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CONSTITUTIONAL LAW - MINIMUM WAGE DECISION - FUTURE OF LEGISLATION BY STATES

CONSTITUTIONAL LAW — MINIMUM WAGE DECISION — FUTURE OF LEGISLATION BY STATES — The shadow of a thirteen-year old decision[1] which many had hoped was laid forever[2] again fell upon the field of minimum wage legislation as the Supreme Court invalidated the New York minimum wage law for women.[3] With this holding, which came as a surprise to many, the issue of the constitutionality of minimum wage legislation was again thrust into the limelight, and with the two great political parties wrestling with the problem of party programs, the decision may have political repercussions,[4] of a force as yet incalculable. Before considering the future of minimum wage legislation, let us take a brief glance at its history in our courts.

I.

Massachusetts led the way in 1912;[5] in the following year quite a number of states adopted minimum wage laws.[6] The Massachusetts law merely set up a commission to make inquiries as to wages paid

[1] Adkins v. Children's Hospital, 261 U. S. 525, 43 S. Ct. 394 (1923).

[2] 42 YALE L. J. 1250 (1932); 23 AM. LAB. LEG. REV. 103 (1933); 24 KY. L. J. 59 (1935).

[3] Morehead v. Tipaldo, (U. S. 1936) 56 S. Ct. 918.

[4] See editorial by Arthur Krock, N. Y. TIMES, p. 20 (June 5, 1936).

[5] Holcombe v. Creamer, 231 Mass. 99, 120 N. E. 354 (1918).

[6] Cal. Gen. Laws (Henning 1914), 2d ed., c. 241, act 2107; Cal. Comp. Laws (1921), §§ 4262-4283, 4329; Minn. Stat. (1913), c. 547; Ore. Gen. Laws (1913), c. 62, 3 Ore. Code (1930), tit. 49, §§ 303-319; Wis. Stat. (1931), §§ 101.12, 104.01-104.12; Wash. Laws (1913), c. 174; Utah Laws (1913), c. 63; Ark. Stat. Dig. (Crawford and Moses 1921), § 7108; Kan. Laws (1915), c. 275; Ariz. Laws (1917), c. 38.

and to publish their findings and recommendations. It was non-compulsory. The validity of this law was upheld in the Massachusetts courts[7] and has never really been challenged since.[8] The other laws were mandatory in nature, and of these the Oregon act is typical:

> "it shall be unlawful to employ women in any occupation within the State of Oregon for wages which are inadequate to supply the necessary cost of living and maintain them in health."[9]

These statutes set up commissions to fix the wages involved and the only standard laid down for guidance was the so-called health standard. Oregon statute. The Court stood equally divided, with Justice Bran-

This type of legislation came before the Supreme Court in 1917 in the case of *Stettler v. O'Hara*.[10] In a per curiam decision, the Court affirmed the decision of the state court, upholding the validity of the deis not sitting. This decision was of no value as a precedent, but in view of Justice Brandeis' strong sentiments on such legislation, it was accepted as tantamount to an affirmance of the constitutionality of such statutes. State courts were therefore reassured in their affirmance of the validity of their own minimum wage laws.[11] It was estimated that such legislation was considered constitutional by twenty-seven judges out of twenty-nine in the states of Oregon, Minnesota, Arkansas, and Washington.[12]

Consequently, the decision of the Supreme Court in *Adkins v. Children's Hospital*,[13] holding unconstitutional the minimum wage law passed by Congress for women employed in the District of Columbia, came as something of a surprise. That law[14] was a typical health law and the standard set up for the commission to follow in fixing the legal minimum wage was the "cost of living . . . to maintain them in good health and to protect their morals." After this decision it was clear that a minimum wage law based solely on the health standard

[7] Holcombe v. Creamer, 231 Mass. 99, 120 N. E. 354 (1918).

[8] 2 DAKOTA L. REV. 472 (1929).

[9] Ore. Gen. Laws (1913), c. 62, 3 Ore. Code (1930), tit. 49, §§ 303-319.

[10] 243 U. S. 629, 37 S. Ct. 475 (1917), opinion below, Stettler v. O'Hara, 69 Ore. 519, 139 P. 743 (1914); Simpson v. O'Hara, 70 Ore. 261, 141 P. 158 (1914).

[11] State v. Crowe, 130 Ark. 272, 197 S. W. 4 (1917); Larsen v. Rice, 100 Wash. 642, 171 P. 1037 (1918); Spokane Hotel Co. v. Younger, 113 Wash. 359, 194 P. 595 (1920); Williams v. Evans, 139 Minn. 32, 165 N. W. 495 (1917); Miller Tel. Co. v. Minimum Wage Commission, 145 Minn. 262, 177 N. W. 341 (1920).

[12] Powell, "The Judiciality of Minimum-Wage Legislation," 37 HARV. L. REV. 545 (1924).

[13] 261 U. S. 525, 43 S. Ct. 394 (1923).

[14] 40 Stat. L. 960-964 (1918).

would be bad, and when such laws thereafter came before the courts they were uniformly held unconstitutional on the authority of the *Adkins* case.[15] The Supreme Court itself twice had occasion to affirm this view, each time in a per curiam decision.[16]

The advocates of minimum wage legislation rallied after this repulse and began to study the opinion in the *Adkins* case to the end that a wage law might be evolved that would be constitutional, meeting the objections the Court had found in the *Adkins* case. The result was the New York minimum wage law of 1933.[17] This was followed by legislation in other states substantially identical with that of New York.[18] These laws have discarded the "health standard" as the measure of the minimum wage and joined to it, or substituted for it, another—the "fair value of the services rendered." All the objections to the type of law held bad in the *Adkins* case are sought to be met. The two most salient features that Justice Sutherland found to invalidate the District of Columbia act were these: First, the law "takes account of the necessities of only one party to the contract. . . . To the extent that the sum fixed exceeds the fair value of the services rendered it amounts to a compulsory exaction from the employer. . . ."[19] Second, "The standard furnished by the statute for the guidance of the board is so vague as to be impossible of practical application with any reasonable degree of accuracy."[20] Let us see how the draftsmen of the New York act met these objections.

The first objection was met by discarding the health standard and substituting the "fair wage." The "fair wage" is defined as a "wage fairly and reasonably commensurate with the value of the service or class of service rendered."[21] Jurisdiction of the commission to act is based upon a finding that wages are being paid which are "*both* less than the fair and reasonable value of the service rendered *and* less

[15] Topeka Laundry Co. v. Court of Industrial Relations, 119 Kan. 12, 237 P. 1041 (1925); Folding Furniture Works v. Industrial Commission of Wisconsin, (D. C. Wis. 1924) 300 F. 991; Stevenson v. St. Clair, 161 Minn. 444, 201 N. W. 629 (1925).

[16] Murphy v. Sardell, 269 U. S. 530, 46 S. Ct. 22 (1925); Donham v. West-Nelson Manufacturing Co., 273 U. S. 657, 47 S. Ct. 343 (1927).

[17] N. Y. Laws (1933), c. 584.

[18] Conn. Gen. Stat. (Cum. Supp. 1935), c. 131a, §§ 910c-923c; Ill. Rev. Stat. (1935), c. 48, pars. 238-256; Mass. Acts (1934), c. 308, as amended by Mass. Acts (1935), c. 267; N. H. Laws (1933), c. 87; N. J. Laws (1933), c. 152; R. I. Laws (1936), p. 37. The above states joined and submitted a brief as amici curiae when the New York law was before the Supreme Court. See also, Utah Laws (1933), c. 38, and Ohio Laws (1933) 502-510.

[19] 261 U. S. 525 at 557, 43 S. Ct. 394 (1923).

[20] Ibid. at 555.

[21] N. Y. Laws (1933), c. 584, § 551 (8).

than sufficient to meet the minimum cost of living necessary for health."[22]

The second objection, that directed at the vagueness of the standard, is sought to be met by the provision that in fixing this fair wage the commission

> "(1) may take into account all relevant circumstances affecting the value of the service or class of service rendered, and (2) may be guided by like considerations as would guide a court in a suit for the reasonable value of services rendered where services are rendered at the request of an employer without contract as to the amount of the wage to be paid, and (3) may consider the wages paid in the state for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards."[23]

Although it may be urged that the use of the word "may" here was unfortunate, since it seems to leave the commission unbridled discretion, it would appear that reasonably interpreted the standard thus set forth is mandatory and that it is as definite as could be formulated without including numberless details.

2.

It was this New York statute that came before the Supreme Court in *Morehead v. Tipaldo*.[24] It was, if not confidently expected, at least reasonably anticipated that it would be upheld.[25] However, the Court held that the statute as interpreted by the Court of Appeals of New York was indistinguishable from that involved in the *Adkins* case and that the latter case governed the one before the Court. From a study of Justice Butler's opinion, the extraordinary contrast between the narrowness of the actual holding and the breadth of the language used looms as most significant. Let us consider first the actual holding of the Court.

The Court, speaking through Justice Butler, at the very outset restricts its decision to this bare question: Is this case distinguishable from the *Adkins* case? The Court states quite clearly that it is not re-considering the question of constitutionality involved in that case. The reason for this self-imposed limitation is stated to be a general

[22] N. Y. Laws (1933), c. 584, § 551 (7). (Italics ours.)

[23] N. Y. Laws (1933), c. 584, § 551 (8).

[24] (U. S. 1936) 56 S. Ct. 918.

[25] 3 CHI. L. REV. 657 (1936); 24 KY. L. J. 59 (1935); 42 YALE L. J. 1250 (1933); Crow, "History of Legislative Control of Wages in Wisconsin," 16 MARQ. L. REV. 188 at 197 (1932); 49 HARV. L. REV. 995 (1936); 36 COL. L. REV. 629 (1936).

rule of court procedure that "this court confines itself to the ground upon which the writ was asked or granted." Appellants' main argument was directed to the contention that the cases were distinguishable; a review of the former case was not sought.

The Court, having thus limited its holding, limited it even further by deciding that it was bound by the interpretation given the statute by the New York Court of Appeals.[26] With these limitations, the Court held that the statute as interpreted violated due process and was unconstitutional. The Court's argument as to the New York court's interpretation is very interesting. The Court of Appeals was not attempting to interpret the statute for the purpose of pointing out how it should be administered. It was merely comparing the act with that involved in the *Adkins* case and stating that it believed them indistinguishable in principle. The fartherest the New York court went toward statutory interpretation, independent of the question of constitutionality, was to state that the minimum wage must include both the old and the new standard.[27] Hence, for the Supreme Court to say that it must hold this act as interpreted by the New York court to be indistinguishable from the act involved in the *Adkins* case smacks of circular reasoning. Such was the opinion of the Chief Justice, who found the acts distinguishable and dissented upon that theory.[28]

It was argued strongly in support of the act that the New York law created a double standard. The statute prohibits, as against public policy, an "oppressive and unreasonable wage." However, such a wage must *also* be "less than sufficient to meet the minimum cost of living necessary for health."[29] But in arriving at the "fair wage," counsel argued, the only standard is the fair and reasonable value of the services rendered. The result of reading these together, counsel insisted, is that the commission is without power to fix a wage that is any higher than the reasonable value of the services. It cannot go higher than the reasonable value of the services, or the cost of living, *whichever is lower.* The existence of oppressive wages is but a "danger signal" to the wage board.[30]

The Court of Appeals, however, said that the effect of this language was that the minimum wage should be fixed by reference to

[26] People ex rel. Tipaldo v. Morehead, 270 N. Y. 233, 200 N. E. 799 (1936).

[27] People ex rel. Tipaldo v. Morehead, 270 N. Y. 233, 200 N. E. 799 at 801 (1936).

[28] Said the Chief Justice, (U. S. 1936) 56 S. Ct. 918 at 928: "the state court is not construing the state statute. It is passing upon the effect of the difference between the two acts from the standpoint of the Federal Constitution. It is putting aside an admitted difference as not controlling."

[29] N. Y. Laws (1933), c. 584, § 551 (7).

[30] See Appellant's Brief on the Law, pp. 10-12.

both the old and the new standard. The Supreme Court took these statements as the New York court's interpretation of its own act. As the Supreme Court interpreted the New York court's "interpretation" of the act, there was set up for the fixing of the wage a single standard with a double aspect. The minimum wage has to be *both* sufficient to maintain the worker in health *and* equal to the reasonable value of the services. Neither of these requirements is to be taken as a maximum limit on the power of the commission; both are but factors to be considered. So interpreted, it is submitted that the Court was right in holding that the "standard" here fell under the condemnation of the Court in the *Adkins* case.

3.

But of probably greater moment than the actual decision of this case is the breadth of the language used. It is here that the really fundamental differences between the majority and the minority of the Court are to be found. Justice Butler quotes at some length from the *Adkins* case with very evident approval. One passage in particular is noteworthy in showing the viewpoint with which the majority approached the subject of the validity of this type of legislation. "Legislative abridgement of that freedom [in making contracts of employment] can only be justified by the existence of exceptional circumstances. Freedom of contract is the general rule, and restraint the exception."[31] In approving this theory, Justice Butler was departing from some of the best traditions of the Supreme Court. The Court has time and again recognized that freedom of contract is not unlimited, but subject to regulation under the police powers of the states.[32] Furthermore, it has always been a cardinal principle of constitutional interpretation that when the constitutionality of an act depends upon the existence of a certain fact situation, the burden of

[31] Morehead v. Tipaldo, (U. S. 1936) 56 S. Ct. 918 at 923, paraphrasing Adkins v. Children's Hospital, 261 U. S. 525 at 546, 43 S. Ct. 394 (1923).

[32] McLean v. State of Arkansas, 211 U. S. 539, 29 S. Ct. 206 (1908); Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co., 284 U. S. 151, 52 S. Ct. 69 (1931). Said the Court in the latter case at p. 157: "The right to make contracts embraced in the concept of liberty guaranteed by the Fourteenth Amendment is not unlimited. Liberty implies only freedom from *arbitrary* restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. Hence, legislation otherwise within the scope of acknowledged state power, not unreasonably or arbitrarily exercised cannot be condemned because it curtails the power of the individual to contract." (Italics ours.)

As early as 1885 the Court expressed these same sentiments in Barbier v. Connolly, 113 U. S. 27, 5 S. Ct. 357 (1885). "But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people. . . ."

proving that such facts do not exist falls upon the party alleging unconstitutionality. The presumption of constitutionality is very strong where the legislature has found such facts to exist. Unless the act in question is unmistakably and palpably in excess of legislative power, the action of the legislature is free from objection on constitutional grounds.[33]

Having thus begun by saying that only exceptional circumstances could justify a restriction on the freedom to contract and that the burden was upon the state to show these circumstances, the Court took a still further step and said that the *Adkins* case properly interpreted means that the states are "without power to deal with the subject at all."[34] The Court thus easily discards all the arguments raised to distinguish the types of laws involved, disregards all the materials which the appellant amassed showing increasing numbers of women in industry and the smallness and unfairness of the wages paid. It disregards the fact that the legislature of New York had solemnly declared that such a law was necessary to the policy of the state to prevent oppression and unfair competitive conditions.[35] It disregards the fact that at one time or another Congress and the legislatures of seventeen states, and the legislative bodies of twenty-one foreign countries,[36] have agreed with the New York legislature on these solid grounds of policy. All of these arguments that are customarily advanced to defend an exercise of the police power of the state against the charge of violation of due process are discarded on the theory that they are immaterial to the question of power which the *Adkins* case had decided did not exist. "Any measure," says Justice Butler, "that deprives employers and adult women of freedom to agree upon wages, leaving employers and men employees free to do so, is necessarily arbitrary."

Surely the broad language used by the Court in putting minimum wage legislation in a class by itself and setting off the subject of wages as something sacrosanct and untouchable by the police power is not

[33] Lawrence v. State Tax Commission, 286 U. S. 276 at 283, 52 S. Ct. 556 (1932); Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co., 284 U. S. 151, 52 S. Ct. 69 (1931); McLean v. State of Arkansas, 211 U. S. 539, 29 S. Ct. 206 (1908); Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505 (1934), and many cases therein cited; and especially O'Gorman & Young v. Hartford Fire Insurance Co., 282 U. S. 251 at 257, 258, 51 S. Ct. 130 (1931), and Borden's Farm Products Co. v. Baldwin, 293 U. S. 194 at 209, 55 S. Ct. 187 (1934).

[34] (U. S. 1936) 56 S. Ct. 918 at 925. Since the Adkins case involved a statute passed by Congress for the District of Columbia, as to which Congress has a police power as broad as that of the states, the Court's statement as to the power of Congress is likewise applicable to state power. See also, opinion at p. 923.

[35] N. Y. Laws (1933), c. 584, § 550.

[36] See dissenting opinion of Justice Stone, (U. S. 1936) 56 S. Ct. 918 at 933.

to be justified by any language in the Constitution. There is absolutely no warrant for applying a different test of due process in one case than in another. If this test is to be a judicial and not a legislative test, it must be applied uniformly and objectively, as the Court suggests in McLean v. State of Arkansas:[37]

> "If the law in controversy has a reasonable relation to the protection of the public health, safety, or welfare it is not to be set aside because the judiciary may be of the opinion that the act will fail of its purpose or because it is thought to be an unwise exercise of the authority vested in the legislative branch of the Government."

The theory that the various liberties which due process protects may be classified and that some can be held subject to regulation because "affected with the public interest" or for other special reasons, while others are not subject to any interference, was rejected by the Court in *Nebbia v. New York*.[38] It was there argued that price fixing was in a category by itself and beyond the legislative power. But Justice Roberts, speaking for the majority, denied that there was anything sacrosanct about any particular type of business or any particular type of contract. He concluded that,

> "There can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects. . . . It is clear that there is no closed class or category of business affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. . . . 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. . . ."[39]

Even if classification were the order of the day, it seems very difficult to understand why prices can be fixed without violating due process, but wages cannot be. Both interfere with liberty to contract. The legislative fixing of a minimum wage is not really different in principle from the legislative determination of hours of service, which is clearly constitutional today.[40] It is the same liberty to contract that

[37] 211 U. S. 539 at 547, 29 S. Ct. 206 (1908).

[38] 291 U. S. 502, 54 S. Ct. 505 (1934).

[39] Ibid at p. 537 and 536.

[40] Miller v. Wilson, 236 U. S. 373, 35 S. Ct. 342 (1915); Muller v. Oregon, 208 U. S. 412, 28 S. Ct. 324 (1908); Bunting v. Oregon, 243 U. S. 426, 37 S. Ct. 435 (1917).

is invaded and the same legislative policy that is involved. Liberty of contract between employer and employee is largely illusory.[41] The aim of both types of legislation is to create an equality where none existed,[42] to prevent employers from making an unfair use of their superior bargaining power. Misuse of bargaining power leads to extortion and the state should surely be able to legislate against extortion under its police power.

Whether there are "adequate reasons" for subjecting certain types of contracts to the public control depends on the economic policy of the states, and as to this the Court said in the *Nebbia* case:

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or when it is declared by the legislature, to overrule it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and a judicial determination to that effect renders a court *functus officio*. . . .[43]

What, then, is the future of minimum wage legislation? Does the decision of the Court invalidating the New York law leave any opening for a new law that will meet the tests laid down by the Supreme Court, or must we have a constitutional amendment? The answer is not clear. If we consider the actual holding of the Court, it appears that there is a large loophole left. A state legislature or court may re-interpret its statute to make it quite clear that *only* the reasonable value of the services may be considered in arriving at the minimum wage. This was the construction of the New York law urged by the appellant but rejected by the Court. However, if the broad language of Justice Butler used in interpreting the *Adkins* case, to the effect that the standard is immaterial because the state inherently lacks the power to fix wages, really expresses the view of all the members of the majority of the Court, this loophole is pretty effectively closed.

J. S. W.

[41] See dissenting opinion of Justice Stone, (U. S. 1936) 56 S. Ct. 918 at 932.
[42] Knoxville Iron Co. v. Harbison, 183 U. S. 13, 22 S. Ct. 1 (1901).
[43] 291 U. S. 502 at 537, 54 S. Ct. 505 (1934).