theory of equality in the face of practical conditions of inequality? Why do we find a great and learned court in 1908 taking the long step into the past of dealing with the relation between employer and employee in railway transportation, as if the parties were individuals—as if they were farmers haggling over the sale of a horse? Why is the legal conception of the relation of employer and employee so at variance with the common knowledge of mankind?

may believe that only by belonging to a union can he secure a contract that shall be fair to him. If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins."

[1] Requiring payment by "run of mine" weight, McLean *v.* Arkansas (1909) 211 U. S. 539.

[2] Prohibiting contracts to pay employees less often than semi-monthly, Erie Railroad Co. *v.* Williams (1914) 233 U. S. 685. Requiring redemption in money of scrip or store orders issued in payment of wages, Knoxville Iron Co. *v.* Harbison (1901) 183 U. S. 13.

[3] Mutual Loan Co. *v.* Martell (1911) 222 U. S. 225.

[4] Patterson *v.* Bark Eudora (1903) 190 U. S. 169.

[5] Brazee *v.* Michigan (1916) 241 U. S. 340.

[6] (1908) 208 U. S. 261.

[7] 18 *Yale Law Journal* 454 (May 1909).

The same issue was presented by the minimum-wage cases. Mr. Frankfurter is rigidly scientific in recognizing it. When he writes his concluding paragraphs on the point now under consideration, he is dealing with the real forces which mold the judicial application of the due-process clause to legislation affecting freedom of contract.

> The largest opportunity for the fullest development of men's faculties has undoubtedly been one of the basic considerations of Anglo-American institutions. To the extent that such development touches fundamentals, this political principle is incorporated in the protection of due process (see Butler *v.* Perry, 240 U. S. 328, 333). But just because the largest opportunities for development of men's faculties implies [*sic*] choice and freedom, within the circumscribed range of human freedom, the common law in both phases of its legal functions, namely, through adjudication and legislation, has thrown its weight in favor of the necessitous and conversely has sanctioned, as the proper function of law, the curbing of the "avaricious" and the "malevolently inclined." The principle has been briefly and comprehensively expressed by Lord Chancellor Nothington when he said that "necessitous men are not, truly speaking, free men" (Vernon *v.* Bethell, 2 Eden, 110, 113).
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> The "liberty of contract" which the present legislation would destroy is only the "liberty" of an employer to abuse and the "liberty" of an employee to be abused. True freedom of contract is established, rather than impaired, by such restrictions. Their very purpose is to assure the parties an equal basis for bargaining, so that they may be *free* to bargain on the merits, and not under the compulsion of a crippling necessity. With no margin or the margin of but a single meal between starvation there can be no true liberty of contract.

The next point made in the brief is closely connected with the preceding one. The statute is called "a reasonable exercise of the state power to minimize danger of unfair or oppressive contracts." The established fact that about half the women in Oregon were receiving less than a living wage is regarded as proof of the likelihood of unfair contracts. It is urged that the state has the same power to limit unrestricted "demand and supply" in the interest of fair and ethical dealing with respect to the wage contract as it has to seek the same object in the same way when it restricts freedom of contract to protect people from exploitation by lotteries,[1] bulk sales,[2] marginal dealing in

[1] Lottery Case (1901) 188 U. S. 321.

[2] Lemieux *v.* Young (1909) 211 U. S. 489.

stocks,[1] trading stamps[2] and the sale of small bread loaves.[3] Statutes dealing with such matters are designed to secure to unwary buyers a fair equivalent for what they give.[4] The minimum-wage law is designed to secure to unwary and necessitous sellers of labor the equivalent of the cost of what they give.

Finally, the statute is advocated as a "reasonable exercise of the state power to foster the productivity of industry."

> The fundamental policy represented by this act is the prevention of taxation upon sound industries for the artificial support of unsound ones, and the correlative direction of the energies of the state into lines which can be truly productive. Its purpose is to compel those industries which are now parasites either to make themselves self-supporting through higher efficiency or to discontinue.

To promote these various ends, the statute substitutes a conception of relationship for one of free contract. Mr. Frankfurter goes back to the feudal period for the common-law recognition of the concept of relationship as the controlling principle in the reciprocal liabilities of those having different interests in land tenure. "Industry under modern conditions," he says, "has come to be one of the most important fields in which the interrelation of human beings requires supervision and control by the state. . . . We are here dealing with an exercise of the same public power as that of the common law regarding land tenure."

The justifications for the statute in the public interest which it promotes apply as well to the objections of the employee as to those of the employer. That the statute may deprive some employees of the opportunity to get what they are now getting is clear. An employer who is compelled to raise the wages of an employee or to dismiss her may choose the latter alternative. The statute makes provision for mitigating this danger to employees by authorizing the commission to issue to those who are "physically defective, crippled by age or otherwise" licenses to accept employment at less than the cost of living.

[1] Otis *v.* Parker (1903) 187 U. S. 606.

[2] Rast *v.* Van Deman & Lewis Co. (1916) 240 U. S. 342.

[3] Schmidinger *v.* Chicago (1913) 226 U. S. 579.

[4] To the cases cited by Mr. Frankfurter may be added the decisions handed down subsequent to the filing of his brief which sustain the constitutionality of the so-called "Blue Sky" Laws; Hall *v.* Geiger-Jones Co. (January 22, 1917) U. S. Adv. Ops. 1916, p. 217, 37 Sup. Ct. Rep. 217; Caldwell *v.* Sioux Falls Stock Yards Co., *ibid.*, p. 224; Merrick *v.* Halsey & Co., *ibid.* p. 227.

But it does not obviate the danger entirely, since some who are denied licenses may be unable to obtain employment at the wages fixed by the commission, because employers will not think it worth their while to pay $8.64 for their labor even though they cannot get it for less. Since, however, employers must pay $8.64 for the labor of any normal person, those employees who in fact suffer from the operation of the statute will in the long run be those who are the less competent. Though it is not possible to fix the exact value of the contribution of a laborer to a product created jointly by labor, management, and the use of material facilities, it is certain that some laborers can contribute more to a joint product than can some of their fellows. If, therefore, an employer is compelled to pay a minimum wage, he will inevitably be spurred to get the most efficient labor which he can for that wage, to the resulting loss of employment by some of the less efficient. It seems, then, a safe inference that the employees who may suffer from the act will be the less efficient. The result of the statute to any employee who suffers actual injury from it will be, argues the brief, to compel such employee to become more efficient or to accept the status of a defective. In answer to the contention on behalf of Simpson that the state cannot put her in such a position unless it provides in advance for her maintenance, Mr. Frankfurter says that this ignores the provision of the statute for special licenses, and that it denies the right of the state to determine how defectives may be supported without its being compelled to grant them an indirect subsidy. The statute is said to be the first step in the solution of the problem of determining how to treat those who cannot carry their own weight.

> The state, therefore, may use means, like the present statute, of sorting the normal self-supporting workers from the unemployables and then deal with the latter appropriately as a special class, instead of an indiscriminate, unscientific lumping of all workers, with a resulting unscientific confusion of standards.

The brief cannot be said to deal as adequately with the contentions of the employee as with those of the employer. It seems a legitimate point to have urged that the court should regard the employees as a class, and should recognize that the class as a whole derived such benefit from the statute that the possible loss to a few is greatly overbalanced by the gain to the many, and that therefore no deprivation to the laboring class has to be weighed against the public benefits to be derived from the statute.

It is apparent that much of the logic in the brief is far from tight. This is inevitable from the nature of the problem. Many of the precedents cited are precedents in favor of the constitutionality of promoting the general economic policy underlying the minimum-wage law. It cannot be said that the economic policy underlying statutes which have been sustained is identical with that of the statutory minimum wage. All that it is possible to show is that the former and the latter have much in common, and that the differences between them are not enough to warrant a court in declaring that the minimum-wage law is an arbitrary and wanton exercise of power. One of the significant contributions of the brief is its emphasis on the point that decisions sustaining statutes under the due-process clause are precedents on the constitutional validity of the legislative promotion of the economic policy favored by the statute. When, therefore, we have statutes which seem novel from the standpoint of their particular incidence and purposes, we may nevertheless find support for their constitutionality by showing economic analogies between them and other statutes which have received judicial approval. When this method of reasoning receives wider acceptance, those who object to the constitutionality of any novel statute may cease to rely on arguments which imply that never before has complete freedom to contract as one pleases been curtailed by legislative enactment.

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THE STILL SMALL VOICE OF THE HERD[1]

THE importance of *crises* in all organic development has been emphasized by recent anthropologists and sociologists. The crisis or unexpected "fix" in which a creature finds itself furnishes the test of its capacity of readjustment. In the case of man, crisis centers attention on unobserved or ill-understood factors in a situation and may happily lead to more complete control and thus to escape from pressing difficulties. The present war is a crisis of unprecedented magnitude, and is inevitably promoting thinking of unprecedented variety and depth in regard to man's woes, their origin, nature and remedy. The English philosopher Bertrand Russell, surprised in his abstract and subtle metaphysical and mathematical speculations by undreamed-of horrors, directs the resources of an extraordinarily free and highly trained intelligence to the solution of the problem of why we act as we do. He says:

> To me the chief thing to be learnt through the war has been a certain view of the springs of human action, what they are, and what we may legitimately hope that they will become. This view, if it is true, seems to afford a basis for political philosophy more capable of standing erect in a time of crisis than the philosophy of traditional Liberalism has shown itself to be.

His chief theme is not war but rather the great and fundamental reconstruction of economic and social life which shall ultimately make war repugnant to men.

The writer is not versed in the social sciences; he betrays no knowledge of his predecessors in this field of speculation. But if he has *read* little, he seems to have *lived* much, and is evidently acquainted at first hand with men's hopes and dreads, their loves and hates, their timidity and heroism; "and without understanding and sympathy it is impossible to find a cure for the evil from which the world is suffering." This understanding and sympathy combined with a simple and unaffected mode of presentation insure his little book a wide appeal. For they serve to disguise and palliate the absolute ruthlessness with which the author sweeps away the ancient foundations of morality and

[1] Why Men Fight; A Method of Abolishing the International Duel. By Bertrand Russell. New York, The Century Company, 1917. 272 pp.

Instincts of the Herd in Peace and War. By W. Trotter. New York, The Macmillan Company, 1916. 213 pp.