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# THE WASHINGTON MINIMUM WAGE DECISION

By PAUL Y. DAVIS\*

At a time when measures designed to ameliorate the economic condition of labor by correction of its unequal bargaining position are receiving major legislative attention, state and national, the importance

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of the decision in the Washington Minimum Wage<sup>1</sup> case can scarcely be overemphasized. Prior to 1923 the judicially created<sup>2</sup> doctrine of the substantive protection of rights of property and contract under the due process clause had operated to check, but, with a few exceptions, not seriously to impede the progress of such legislation. In 1923 the decision in the case of *Adkins v. Children's Hospital*<sup>3</sup> appeared to interpose an insuperable barrier to regulation with respect to wages. Before that case one searches in vain for any definite pronouncement that the "liberty of contract" protected contained any elements of absolute right, wholly immune from legislative interference.

In a series of cases extending over two decades, various legislative restrictions upon the freedom of contract of employer and employee had been upheld against attack under the due process clause, in each after consideration of the reasonableness of the particular regulation with respect to the social end sought to be achieved.<sup>4</sup> Even those cases in which such legislation was condemned had been governed by the court's decision as to the unreasonableness of the particular regulation in question, or ultimate end sought, and not by any doctrine that absolute immunity attached to any term of the contract.<sup>5</sup>

The *Adkins*<sup>6</sup> case involved an Act of Congress under which a Board was authorized to establish minimum wages for women and children in the District of Columbia. The general recognition of the need for such laws would seem to have been sufficiently established by their prevalence; their reasonableness both by experience of their operation<sup>7</sup> and extensive

<sup>1</sup> *West Coast Hotel Co. v. Parrish*, (U. S. Supreme Court, March 29, 1937), 57 S. Ct. 578.

<sup>2</sup> Willis Constitutional Law, 705-706.

<sup>3</sup> *Adkins v. Children's Hospital*, 261 U. S. 525 (1923).

<sup>4</sup> *Holden v. Hardy* (1897), 169 U. S. 366 (eight-hour law in mines and smelters); *Knoxville Iron Co. v. Harbison* (1901), 183 U. S. 13 (cash redemption of wage orders or tokens), *Patterson v. Bark Eudora* (1903), 190 U. S. 169 (prohibiting advance payments to seamen), *Mueller v. Oregon* (19—), 208 U. S. 412 (maximum hour law for women), *Mills v. Wilson* (1915), 236 U. S. 373, *Bosley v. McLaughlin* (1915), 236 U. S. 385 (maximum hour law for women), and *Bunting v. Oregon* (1917), 243 U. S. 426 (ten-hour law). State decisions upholding minimum wage laws had been affirmed by a divided court, Brandeis, J., not participating. *Stettler v. O'Hara*, 69 Or. 519, 139 Pac. 743, and *Simpson v. O'Hara*, 70 Or. 261, 141 Pac. 158, aff. (1917), 243 U. S. 629.

<sup>5</sup> *Lochner v. New York* (1905), 198 U. S. 52 (maximum hour law for bakeries), *Adair v. U. S.* (1908), 208 U. S. 161 (Act of Congress forbidding discharge of employee because of membership in labor union); *Coppage v. Kansas* (1915), 236 U. S. 1 (state law making it illegal to require non-membership in union as condition of employment).

<sup>6</sup> *Supra*, note 3.

<sup>7</sup> See argument of counsel, 261 U. S. 527, dissenting opinion of Mr. Justice Holmes, 261 U. S. 570.

judicial approval in state courts.<sup>8</sup> Nevertheless the law was overthrown on various grounds, most important of which, as afterward developed, was the doctrine that legislation affecting "the heart of the contract, that is the amount of wages to be paid and received" differed in kind from the regulations previously upheld.<sup>9</sup> As more recently explained, "The decision and the reasoning upon which it rests clearly show that the State is without power by any form of legislation to prohibit, change or nullify contracts between employers and adult women workers as to the amount of wages to be paid."<sup>10</sup>

A similar doctrine was quickly applied to price-fixing legislation of all kinds,<sup>11</sup> so that for a while it seemed settled that "liberty of contract" with respect to a price, whether of goods or services, was immune from all legislative interference irrespective of the social need for any given regulation, except in business "affected with a public interest."

This general doctrine was effectively discredited by the decision in *Nebbia v. New York*,<sup>12</sup> where, in upholding a statute regulating milk prices, the court squarely met and disposed of the contention that not being "affected with a public interest" as a utility the price of milk could not be legislatively fixed. The court stated, "the phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good."<sup>13</sup>

With respect to minimum wage laws, however, the doctrine of the *Adkins*<sup>14</sup> case was reaffirmed in 1936 with even greater vigor by the majority opinion in *Morehead v. New York ex rel. Tipaldo*.<sup>15</sup>

It now seems clear that Mr. Justice Roberts' concurrence in an opinion so at variance with the principle of his own pronouncement in *Nebbia v. New York*<sup>16</sup> was only obtained because of the supposed procedural bar to a re-examination of the *Adkins* case.<sup>17</sup>

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<sup>8</sup> Powell, *The Judiciality of Minimum Wage Legislation*, 37 *Harv. L. Rev.* 545.

<sup>9</sup> 261 U. S. 553-554.

<sup>10</sup> *Morehead v. New York ex rel. Tipaldo* (June 1, 1936), 298 U. S. 587, 611.

<sup>11</sup> *Wolff Packing Co. v. Court of Industrial Relations* (1923), 262 U. S. 522 (wages in packing plant); *Tyson v. Bunton* (1927), 273 U. S. 418 (ticket brokers' charges); *Ribnik v. McBride* (1928), 277 U. S. 350 (employment agency charges); *Williams v. Standard Oil Co.* (1929), 278 U. S. 235 (gasoline).

<sup>12</sup> 291 U. S. 502 (1935).

<sup>13</sup> 291 U. S. 536.

<sup>14</sup> *Supra*, note 9.

<sup>15</sup> *Supra*, note 3.

<sup>16</sup> 291 U. S. 502. "But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."

<sup>17</sup> The New York Court of Appeals had declared the act unconstitutional on the authority of *Adkins v. Children's Hospital* (*supra*, note 2). The petition

At the time, however, and until the recent decision in *West Coast Hotel Company v. Parrish*,<sup>18</sup> it seemed that the price of labor was the one price not susceptible of governmental regulation. The latter case arose on certiorari to review a decision of the Supreme Court of Washington rendered after the *Nebbia* case but prior to the *Morehead* case. The state court, relying largely upon the dissenting opinions of Chief Justice Taft and Mr. Justice Holmes in the *Adkins* case, and upon the later decisions in *O'Gorman & Young v. Hartford Fire Insurance Company*,<sup>19</sup> and *Nebbia v. New York*,<sup>20</sup> had refused to regard the *Adkins* case as controlling, and had sustained the validity of a state minimum wage law for women which had been in force twenty-three years.<sup>21</sup>

It was thus necessary for the court either to reaffirm or repudiate the doctrine of the absolute invalidity of minimum wage laws, established in the *Adkins* and *Morehead* cases, and the latter alternative was forcefully adopted.

In language expressly applicable to both the Fifth and Fourteenth Amendments, the court outlined the method of approach to the constitutionality of minimum wage laws as follows:

"The principle which must control our decision is not in doubt. The constitutional provisions invoked is the due process clause of the Fourteenth Amendment governing the states, as the due process clause invoked in the *Adkins* Case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."

Given the above approach, the court of its own knowledge had no difficulty in finding factual basis for concluding the legislation to be

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for certiorari sought review on the ground that the *Adkins* case was distinguishable. The Court refused to reconsider its correctness. 298 U. S. 604. It is to be noted that conflict between a state decision and a decision of the United States Supreme Court is listed as ground for certiorari. Obedience by a state to an applicable Federal precedent alleged to be erroneous, is not. Revised Rules, United States Supreme Court. Rule 38 (5a) 286 U. S. 624.

<sup>18</sup> *Supra*, note 1.

<sup>19</sup> 282 U. S. 251 (19—).

<sup>20</sup> *Supra*, note 12.

<sup>21</sup> *Parrish v. West Coast Hotel Co.* (S. Ct. Or. 1936), 55 P (2d) 1083.

reasonably adapted to serve a legitimate social interest. Significant perhaps, but not essential to the decision, is the court's allusion to "economic conditions which have supervened since the *Adkins* case," and particularly the suggestion that payment of less than a living wage casts upon the community an extra burden in the form of relief, coupled with the dictum that "The community is not bound to provide what is in effect a subsidy for unconscionable employers."

The minority opinion, assuming to read into the due process clause an absolute prohibition of minimum wage legislation, makes of this reference to changed economic conditions a point of departure for the charge that the majority is assuming the power to amend the Constitution. Says Mr. Justice Sutherland, dissenting, "The Constitution does not change with the ebb and flow of economic events,"<sup>23</sup> seemingly oblivious to the fact that the reasonableness of corrective legislation has direct relation to the conditions to be corrected, and that changed economic conditions render reasonable different, if more drastic, remedies. There seems more wisdom in the pronouncement of Mr. Justice Stone, that the individual problems of a generation ago have today become the problem of a nation.<sup>24</sup>

Although the importance of the decision in the *Parrish* case is already somewhat dimmed in the public mind by more recent decisions involving issues of more spectacular character, it is believed that the *Parrish* opinion is destined to have equally far reaching consequences. Express judicial recognition that differing economic and social conditions require and therefore justify changing remedies for their attendant ills, and that the due process clause is not a straight jacket, confining legislative power to the means and methods of the past, clearly indicates that legislative progress will not be obstructed by Eighteenth Century philosophy in the guise of constitutional law.

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<sup>22</sup> 57 S. Ct. 581-582.

<sup>23</sup> 57 S. Ct. 586, 587. Justice VanDevanter, McReynolds and Butler concurred in the dissent.

<sup>24</sup> "In the years which have intervened since the *Adkins* case we have had opportunity to learn that a wage is not always the resultant of free bargaining between employers and employees; that it may be one forced upon employees by their economic necessities and upon employers by the most ruthless of their competitors. We have had opportunity to perceive more clearly that a wage insufficient to support the worker does not visit its consequences upon him alone; that it may affect profoundly the entire economic structure of society and in any case, that it casts on every taxpayer, and on government itself, the burden of solving the problems of poverty, subsistence, health and morals of large numbers in the community. Because of their nature and extent these are public problems. A generation ago they were for the individual to solve; today they are the burden of the nation." Mr. Justice Stone, dissenting, in *Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587, 635.