

THE MINIMUM WAGE AS INDUSTRIAL POLICY: A FORGOTTEN ROLE

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In 1938 the Congress decided that it is against the public interest for businesses to operate on the sweat of exploited workers. Any employer so inefficient that he could stay in business only by paying sweatshop wages—like the employer who could stay in business only by operating an unsafe plant—was told that he did not belong in business.¹

I. Original Intent

In the welter of arguments being debated in connection with amending minimum-wage legislation², the parties have lost sight of the original intent of such state intervention. That purpose was to help—exclusively³—those workers whose wage formation process was subject to “market failure” by forcing their employers to internalize the minimum social costs of maintaining a worker,⁴ which they had succeeded in shifting onto the worker or society⁵: “The community

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1. *Amendment of the Fair Labor Standards Act: Hearings before the Senate Committee on Education and Labor on S. 1349, 79th Cong., 1st Sess. 847 (1945)* (testimony of Chester Bowles, Adm'r, Office of Price Admin.). A typical exchange at the time of the original Fair Labor Standards Act (FLSA) debates ran thus:
Sen. Borah: [A] man who employs another must pay him sufficient to enable the one employed to live.
Sen. Pepper: What if he cannot afford to pay?
Sen. Borah: If he cannot afford to pay it, then he should close up the business. No business has a right to coin the very lifeblood of workmen into dollars and cents.
81 CONG. REC. 7796 (July 29, 1937). See also 83 CONG. REC. 7290 (May 23, 1938) (statement of Rep. Boileau).
 2. On November 17, 1989, President Bush signed into law H.R. 2710, raising the minimum wage to \$3.80 an hour on April 1, 1990, and to \$4.25 an hour on April 1, 1991. The new law also provides for a subminimum training wage that permits employers to pay workers age 16 to 19 \$3.35 an hour for up to 90 days, and for an additional 90 days if the workers receive on-the-job training that meets certain criteria.
 3. In other words, state intervention was not aimed at interfering with the exploitation of highly paid workers. This limitation was expressly reflected in the original bill, § 5 of which prohibited the Labor Standards Board from establishing a wage that would give employees an annual income in excess of \$1,200. *Fair Labor Standards Act of 1937: Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong., 1st Sess. 58 (1937)*.
 4. In other words, firms are forced to pay the total cost of the labor they employ within the firm, rather than forcing society to pay part of the cost.
 5. FLSA, in other terms, effected a shift in the “cost accounting system” by converting “social variable costs,” which might or might not be covered, into “social overhead costs,” for which society has mandated responsibility. Blum, *The Social and Economic Implications of the Fair Labor Standards Act: An Interpretation in Terms of Social Cost*, 9 PROC. IND. REL. RES. A. 167, 169-70 (1956).

is not bound to provide what is in effect a subsidy for unconscionable employers."⁶ Although the minimum wage was obviously also designed to create micro-welfare effects, its primary function lay in removing labor costs from competition,⁷ increasing productivity macroeconomically by driving "parasitic" firms out of business and concentrating production in the most competent firms,⁸ and in steering capital-labor relations.

[I]t is the chiseler, the corner-cutter, and the downright unscrupulous who need our attention. It is this small percentage of employers who drag down our business standards and make it harder for the overwhelming majority of our American businessmen to compete on a decent basis. These are the men for whom we need a Fair Labor Standards Act—let me call it a Fair Labor Competition Act—and these are the men we should keep in mind in voting on the bill.⁹

The chief objective of this Article is to recover the missing theoretical and political underpinnings of the current controversy by examining earlier political and economic debates in which arguments of principle tended not to be subordinated to those of expediency.¹⁰

II. An Impoverished Debate About Poverty

The current theoretically and politically truncated debates over raising or even retaining the federally mandated minimum wage¹¹ have confined their focus to the empirical¹² efficacy of the minimum wage in reducing

6. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399-400 (1937). Enactment of a legal minimum wage was, in other words, "a recognition of the fact that due to unequal bargaining power as between employer and employee, certain segments of the population required Federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency" *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706 (1945).
7. *See Fair Labor Standards Act of 1937: Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor*, 75th Cong., 1st Sess. 177 (1937) (testimony of Frances Perkins, Sec'y of Labor). The minimum wage was perceived as "prevent[ing] the backward businessmen from undermining the wage structure and from living off the purchasing power provided by the payrolls of businessmen who pay decent wages." C. BOWLES, *TOMORROW WITHOUT FEAR* 59 (1946).
8. This position is stated most clearly by Webb, *The Economic Theory of A Legal Minimum Wage*, 20 J. POL. ECON. 973, 978-79, 983-88 (1912). *See also* NATIONAL INDUSTRIAL CONFERENCE BOARD, *MINIMUM WAGE LEGISLATION IN MASSACHUSETTS* 5 (1927).
9. 93 CONG. REC. 1502 (1947) (statement of Rep. Klein). The congressional debates on the Portal-to-Portal Act of 1947 were replete with references to employers as chiselers, who cheated their employees. *See id.* at 1494 (statement of Rep. Celler); *id.* at 1497 (statement of Rep. Walter); *id.* at 1503 (statement of Rep. Norton); *id.* at 1507 (statement of Rep. Kefauver).
10. For an introduction to the legislative history of FLSA, see Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335 (1987).
11. Fair Labor Standards Act of 1938, § 6, 52 Stat. 1062 (codified as amended at 29 U.S.C. § 206 [1977]).
12. Most of the data on minimum wage workers derive from unpublished tabulations from the Current Population Survey (CPS) made available by the Bureau of Labor Statistics. For a synopsis, see Mellor, *Workers at the minimum wage or less: who they are and the jobs they hold*, MONTHLY LAB. REV., July 1987, at 34-38. This Article assumes that the data are reliable. Although the CPS in general enjoys an excellent reputation, analysis of the underlying data collection methodology as well as of the results regarding migrant farmworkers reveals that these data are virtually worthless. *See* LINDER, MARTIN/HOLT, DRAFT REPORT, FARMWORKERS: A TEXAS CRITIQUE at 12-13 (unpub. 1987). If the demographic groups making up the poor minimum-wage population are similarly small and subject to significant sampling error, the aforementioned critique may also be applicable to the CPS minimum-wage data. On the CPS, *see* U.S. BUREAU OF THE CENSUS, *THE CURRENT POPULATION SURVEY: DESIGN AND METHODOLOGY* (Technical Paper 40, 1978).

poverty.¹³ Given the undisputed fact that the minimum wage has declined in terms of purchasing power as well as in relation to average wages,¹⁴ defenders urge that, because the minimum wage no longer guarantees a "living wage," an increase is necessary in order "to restore a full measure of dignity to all minimum wage workers."¹⁵ Opponents, having successfully maneuvered proponents onto this programmatic terrain, respond by offering similarly uncontested evidence¹⁶ that the vast majority of the poor do not earn the minimum wage,¹⁷ while the vast majority of minimum-wage workers are not poor.¹⁸ Alleging that lack of

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13. In this respect Milton Friedman has succeeded in imposing on the policy debate the fiction that it is about "positive" predictions rather than a "normative" contest between fundamentally different values:

Underneath the welter of arguments offered for and against such legislation there is an underlying consensus on the objective of achieving a "living wage" for all, to use the ambiguous phrase so common in such discussions. The difference of opinion is largely grounded on an implicit or explicit difference in predictions about the efficacy of this particular means in furthering the agreed-on end. Proponents believe (predict) that legal minimum wages diminish poverty by raising the wages of those receiving less than the minimum wage as well as of some receiving more than the minimum wage without any counterbalancing increase in the number of people entirely unemployed or employed less advantageously than they would otherwise be. Opponents believe (predict) that legal minimum wages increase poverty by increasing the number of people who are unemployed or employed less advantageously and that this more than offsets any favorable effect on the wages of those who remain employed.

Friedman, *The Methodology of Positive Economics*, in *idem*, *ESSAYS IN POSITIVE ECONOMICS* 3, 5 (1953). Levitan, the most prolific liberal writer on the subject of public policy toward low-wage workers, agrees that: "The acid test is whether the benefits of high wages outweigh the negative effects of lost employment opportunities." S. LEVITAN & I. SHAPIRO, *WORKING BUT POOR: AMERICA'S CONTRADICTION* 56 (1987).

14. Smith & Vavrichek, *The Minimum Wage: its relation to incomes and poverty*, *MONTHLY LAB. REV.*, June 1987, at 24, 25-26; Rasky, *House, Defying Threat of a Veto, Backs Increase in Minimum Wage*, *N.Y. Times*, Mar. 24, 1989, at 1, col. 4 (nat. ed.); Hershey, *Battling for Last Laugh Over Minimum Wage as Comedians Profit*, *N.Y. Times*, Apr. 27, 1989, at 12, col. 1 (nat. ed.).
15. H.R. Rep. No. 560: *Fair Labor Standards Amendments of 1988*, 100th Cong., 2d Sess. 9 (1988). See also SERVICE EMPLOYEES INTERNATIONAL UNION, *AMERICANS DESERVE A LIVING WAGE* (n.d. 1988).
16. In trying to explain the defeat of the proposed increase in the minimum wage in 1988, Senator Hatch claimed that: "We beat them intellectually; our facts were better than theirs." Bacon, *A Victory on the Minimum Wage*, *NATION'S BUSINESS*, Nov. 1988, at 45.
17. Or any money for that matter; thus ninety-four per cent of AFDC families are said to have no working members. H.R. Rep. No. 560: *Fair Labor Standards Amendments of 1988*, 100th Cong., 2d Sess. 35 (1988). This figure (for 1984) declined from 16.3 per cent in 1973 to 5.7 per cent in 1983. See HOUSE COMMITTEE ON WAYS AND MEANS, *BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS*, 100th Cong., 2d Sess., Table 21 at 431 (1988 ed., Comm. Print 1988). Although the Survey of Income and Program Participation, conducted within the CPS, indicates that 43.2 per cent of persons sixteen years and older receiving AFDC in 1984 reported "labor force activity," the vast majority included under this rubric appear to be those merely "looking for work." U.S. BUREAU OF LABOR STATISTICS, *BULLETIN 2270: LINKING EMPLOYMENT PROBLEMS TO ECONOMIC STATUS*, Table 23 at 30, 36 (1986).
18. In March 1985, 5,200,000 (or one-tenth) of 52,110,000 hourly employees earned the minimum wage or less. Of these minimum-wage workers, only 19.0 per cent (990,000) lived in families whose incomes in 1984 were below the official poverty thresholds (e.g., \$10,990 for a four-person family). Smith & Vavrichek, *The Minimum Wage: Its Relation to Incomes and Poverty*, *MONTHLY LAB. REV.*, June 1987, at 24, Table 2 at 27, at 30 n. 4. (Smith and Vavrichek used the poverty thresholds for 1985; the corresponding threshold for 1984 was \$10,609.) If workers frequently move into and out of the minimum-wage population, the relationship between earning the minimum wage during one month of one year and poverty in the previous year

employment rather than low wages is the primary cause of poverty,¹⁹ opponents note that as an anti-poverty measure, the statutory minimum wage is inefficiently over-inclusive and under-inclusive²⁰: it aids more non-poor workers than poor ones and misses most of those who are poor.²¹ Moreover, because virtually all economists agree that raising the minimum wage will lead to at least some increased unemployment among low-paid workers,²² the costs may outweigh the meager benefits.²³ Consequently, with only one percent of all workers both poor and minimum wage earners,²⁴ opponents²⁵ favor enactment of more accurately

may be tenuous. For a more narrowly defined group of minimum wage workers, the poverty rate is somewhat higher: in 1984, 2,240,000 year round employees working on full-time schedules (i.e., at least fifty weeks with no more than five part-time) earned no more than the equivalent of the minimum wage (i.e., \$7,000); 550,000 or 24.3 per cent of these lived in families with incomes below the poverty thresholds. *Id.* Table 5 at 28. Because it defines the universe of year-round full-time workers more broadly to include the self-employed as well as those working full-time merely in a majority of the weeks, the Bureau of Labor Statistics found that 1,402,200 (or 31.1 per cent) of 4,492,000 year-round full-time workers earning the equivalent or less than the minimum wage were members of families with incomes below the government poverty threshold in 1984. U.S. BUREAU OF LABOR STATISTICS, BULLETIN 2270, cited *supra* note 16, at 4, 33, Table B-3 at 50. See also Gramlich, *Impact of Minimum Wages on Other Wages, Employment, and Family Income*, BROOKINGS PAPERS ON ECON. ACTIVITY, No. 2, 1976 at 409-52; Chap. 1: *A Demographic Profile of Minimum Wage Workers*, 1 REPORT OF THE MINIMUM WAGE STUDY COMMISSION 7, Table 1-9 at 18 (1981).

19. See U.S. Congress, *Minimum Wage Restoration Act of 1987: Hearings before the Senate Committee on Labor and Public Welfare*, 100th Cong., 1st Sess. 26 (1987) (testimony of Sec'y of Labor, W. Brock) (almost one-half of the heads of poverty-households are not in the labor force). For a comprehensive account of the conditions of low-wage workers, see R. TAGGART, *HARDSHIP: THE WELFARE CONSEQUENCES OF LABOR MARKET PROBLEMS* (1982).
20. Earlier the Minimum Wage Study Commission concluded that:
 [T]he minimum wage has caused a small but real improvement in the personal well-being of those near the poverty level. Equally clear, however, is the message that other mechanisms such as direct government transfer payments or some variant of a negative income tax would be more effective tools for fighting poverty, no matter how it is defined.
 Chap. 5: *The Effects of the Minimum Wage on Income Distribution*, 1 REPORT OF THE MINIMUM WAGE STUDY COMMISSION 85, 85 (1981). An analogous criticism of inefficient over-inclusiveness has been levelled at the minimum old-age benefit under social security. See M. DERTHICK, *POLICYMAKING FOR SOCIAL SECURITY* 343 (1979).
21. See H.R. Rep. No. 11: *FAIR LABOR STANDARDS AMENDMENTS OF 1989*, 101st Cong., 1st Sess. 42 (1989).
22. The literature on this aspect is huge. See, e.g., Peterson, *Employment Effects of Minimum Wages, 1938-50*, 65 J. POL. ECON. 412 (1957); J. PETERSON AND. STEWARD, *EMPLOYMENT EFFECTS OF MINIMUM WAGE RATES* (1969); F. WELCH, *MINIMUM WAGES* (1978); S. LEVITAN AND R. BELOUS, *MORE THAN SUBSISTENCE* 150-54 (1979); Linneman, *The Economic Impacts of Minimum Wage Laws: A New Look at an Old Question*, 90 J. POL. ECON. 443 (1982); S. REP. NO. 6: *MINIMUM WAGE RESTORATION ACT OF 1989*, 101st Cong., 1st Sess. 43 (1989). But see Lester, *Employment Effects of Minimum Wages*, 13 IND. & LAB. REL. REV. 254 (1960).
23. D. PARSONS, *POVERTY AND THE MINIMUM WAGE* (1980), concluded that the transfer of income to the chief beneficiaries—namely, adult women—was more or less bought at the expense of increased unemployment among teenagers. But it is not clear that findings such as Parsons' are correct; the fact that such variables as experience and education are not good predictors of earnings and employment status in secondary labor markets means that the alleged dichotomy between the employed who benefit from and the unemployed who lose by a minimum wage may not exist. See King, *Minimum Wages and the Secondary Labor Market*, 41 S. ECON. J. 215-19 (1974).
24. *Minimum Wage Restoration Act of 1987: Hearings before the Senate Committee on Labor and Public Welfare*, 100th Cong., 1st Sess. 26 (1987) (testimony of Sec'y of Labor, W. Brock).
25. Including the New York Times, which has editorialized against the minimum wage for many

targeted programs such as increased earned income tax credits keyed to family size.²⁶

In an effort to make minimum wage legislation politically more palatable in a period during which entitlement programs (the "social wage")²⁷ have been under attack, supporters have taken issue with the claims of market-efficiency-oriented economists that increasing the minimum wage harms low-wage workers by bringing about greater unemployment.²⁸ But by downplaying the number of jobs destroyed by a statutory minimum wage, proponents unwittingly undermine the most cogent grounds for supporting it—namely, that the jobs it destroys are low-wage and unproductive. A minimum wage that did not significantly contribute to the elimination of such jobs would be superfluous: "If you fix a wage that is so low that it won't do that any place in the United States, the chances are that it is so low that it won't do anybody any good."²⁹ Thus the appropriate response to the argument that the minimum wage hurts the very people it is

years. *Tinkering with the Minimum Wage*, Dec. 2, 1980, at A18, col. 1; *The Right Minimum Wage: \$0.00*, Jan. 14, 1987, at 18, col. 1 (nat. ed.); *Don't Raise the Minimum Wage*, Apr. 15, 1987, at A26, col. 1; *The Minimum Wage Illusion*, Feb. 23, 1988, at A30, col. 1; *Better than \$3.35, \$4.25 Or Even \$5.05*, July 11, 1988, at 20, col. 1 (nat. ed.); *The Minimum Wage: A Better Way*, Sept. 21, 1988, at 24, col. 1 (nat. ed.); *A Veto to Help the Poor*, June 15, 1989, at 22, col. 1 (nat. ed.). See also Passell, *Minimum Wage: A Tangled Puzzle*, N.Y. Times, April 6, 1988, at 28, col. 1 (nat. ed.). In 1966 the Times supported extended coverage, arguing that the social wage was still too underdeveloped to displace the minimum wage. N.Y. Times, Aug. 23, 1966, as cited in 112 CONG. REC. 20,510 (Aug. 24, 1966). Ultimately the Times editorially took the position that "the long, bitter battle over raising the minimum wage. . . doesn't make much difference." *The Minimum Wage: A Distraction*, Mar. 22, 1989, at 22, col. 1 (nat. ed.); see also Passell, *Minimum Wage: A Reality Test*, N.Y. Times, Mar. 15, 1989, at 28, col. 1 (nat. ed.). After passage of an increased minimum wage in 1989, the Times rationalized its support on the grounds that an expanded earned income tax credit would raise the federal deficit by too much. *Help, At Last, For the Working Poor*, N.Y. Times, Nov. 2, 1989, at 20, col. 1 (nat. ed.). For the convergence of liberal and conservative views on the efficacy of the minimum wage as an anti-poverty measure, see Brown, *Minimum Wage Laws: Are They Overrated?* 2 J. ECON. PERSPECTIVES 133 (1988); Burkhauser and Finegan, *The Minimum Wage and the Poor: The End of A Relationship*, 8 J. POL'Y ANALYSIS & MGMT. 53 (1989).

26. Bureau of National Affairs, LAB. REL. WEEK, July 13, 1988, at 681 (statement of Sec'y of Labor McLaughlin); H.R. Rep. No. 560: FAIR LABOR STANDARDS AMENDMENTS OF 1988, 100th Cong., 2d Sess. 37, 43 (1988); M. WEINSTEIN, RAISING THE MINIMUM WAGE IS THE WRONG WAY TO HELP THE POOR (n.d. [ca. 1988]); PROGRESSIVE POLICY INSTITUTE, POLICY REPORT NO. 1: WORK AND POVERTY: A PROGRESSIVE VIEW OF THE MINIMUM WAGE AND THE EARNED INCOME TAX CREDIT (June 1989). This position is not new; see, e.g., Stigler, *The Economics of Minimum Wage Legislation*, 36 AM. ECON. REVIEW 358, 362-65 (1946); *Fair Labor Standards Amendments of 1977: Hearings before the Subcommittee on Labor of the Senate Committee on Human Resources*, 95th Cong., 1st Sess. 860-71 (1977) (statement of Carolyn Shaw Bell).
27. The "social wage," otherwise known as the "social safety net," includes "those entitlement programs designed to act as a buffer for the general population from the vicissitudes of the economy and the labor market, for instance, unemployment insurance, welfare, etc." *Is Labor a Widget: A Comparative Study*, 59 TUL. L. REV. 1517, 1543. In economic terms, it is that part of labor power that is not part of the labor exchange with the individual employer, but is financed through taxes and allocated by the state. See GOUGH, *THE POLITICAL ECONOMY OF THE WELFARE STATE* 108-17 (1979); Linder, *What Is an Employee? Why It Does, But Should Not, Matter*, 7 LAW AND INEQUALITY 155, 186, n. 121 (1989).
28. See, e.g., Sheinkman, N.Y. Times, Feb. 9, 1987, at A18, col. 4 (letter to editor); Houseman, *id.*, Apr. 30, 1987, at A30, col. 5 (letter to editor); Flemming, *id.*, Mar. 4, 1988, at A38, col. 4 (letter to editor); Roberts & Bowers, *Patching the Crack in the Floor: Strategies for Expanding the Minimum Wage*, 22 CLEARINGHOUSE REV. 23, 25 (1988).
29. *Fair Labor Standards Act of 1937: Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor*, 75th Cong., 1st Sess. 66 (1937) (testimony of Asst. Attorney General Robert Jackson).

supposed to protect is: the minimum wage helps those marginal workers by forcing their inefficient employers either to rationalize or to be driven out of business by more efficient competitors paying higher wages.³⁰

III. Low-Wage Labor Markets, Macroeconomic Employment Policy and the Continued Applicability of the Original Intent

Minimum-wage legislation remains important in the United States because of two interconnected facts: its low degree of union organization and its under-developed social wage. In Western Europe a greater proportion of workers are union members, are covered by national collective bargaining agreements, or both. Thus relatively fewer workers there are isolated, vulnerable employees in need of state intervention into wage negotiations with powerful employers.³¹ Moreover, the much more extensive European social welfare systems furnish those who would otherwise need protection against sweated wages with living family incomes.³² Consequently, national minimum-wage programs are found in few Western European societies.³³

To acknowledge that a statutory minimum wage is not an optimal anti-poverty measure³⁴ is not to say that it is an obsolete piece of depression-born state intervention. In an economy characterized by a chronic tendency to create sub-standard working conditions, a measure designed to insure minimum standards remains useful.³⁵ First, minimum wage jobs are not simply short-term entry-level way stations occupied by workers "who rapidly begin to climb the economic ladder of ever increasing [sic] complex and more highly paying posi-

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30. "If those companies can't afford to pay a decent wage, it is too bad." *Amendment of the Fair Labor Standards Act of 1938: Hearings before the Senate Committee on Education and Labor*, 79th Cong., 2d Sess. 1421 (1946) (testimony of Chester Bowles, Adm'r, Office of Price Admin). On this so-called shock or efficiency effect, see C. O'HERLIHY, *MEASURING MINIMUM WAGE EFFECTS IN THE UNITED STATES* 66 (1969); on the further measures that would be required to facilitate re-employment of those whose jobs were made redundant, see *infra* § III.
 31. For an overview, see R. FLANAGAN, *UNIONISM, ECONOMIC STABILIZATION, AND INCOME POLICIES: EUROPEAN EXPERIENCE* (1983).
 32. See EUROPEAN COMMUNITIES COMMISSION, *COMPARATIVE TABLES OF THE SOCIAL SECURITY SCHEMES IN THE MEMBER STATES OF THE EUROPEAN COMMUNITIES* (13th ed. 1985); COUNCIL OF EUROPE, *COMPARATIVE TABLES OF THE SOCIAL SECURITY SYSTEM IN COUNCIL OF EUROPE MEMBER STATES NOT BELONGING TO THE EUROPEAN COMMUNITIES* (2d ed. 1985); L. RAINWATER, *INCOME PACKAGING IN THE WELFARE STATE* (1986).
 33. On the complicated French legislation, see J. Rosa, *The Effects of Minimum Wage Legislation in France*, in *THE ECONOMICS OF LEGAL MINIMUM WAGES* 357-76 (S. Rottenberg ed. 1981). For brief overviews of the programs in France, the Netherlands, and Canada, see UNITED KINGDOM, DEPARTMENT OF EMPLOYMENT AND PRODUCTIVITY, *A NATIONAL MINIMUM WAGE* 55-65 (1969). On the industry-wide system in Great Britain, see D. SELLS, *BRITISH WAGE BOARDS* (1939); F. J. BAYLISS, *BRITISH WAGE COUNCILS* (1962); D. METCALF, *LOW PAY, OCCUPATIONAL MOBILITY, AND A MINIMUM WAGE POLICY IN BRITAIN* 63-82 (1981); F. FIELD, *THE MINIMUM WAGE* (1982). The rise of statutory minimum wages in Australia at the turn of the century as a tool of labor arbitration is recounted by McCarthy, *Victorian Wage Boards: Their Origins and the Doctrine of the Living Wage*, 10 J. IND. REL. 116 (1968). See also the overview in INTERNATIONAL LABOUR OFFICE, *THE MINIMUM WAGE: AN INTERNATIONAL SURVEY* (Studies and Reports, Series D, No. 22, 1939).
 34. See generally Kaufman & Foran, *The Minimum Wage and Poverty*, in: *TOWARDS FREEDOM FROM WANT* 189-218 (Sar Levitan ed. 1968).
 35. Blum, *The Social and Economic Implications of the Fair Labor Standards Act*, 9 PROC. IND. REL. RES. A. 167, 172 (1956).

tions.”³⁶ Longitudinal studies confirm dual-labor-market analysis³⁷ showing that significant numbers of non-white male workers are trapped in minimum-wage secondary employment.³⁸ Thus, while 70 per cent of a cohort of 16-19 year-old women were minimum-wage workers in 1966, ten years later 15 per cent of the original group of women still were; the corresponding figures for a cohort of 20-24 year-old women were 30 per cent and 15 per cent respectively.³⁹ Life-long employment at or below the minimum wage is particularly prevalent for the two occupations with the highest proportions of minimum wage workers—domestic servants and farmworkers (who, however, currently account for less than one-tenth of all minimum wage workers).⁴⁰

Second, regardless of the extent to which the Fair Labor Standards Act (FLSA) may increase the incomes of minimum-wage workers, a statutory minimum wage still performs the vital function of promoting macroeconomic productivity by interfering with the misleading messages sent by the pseudo-markets for sweated labor; these markets disguise inefficiency, creating large profit margins that are due not to efficient production but to extreme exploitation. Increasing the minimum wage, by eliminating the chief prop of such low-productivity firms and industries, will force out of business those that cannot modernize.⁴¹ Under-

36. 1 *Hearings on H.R. 1834, The Minimum Wage Restoration Act of 1987: Hearings before the Subcommittee on Labor Standards of the House Committee on Education and Labor*, 100th Cong., 1st Sess. 82-83 (1987) (statement of National Grocers Association).

37. Dual labor market theories divide labor markets into two sectors. The primary sector has relatively high wages and benefits, high capital investment, advanced technology, unionization, opportunities for promotion, and low employee turnover. The secondary sector has lower pay scales and benefits, higher turnover, and few opportunities for advancement. Rhode, *Occupational Inequality*, 1988 DUKE L. J. 1207, 1216 (1988).

38. Thus, while 70 percent of a cohort of 16-19 year-old women were minimum wage workers in 1966, ten years later 15 percent of the original group of women still were; the corresponding figures for a cohort of 20-24 year-old women were 30 percent and 15 percent respectively. While 57 percent of a cohort of black males 16-24 years old were minimum-wage workers, in 1976 one-eighth of the original group of black men were still so employed; for a similar cohort of black women, the corresponding figures were 60 percent (for 1969) and 22 percent (for 1977). 1 REPORT OF THE MINIMUM WAGE STUDY COMMISSION Fig. 1-5, 1-6 at 27 (1981).

39. 1 *Id.* at Fig. 1-5.

40. In 1978, 47.4 of farm laborers and 74.8 per cent of private household employed were minimum wage workers. 1 REPORT OF THE MINIMUM WAGE STUDY COMMISSION Table 1-11 at 20 (1981). By 1987, these shares had dropped to 14.2 per cent and 54.7 per cent respectively. Calculated according to unpublished data tabulated from the CPS and furnished by the U.S. Bureau of Labor Statistics, *Characteristics of Workers Paid at Hourly Rates including those Paid At or Below the Prevailing Minimum Wage in 1987*. Both the decline and the absolute level for farmworkers are incredible, especially since by 1987, 62 per cent of non-supervisory employees in agriculture were not even subject to the minimum wage provision of FLSA. Calculated according to data in: H.R. REP. NO. 560: FAIR LABOR STANDARDS AMENDMENTS OF 1988, 100th Cong., 2d Sess. Table 1 at 16 (1988).

41. For empirical evidence suggesting that the minimum wage has indeed had the effect of reducing labor intensity among surviving firms and ousting marginal ones in low-wage industries, see Kaun, *Minimum Wages, Factor Substitution and the Marginal Producer*, 79 Q.J. ECON. 478-86 (1965). For a critique of Kaun's use of the data, see Matherall, *Minimum Wages, Factor Substitution and the Marginal Producer: Comment*, 81 Q.J. ECON. 343 (1967). During a recent congressional hearing on FLSA, the president of a small glass manufacturing firm (with about eighty employees in two plants) offered confirming testimony:

We are fighting PPG Industries. Those people have millions to invest in training people on insulated glass techniques, tempering techniques; and we don't have that kind of money, so minimum wage provides us with that pool. [T]here is machinery available that we could conceivably run our plant in Louisville with 12 people—if we bought all

lying this strategy is the assumption that, in the aggregate and within broad limits, the organizational and capital structure of the job—rather than the personal characteristics of the worker—control the level of productivity. In other words, a minimum-wage-driven productivity policy presupposes not that particular individuals are “worth” \$x per hour, but that no job should be structured so unproductively as to fail to provide for a \$x wage.⁴²

But imposition of a minimum wage is only half the task⁴³:

With these bans, society assumes a commitment to provide jobs that are not . . . woefully underpaid. That commitment is often regrettably unfulfilled, and perhaps, if it were fulfilled, the bans would be unnecessary. Still, closing a bad escape valve may be an efficient way of promoting the development of better ones through the political process.⁴⁴

In tandem with the displacement of workers and capital⁴⁵ from low-productivity to high-productivity firms and sectors by market forces, the state must intervene to insure that individual workers do not bear the risk or costs of such macro-economic rationalization policy.⁴⁶ Such an “active manpower policy” would

of the state-of-the-art stuff.

Now, there is an economic reason why. . . . When business is bad, the interest payments and the maintenance on that equipment goes on; people are a variable cost, but ultimately, if you continue to raise minimum wages and mandated benefits, you will eventually make that business decision viable to modernize.

1 *Hearings on H.R. 1834, The Minimum Wage Restoration Act of 1987: Hearings before the Subcommittee on Labor Standards of the House Committee on Education and Labor*, 100th Cong., 1st Sess. 134 (1987) (testimony of W. Stone).

42. To be sure, the heterogeneity of the work force ensures that some workers will be less productive than others at the same job. At the extreme, FLSA authorizes compensation, pegged to individual productivity, to handicapped workers at levels below the minimum wage. 29 U.S.C. § 214(c).
43. See S. BOWLES, *BEYOND THE WASTE LAND* 279-84 (1984 [1983]).
44. A. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADE-OFF* 21 (1975).
45. At the time of the original FLSA debates, the president of the International Union of Operating Engineers, John Possehl, wrote to the president of the American Federation of Labor, William Green, that if a business could afford to pay only unconscionably low wages, “then the time is at hand for that business to conclude its affairs and turn its capital into other channels of investment.” *As printed in* 81 CONG. REC. 7898 (July 30, 1937). In point of fact, the productive form of such capital may be morally obsolescent and thus incapable of being realized and transferred to more profitable investment.
46. Two leading advocates of the omniscience of unfettered markets, Milton Friedman and Yale Brozen, object to this function of the minimum wage. Rather than leading to enhanced economy-wide productivity, they see this use of the minimum wage as “caus[ing] a misallocation of capital.” *THE MINIMUM WAGE RATE: WHO REALLY PAYS? AN INTERVIEW WITH YALE BROZEN AND MILTON FRIEDMAN* 18 (1966). Such an “automation effect” constitutes a less efficient use of capital because it is “forced” or the result of “arbitrary power” rather than the “normal” consequence of labor scarcity induced by the higher wages offered by other employers. *Id.* at 18-21. The ideological source of this position is the notion that large aggregates of capital confronting atomized individual workers on the labor market and at the workplace constitute the “natural” socio-economic and political framework within which change would take place “in a more orderly fashion, without the enormous social costs we have now” such as poverty. *Id.* at 20. Thus, no matter how low wages might fall under such conditions, that level becomes the fictional standard against which Friedman and Brozen judge the effects of the “artificial” and “arbitrary” intervention of unions or the state. Yet labor market imperfections make possible the existence of split labor markets separated from each other in such a way that workers in secondary market firms have little opportunity to become employed in the high-wage, high-productivity (largely) unionized primary sector. Finally, the extreme free-market stance is incongruent; for although the elimination of unions, minimum wages, and other kinds

include retraining and education, coordinated employment exchange, and public employment.⁴⁷

This function of the minimum wage, moreover, could not be replaced by the enactment of social welfare programs and policies specifically designed to ameliorate the condition of the working poor. For while an increased earned income tax credit⁴⁸ adjusted for family size,⁴⁹ or extension of Medicare benefits

of labor protection might foster the ruthless pursuit of capitalist efficiency, Friedman presumably understands that the advent of his idealized capitalist society would inevitably be followed by its self-destruction unless it enacted some form of income redistribution to bolster the depressed standard of living of unprotected workers. The decisions regarding the calibration of a negative income tax, for example, would be as political and hence "arbitrary" as those underlying a minimum wage.

47. For a description of the most advanced policies of this type as practiced in Sweden, see Meidner and Andersson, *The Overall Impact of an Active Labor Market Policy in Sweden*, in *MANPOWER PROGRAMS IN THE POLICY MIX* 117 (L. Ulman ed. 1973); G. ESPING-ANDERSEN, *POLITICS AGAINST MARKETS: THE SOCIAL DEMOCRATIC ROAD TO POWER* 229-36 (1988 [1985]); Martin, *Trade Unions in Sweden: Strategic Responses to Change and Crisis*, in *UNIONS AND ECONOMIC CRISIS: BRITAIN, WEST GERMANY AND SWEDEN* 189, 295-8 (P. Gourevitch ed. 1984). A highly developed system of employer-oriented wage subsidies (for employment of recipients of payments under means-tested transfer programs and other poor people) might also share this function of the minimum wage—but only insofar as it does not shore up inefficient employers. This allocative caveat is overlooked by A. SCHOTTER, *FREE MARKET ECONOMICS: A CRITICAL APPRAISAL* 75-80 (1985), who regards the subsidy as superior to a free market and a minimum wage because it would avoid the unemployment, crime, or both, associated with both a free market and a minimum wage: whereas a free labor market would create a market-clearing wage rate that would be below the reservation wage rate (the wage below which a worker would prefer unemployment to employment) of many workers, a minimum wage prices some workers out of the market. On the limited success of the Targeted Jobs Credit Tax, enacted in 1977 and currently codified at Internal Revenue Code § 51, see HOUSE COMMITTEE ON WAYS AND MEANS BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS, 100th Cong., 2d Sess. 617-19 (1988 ed., Comm. Print 1988); S. LEVITAN & S. GALLO, *THE TARGETED JOBS TAX CREDIT: AN UNCERTAIN AND UNFINISHED EXPERIMENT* (1986), reprinted in, *Minimum Wage Increase: Hearings before the House Committee on Small Business*, 100th Cong., 1st Sess. 73-79 (1987). For a proposal of wage rate subsidies to workers, see *Welfare: Reform or Replacement? (Work and Welfare): Hearing before the Subcommittee on Social Security and Family Policy of the Senate Committee on Finance*, 100th Cong., 1st Sess. 268-70 (1987) (statement of Robert Lerman).
48. The current earned income tax credit (EITC), which was enacted in 1975 and is currently codified at Internal Revenue Code § 32, merely offsets the regressive impact of social security taxes on low-income workers with children. See C. CAMPBELL & W. PIERCE, *THE EARNED INCOME CREDIT* (1980); Steuerle & Wilson, *The Taxation of Poor and Lower-Income Workers*, in *LADDERS OUT OF POVERTY* 33, 37-39 (J. Meyer ed. 1986). The minimal scope of the EITC is seen in the fact that in 1986, somewhat more than six million families received slightly in excess of two billion dollars for an average of \$321 per family. HOUSE COMMITTEE ON WAYS AND MEANS, BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS, 100th Cong., 2d Sess., Table 9 at 610-11 (1988 ed., Comm. Print 1988). See also INTERNAL REVENUE SERVICE, *STATISTICS OF INCOME 1984: INDIVIDUAL TAX RETURNS*, Table 1.4 at 35 (Pub. 1304, Rev. Nov. 1986). These figures, which are in line with those for earlier years, indicate that the federal government would have to commit a sizable block of revenues to the EITC in order to transform it into anything resembling a significant working-family allowance. Even the increased EITC levels mandated by the Tax Reform Act of 1986 are not expected to raise the average credit per family to \$600. HOUSE COMMITTEE ON WAYS AND MEANS, BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS, 100th Cong., 2d Sess., Table 9 at 610-11 (1988 ed., Comm. Print 1988).
49. Such a proposal is embodied in the Republican-sponsored H.R. 4119, 100th Cong., 2d Sess. (1988), and H.R. 1104, 101st Cong., 1st Sess. (1989). For a detailed account of such an EITC, see *Welfare: Reform or Replacement? (Work and Welfare): Hearing before the Subcommittee on Social Security and Family Policy of the Senate Committee on Finance*, 100th Cong., 1st Sess. 237-61 (1987) (statement of Robert Reischauer).

to minimum wage workers might indeed be "more beneficial than a few extra cents per hour of work,"⁵⁰ they are neither inconsistent with, nor able to usurp the role performed by, a statutory minimum wage in preventing the allocative inefficiencies associated with wage chiseling.⁵¹ That function could, however, be taken over by a guaranteed basic annual income fixed at the equivalent of a (higher) minimum wage, which would provide workers with the financial wherewithal to resist working for inefficient but exploitative employers.⁵²

IV. The Socio-Economic Purpose of a Statutory Minimum Wage

What is the purpose of prohibiting employers from employing workers—and the latter from accepting employment—at less than a mandated hourly wage?⁵³ The original intent was to outlaw extreme exploitation of workers who were incapable of resisting such conditions. More specifically, "[t]he historic starting point of minimum wage legislation was the wish to abolish sweating."⁵⁴ The victims of sweating—a system of labor sub-contracting whose *raison d'être* is wage-cutting⁵⁵—were almost exclusively women and children.⁵⁶ Although New

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50. H.R. Rep. No. 560: FAIR LABOR STANDARDS AMENDMENTS OF 1988, 100th Cong., 2d Sess. 43 (1988). See also Passell, *Paying for Wider Health Insurance*, N.Y. Times, May 18, 1988, at 26, col. 1 (nat. ed.).
 51. As an alternative to a statutory minimum wage, a negative income tax "would be nothing but a public subsidy for unfair competition and/or monopsonistic exploitation." Blum, *Marginalism and Economic Policy: A Comment*, 37 AM. ECON. REV. 645, 650 (1947). In distinguishing between a minimum wage and the EITC, the AFL-CIO characterizes the latter as "'a decency standard to be paid by employers for work performed.'" Rasky, *House Fails to Upset Veto on Minimum Wage*, N.Y. Times, June 15, 1989, at 9, col. 1, 6 (nat. ed.).
 52. In that sense it would mark a minimal step towards the de-commodification of labor. In other words, such an income interferes with the laws of supply and demand in respect to labor, and removes such labor from the market. Thus the employee is recognized as having some significance beyond his or her contribution to the market, and is treated as a person rather than as a thing. See Radin, *Market-Inalienability*, 100 HARVARD L. REV. 1849, 1919; and Abraham, *Individual Autonomy and Collective Empowerment in Labor Law*, 63 N.Y.U. L. REV. 1268, 1280 (1988). See also G. ESPING-ANDERSEN, *POLITICS AGAINST MARKETS: THE SOCIAL DEMOCRATIC ROAD TO POWER* 31, 148 (1988 [1985]). Alternatively, insofar as higher wages foster mechanization, in the long run "market forces could be used to eliminate the necessity of certain types of unpleasant work." R. THEOBOLD, *FREE MEN AND FREE MARKETS* 175 (1963).
 53. See generally 3 J. COMMONS, *HISTORY OF LABOR IN THE UNITED STATES, 1896-1932* at 501-39 (1935); A. Tolles, *American Minimum Wage Laws: Their Purposes and Results*, 12 PROC. IND. REL. A. 116-33 (1959). R. EPSTEIN, *TAKINGS* 280 (1985), appears to be unique in his insistence that imposition of a statutory minimum wage constitutes an unconstitutional partial taking.
 54. R. BRODA, *MINIMUM WAGE LEGISLATION IN VARIOUS COUNTRIES* 2 (U.S. Bureau of Labor Statistics, Bulletin No. 467, 1928). For a discussion of the early twentieth-century anti-sweating program in Britain, see Wise, *Wage Boards in England*, 2 AM. ECON. REV. 1 (1912); R. H. TAWNEY, *THE ESTABLISHMENT OF MINIMUM WAGE RATES IN THE TAILORING INDUSTRY UNDER THE TRADE BOARDS ACT OF 1909* (1915); J. H. RICHARDSON, *A STUDY ON THE MINIMUM WAGE* 16-17 (1927); Kahn-Freund, *Minimum Wage Legislation in Great Britain*, 97 U. PA. L. REV. 778 (1949). The program appears to have achieved its objective: "Many businesses which could maintain themselves only by the payment of sweated wages have been forced out of existence. But, on the whole, they have been replaced by more efficient units which have been able to support the higher rates." Hetherington, *The Working of the British Wage Board System*, 38 INTL. LAB. REV. 472, 479 (1938).
 55. On such sub-contracting, see *Fair Labor Standards Act of 1937: Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor*, 75th Cong., 1st Sess. 196-97 (1937) (testimony of Sec'y of Labor Frances Perkins).
 56. THE SWEATING SYSTEM: COPY OF REPORT TO THE BOARD OF TRADE ON THE SWEATING SYSTEM OF THE EAST END OF LONDON BY THE LABOR CORRESPONDENT OF THE BOARD, Parl. Pap., 1887 (331) Vol. 89; FIRST REPORT FROM THE SELECT COMMITTEE OF THE HOUSE OF LORDS ON THE

Deal rhetoric added "chiseling"⁵⁷ to "sweating," then as now women and teenagers (and non-whites) form the vast majority of minimum-wage workers.⁵⁸ For these largely unorganized workers⁵⁹ a statutory base wage was designed to function as a (minimalist) surrogate labor union.⁶⁰

The pending bill does nothing more nor less than say, "You will not be left helpless. You few wage earners in the most remote part of the country, . . . you in sections of this country unable to exercise the right of collective bargaining—we will not leave you helpless. We will not permit your plight to injure the progress made by other employees who have acquired better working conditions. We will not punish the employer who has yielded to them. We will see to it that you, too, are given some of the benefits and some of the privileges of collective bargaining."⁶¹

In the 1930s, such state intervention was welcomed by firms and industries facing "unfair" competitive practices.⁶² The political ramifications of this competition played an important part in the debates surrounding passage of the Fair

SWEATING SYSTEM, Parl. Pap. 1888 (361) Vol. 20; C. BLACK, SWEATED INDUSTRY AND THE MINIMUM WAGE (1907); D. BLYTHELL, THE SWEATED TRADES: OUTWORK IN NINETEENTH-CENTURY BRITAIN (1978); J. MORRIS, WOMEN WORKERS AND THE SWEATED TRADES: THE ORIGINS OF MINIMUM WAGE LEGISLATION (1986). For an overview of the pre-FLSA state statutes covering women and children, see Douglas, *American Minimum Wage Laws at Work*, 9 AM. ECON. REV. 701 (1919).

57. As President Roosevelt put it: "A self-supporting and self-respecting democracy can plead . . . no economic reason for chiseling workers' wages . . ." S. Rep. No. 884, 75th Cong., 1st Sess. 2 (1937).

58. The modal minimum-wage worker is currently a white woman under thirty-five employed part-time (10-30 hours weekly) in retail trade or services. In 1987, women accounted for 65.5 per cent and 16 to 19 year-olds for 36.6 per cent of all hourly employees paid at or below the minimum wage. White men between 25 and 64 years old made up only 6.8 per cent of that labor market segment. Calculated according to unpublished data tabulated from the CPS and furnished by the U.S. BUREAU OF LABOR STATISTICS, CHARACTERISTICS OF WORKERS PAID AT HOURLY RATES INCLUDING THOSE PAID AT OR BELOW THE PREVAILING MINIMUM WAGE IN 1987.

59. In 1980, 96.6 per cent of minimum-wage workers were non-union members. Only 2.1 per cent of union workers—compared with 18.0 per cent of non-union workers—earned the minimum wage or less. Gilroy, *A Demographic Profile of Minimum Wage Workers* in: 2 REPORT OF THE MINIMUM WAGE STUDY COMMISSION Table 10 at 169 (1981). But with the bulk of minimum wage workers concentrated in the service sector, one-fifth of all members of the Service Employees International Union earn no more than four dollars per hour. *Minimum Wage Restoration Act of 1987: Hearings before the Senate Committee on Labor and Public Welfare*, 100th Cong., 1st Sess. 341 (1987) (testimony of John Sweeney, Pres. SEIU).

60. In the earliest versions of the bill, which provided for employer-employee advisory wage boards, this intent was express. See, e.g., *Fair Labor Standards Act of 1937: Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor*, 75th Cong., 1st Sess. 180-82 (1937) (testimony of Sec'y of Labor Frances Perkins); 81 CONG. REC. 7652 (July 27, 1937) ("the Government is attempting to set up machinery which . . . ought to be helpful in providing collective bargaining through a Government agency for the men and women who are not organized") (statement of Sen. Walsh).

61. 81 CONG. REC. 7800 (July 29, 1937) (statement of Sen. Walsh).

62. See, e.g., Filene, *The Minimum Wage and Efficiency*, AM. ECON. REV. 411 (1923). In the 1930s this divide within the employing class in part overlapped with regional division between North and South. See 81 CONG. REC. 7882 (July 30, 1937) (statement of Sen. "Cotton" Ed Smith); Lippmann, *The Sectional Wage Bill*, N.Y. Herald Tribune, May 21, 1938 (reprinted in 83 CONG. REC. 7304-7305 (May 23, 1938)); Boles, *Some Aspects of the Fair Labor Standards Act*, 6 S. ECON. J. 498, 506 (1940). And even today the South accounts for 41.3 per cent of all minimum wage workers. Calculated according to unpublished data tabulated from the CPS and furnished by the U.S. BUREAU OF LABOR STATISTICS, CHARACTERISTICS OF WORKERS PAID AT HOURLY RATES INCLUDING THOSE PAID AT OR BELOW THE PREVAILING WAGE RATE IN 1987.

Labor Standards Act in the 1930s: "The great mass of our population has little patience with that small minority which has been termed 'chiselers.' It is at this minority particularly that this bill . . . is aimed."⁶³ In his message to Congress accompanying submission of the wage and hours bill, President Roosevelt expressed the need for state intervention by referring to this class impasse:

[E]xponents of the theory of private initiative as the cure for deep-seated national ills . . . fail for four evident reasons: First, they see the problem from the point of view of their own business; second, they see the problem from the point of view of their own locality or region; third, they cannot act unanimously because they have no machinery for agreeing among themselves; and finally, they have no power to bind the inevitable minority of chiselers within their own ranks.⁶⁴

However the statutory purpose was described, the underlying notion amounted to a legalization of society's moral revulsion at certain kinds of "socially offensive" labor exchange transactions.⁶⁵ Given the level of macroeconomic productivity, payment of wages below a specified limit demonstrated that the worker's economically coerced acquiescence in whatever conditions he was offered had inverted and perverted his formal freedom to choose to contract or to refrain from market relationships into its opposite. Thus: "[T]o restrain a person's freedom of contract may be necessary to protect his freedom, that is to protect him against oppression which he may otherwise be constrained to impose upon himself through an act of his legally free and socially unfree will."⁶⁶ Because Anglo-American law courts had failed to void labor contracts for unconscionability,⁶⁷ the legislature had to intervene.

63. H.R. Rep. No. 1452, 75th Cong., 1st Sess. 8 (1937). The preamble to FLSA containing the congressional "declaration of policy" focused on findings relating to unfair competition. 29 U.S.C. § 202(a).

64. S. Rep. No. 884, 75th Cong., 1st Sess. 1 (1937).

65. Armstrong, *Public Opinion on Minimum Wage Legislation in Britain and America: A Comparison*, 10 SCOT. J. POL. ECON. 243, 243 (1963). See also E. DURKHEIM, *LEÇONS DE SOCIOLOGIE* 235 (2d ed. 1969 [1950]).

66. O. KAHN-FREUND, *LABOR AND THE LAW* 14 (2d ed. 1977 [1972]). A minimum wage law in effect "declare[s] that anyone who takes an absurdly underpaid . . . job must be acting out of desperation. That desperation may result from ignorance, immobility, or genuine lack of alternatives, but it should be kept out of the marketplace." A. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADE-OFF* 21 (1975). From his extreme social-Darwinist standpoint, Sidney Webb adopted a similar position toward the "unemployable": "But of all ways of dealing with these unfortunate parasites, the most ruinous to the community is to allow them unrestrainedly to compete as wage earners for situations." Webb, *The Economic Theory of a Legal Minimum Wage*, 20 J. POL. ECON. 973, 992 (1912). See also Wolfe, *Some Phases of the Minimum-Wage Discussion*, 7 AM. ECON. REV. SUPP. NO. 1 at 275, 278 (Mar. 1917) ("The elimination of the inefficient is in line with our traditional emphasis on free competition"); *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F. 2d 1173, 1176 (7th Cir. 1987) (per Posner, J.) ("Wages and hours legislation may be a gratuitous interference with the free market in labor, and one that bears hardest on marginal workers—those not worth the minimum wage . . .—in order to prevent them from competing with better-paid, more skilled workers").

67. In the light of the history of labour relations one might have thought that the courts would have had many opportunities of declaring as being against public policy contracts of employment of an extortionate character, "sweating contracts" such as led to the passing of the Trade Boards Act of 1909. I know of no case in which a court invalidated a contract by reason of gross exploitation, but neither can I recall a case in which a court was given an opportunity of doing so. Exploited workers are not plaintiffs in courts of law—until the days of legal aid they had no access to courts . . .

O. KAHN-FREUND, *LABOR AND THE LAW* 23 (2d ed. 1977 [1972]).

Imposition of a mandatory minimum wage is an avowedly paternalistic act designed to moderate the exploitation of a class of adults of sound mind and body caught up in conditions that inevitably overcome their natural will not to lend a hand to low-wage employers who debase their—and, by contamination of the labor market, all workers'—working conditions and living standards. "Social justice means that we as legislators should extend to the unfortunate human beings those social rights which they could demand if they had the power of unity of action."⁶⁸ Deeply at odds with the values of a liberal capitalist society, such protection can be justified by that society only as a temporary shelter or shield—akin to the "infant industry" exception to international free trade—behind which the affected workers can enjoy a breathing spell that will enable them to create the economic, organizational, and psychological wherewithal to place themselves on the same plane as the majority of the working class.⁶⁹

V. Market Structures, Productivity, and Minimum Wages

The prohibition of certain forms or levels of exploitation rather than the achievement of a "living wage" as such underlay early minimum wage measures, as seen in a dissent filed by the conservative Chief Justice of the United States Supreme Court, William Taft. Explaining the constitutionality of a minimum wage statute for the District of Columbia struck down by the majority, Taft wrote that:

Legislatures, in limiting freedom of contract between employee and employer by a minimum wage, proceed on the assumption that employees in the class receiving least pay are not upon a full level of equality of choice with their employer, and in their necessitous circumstances are prone to accept pretty much anything that is offered. They are peculiarly subject to the overreaching of the harsh and greedy employer. The evils of the sweating system and of the long hours and low wages which are characteristic of it are well known.

Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe that when sweating employers are prevented from paying unduly low wages by positive law they will continue their business, abating that part of their profits which were wrung from the necessities of their employees, and will concede the better terms required by the law⁷⁰

Taft here had in mind situations in which the state in effect compels an exploitative employer who has been cheating defenseless employees to transfer

68. 81 CONG. REC. 7886 (July 30, 1937) (statement of Sen. Walsh). See also S. Rep. No. 884, 75th Cong., 1st Sess. 3-4 (1937) ("It is only those low-wage and long-working-hour industrial workers, who are the helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage").

69. In other words, such interventionist measures were intended to confer benefits on shifting groups of workers. An admission that the same groups require extraordinary state aid in perpetuity would be tantamount to acknowledging that certain sectors of the economy are structurally excluded from supposedly self-equilibrating market forces. A legal minimum wage alone cannot eliminate such permanent sectoral market failure; rather, further measures designed to readjust the underlying supply and demand factors are also necessary. In the most obvious and poignant example—hand-harvesting of fruits and vegetables by migrant farmworkers—the supply would have to be curtailed by the strict abolition of child labor and a prohibition on the importation of laborers. For a discussion of the distinction between the effect of a minimum wage and perfecting the elasticity of labor supply, see J. ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* 281-82, 299 (2d ed. 1969 [1933]).

70. *Adkins v. Children's Hospital*, 261 U.S. 525, 562, 563 (1923) (Taft, C.J., dissenting).

part of the surplus to them; the employer then becomes a normal competitor with average profits. Since he had been paying them "less than they are worth, there is no reason to expect that the forcing of the wage rate up to a fair level will cause any of the people affected to lose their jobs for any length of time."⁷¹

Taft's analysis, however, fails to distinguish between two scenarios in which a statutory minimum wage may act: the first, in which an efficient firm takes advantage of a weak labor force, and the second, in which an inefficient firm sustains itself by squeezing employees rather than through entrepreneurial efforts at technical improvements:

As a matter of fact, however, exploitation of this kind is much more often practised by incompetent or badly situated employers, who, without it, could not maintain themselves in business, than by competent and well-situated men. The small masters have, throughout history, been always the worst exploiters. Hence exploitation provides, in the main, a bounty at the workers' expense for relatively incompetent and badly situated employers; and the *prevention of exploitation would tend to hasten their defeat at the hands of more efficient rivals.*⁷²

Abolition of this kind of exploitation enhances aggregate allocative efficiency.⁷³

A third scenario may be distinguished from the second. In this third scenario, the only one recognized by contemporary opponents of the minimum wage, marginally productive employees exist whom firms may no longer profitably employ at a statutory minimum wage. Thus:

The thesis that industries which pay less than "fair wages" ought to be forbidden by law to do this, even though such prohibition involves their destruction, is quite different from, and lends no support to, the thesis that industries which pay less than a "living wage" to workpeople who are in fact worth, for all purposes, less than a living wage, ought to be subjected to a similar prohibition.⁷⁴

Because they do not believe that the imposition of a minimum wage increases productivity, opponents of the minimum wage foresee lay-offs as employers' only option for offsetting higher wage costs.⁷⁵ Supporters of the minimum wage, on the other hand, in effect⁷⁶ concentrate on the first scenario—that of relatively efficient firms that can be compelled to part with their excessive profits without having to change their level of employment or capital-intensity. By concentrating on the two extreme scenarios, the chief protagonists of the debate have neglected the second, central scenario to which a statutory minimum wage is directed—namely, labor-intensive, inefficient firms the existence of which is buoyed by low

71. A. PIGOU, *THE ECONOMICS OF WELFARE* 609 (4th ed. 1962 [1920]).

72. *Id.* at 563 (*emphasis added*).

73. *Id.*

74. *Id.* at 601.

75. See, e.g., Case, N.Y. Times, Apr. 4, 1988, at A20, col. 4 (letter to editor).

76. In fact, however, supporters are themselves skeptical of such a scenario—in which imposition of a minimum wage would be an "unmixed blessing for both the entire economy and the working poor." S. LEVITAN AND R. BELOUS, *MORE THAN SUBSISTENCE: MINIMUM WAGES FOR THE WORKING POOR* 64 (1979) (criticizing one "extreme" in the debate). For the sole oblique reference (by a business representative) to such a possibility in recent congressional hearings, see 1 *Hearings on H.R. 1834, The Minimum Wage Restoration Act of 1987: Hearings before the Subcommittee on Labor Standards of the House Committee on Education and Labor*, 100th Cong., 1st Sess. 140 (1987) (testimony of W. Stone).

wages.⁷⁷ A statutory minimum wage is designed to force these firms either to raise their level of productivity or to exit from the industry, leaving their former share of the market to more efficient firms. Either possibility, increased productivity in formerly inefficient firms or a shift of production to the already more productive firms, entails reduced employment in that industry.

This failure to attend to the second scenario is ironic inasmuch as standard marginal productivity analysis⁷⁸ compels the conclusion that: "If an employer has a significant degree of control over the wage rate he pays for a given quality of labor, a skillfully-set minimum wage may increase his employment and wage rate"⁷⁹ To be sure, marginalist economists, having assumed that such monopsonistic exploitation is not a real-world problem,⁸⁰ have conducted this discussion on a purely theoretical plane because they believe that any labor market failure that might justify mandatory minimum wages is quantitatively insignificant.⁸¹ But underlying this view is the dubious claim "that the occupations most affected by minimum wage legislation are in fact not monopsonistic but competitive."⁸² This position, however, fails to see that firms selling their products

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77. For the claim that, because low-paid labor is not cheap, there is no evidence of the existence of parasitic firms (firms that pay substandard wages and thus force taxpayers to subsidize the firm's workers through welfare programs), see L. Smith, *Economic Theory and Proposals for a Legal Minimum Wage*, 17 *ECON. J.* 504, 508-509 (1907).
 78. The locus classicus of the marginalist theory of the "monopsonistic exploitation of labor" is J. ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* 281-304 (2d ed. 1969 [1933]).
 79. Stigler, *The Economics of Minimum Wage Legislation*, 36 *AM. ECON. REV.* 358, 360 (1946). Stigler's article has become a classic for conservative economists, especially those associated with the American Enterprise Institute, for its concise exposition of the alleged harmful impact of a minimum wage on the poor. Stigler himself appears not to have changed his position; see Stigler, *Economics or Ethics*, in *THE ESSENCE OF GEORGE STIGLER* 303, 314-15 (K. Leube and T. Moore ed. 1986 [1981]). But see Raisian & Stigler, *Minimum Wage: A Perverse Policy*, *N.Y. Times*, Apr. 12, 1988, at A35, col. 2 (letter to editor). Debate within the marginalist school has focused on the claim of increased employment, the claim that a minimum wage will increase wage rates remaining uncontested. See Falero, *A Note on Monopsony, Minimum Wages, and Employment*, 10:2 *AM. ECONOMIST* 39-42 (1966); Yates & Taylor, *A Note on Monopsony, Minimum Wages, and Employment: Comment*, 11:2 *AM. ECONOMIST* 56-59 (1967); Falero, *A Note on Monopsony, Minimum Wages, and Employment: A Reply*, 12:1 *AM. ECONOMIST* 52 (1968); Gramm & Ekelund, *Monopsony, Minimum Wages, and Employment: A Reconsideration* 12:1 *AM. ECONOMIST* 52-54 (1968); Gray & Morrill, *A Note on Monopsony, Minimum Wages, and Employment: Extended*, 12:1 *AM. ECONOMIST* 55-64 (1968).
 80. "[T]his case is little more than a theoretical curiosity, and cannot be regarded as of any great practical importance. This is partly because significant degrees of monopsony are particularly unlikely to occur for factors of the kind affected by minimum wage rates" M. FRIEDMAN, *PRICE THEORY: A PROVISIONAL TEXT*, 190 (rev. ed. 1968 [1962]). See also Anderson, *Background Materials on the Minimum Wage*, 2 *Hearings on H.R. 1834, The Minimum Wage Restoration Act of 1987: Hearings before the Subcommittee on Labor Standards of the House Committee on Education, and Labor*, 100th Cong., 1st Sess. 62, 67 (1988).
 81. Thus, for example, a standard textbook treatment of the effect of a minimum wage under monopsony concludes: "Certainly the types of service establishments that tend to hire the lowest-paid workers—restaurants and snack bars, amusement parks, car washes, and so on—have no monopsony power whatever." W. BAUMOL & A. BLINDER, *ECONOMICS* 534 (1979). Without any empirical foundation, F. Welch, *Minimum-Wage Legislation in the United States*, in *EVALUATING THE LABOR MARKET EFFECTS OF SOCIAL PROGRAMS* 1, 10 (O. Ashenfelter and J. Blum ed. 1976), speculates that such monopsonistic labor markets are presumably characteristic of but a small portion of employment. Even such a staunch advocate of minimum wages as Sar Levitan seems to accept the contention that few exploitative firms dominate their labor market. S. LEVITAN & S. BELOUS, *MORE THAN SUBSISTENCE* 17 (1979).
 82. West & McKee, *Monopsony and 'Shock' Arguments for Minimum Wages*, 46 *S. ECON. J.* 883, 883 (1980). For a broader critique of statutory minimum wages by the same authors, see E. WEST & M. MCKEE, *MINIMUM WAGES* (1980).

in competitive markets may be—indeed, remain competitive precisely because they are—purchasing their labor monopsonistically (or, more realistically, oligopsonistically) in a labor market with a virtually inexhaustible supply of workers willing to work at the prevailing wage rate.⁸³ A narrow microeconomic perspective is inadequate for studying the overall consequences of quasi-captive employment in the so-called secondary labor market, the contemporary industrial-racial-gender-age counterpart to the sweated trades.⁸⁴

83. See, e.g., Bryce, *Alternative Policies for Increasing the Incomes of Migratory Farm Workers*, 18 PUB. POL'Y 413, 423-24 (1970). In analyzing the effect of a minimum wage on monopsony, standard marginalist theory assumes that the monopsonist firm faces an upwardly sloping (or imperfectly elastic) supply curve of labor (presumably because it is the only employer and must bid workers away from other labor markets). Therefore, hiring the marginal worker requires paying a higher wage rate. Marginalist theory further assumes that this step compels the firm to pay the same higher wage rate to all already employed workers. Marginalists thus conclude that marginal labor costs exceed average wages. Under these circumstances, the equilibrium wage is not, as in a competitive labor market, represented by the intersection of the marginal value product and labor supply curves, but rather by that of the marginal value product and the (higher) marginal labor cost. The end result is fewer workers employed at a lower wage than at competitive equilibrium. See, e.g., W. BAUMOL & A. BLINDER, *ECONOMICS* 531-34 (1979).

The critical assumption here is that the firm must raise wages in order to attract additional workers. For although it may be true that higher wages may induce already employed low-wage workers to work longer hours (*id.* at 513-14), in monopsonistic/oligopsonistic labor markets the buyers can take advantage of the sellers because the latter have few (if any) other opportunities to market their labor. For want of an alternative, sellers are compelled to offer themselves at relatively low wage rates; in other words, poor unemployed people do not need to be coaxed into employment (they supply their labor relatively inelastically). Since the current inadequate social welfare system is designed to transfer income to potential workers at a level below that which a year-round full-time minimum wage worker would earn, such transfers would not impede entry into the labor force of any worker whose reservation wage (see note 47) is at least equal to the minimum wage. Data on the relationship between the minimum wage and transfer income from the food stamp and Aid to Families With Dependent Children programs are presented in HOUSE COMMITTEE ON WAYS AND MEANS, BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS, 100th Cong., 2d Sess. 388-89, 405-19 (1988 ed., Comm. Print 1988). A comprehensive overview of labor supply models and studies is available in M. KILLINGSWORTH, *LABOR SUPPLY* (1983). For an institutionalist critique of the methodology of econometric studies that indicate that the labor supply of blacks and women is more rather than less elastic than that of white men, see M. REICH, *RACIAL INEQUALITY* 210-14 (1981). Indeed, in the absence of an organized labor market, firms might be able to hire increasingly desperate workers at ever lower wage rates and to impose them on already-existing employees. Under any of these scenarios, a statutory minimum wage could successfully compensate for such workers' lack of bargaining power.

But this set of circumstances is not what marginalism means by the effect of a minimum wage on monopsony. For as soon as the assumption of an upwardly sloping labor supply curve is abandoned, marginal labor cost ceases to be higher than average wages and the impediment to achievement of competitive equilibrium is removed. Marginalist "exploitation" thus exists only in the presence of an implausible tight labor market of which the sellers are unable to take advantage because firms cease hiring before the point is reached at which the marginal value product and labor supply curves would intersect. With fewer workers employed at lower wages, "exploitation" of the employed coexists with underemployment. Therefore the minimum wage is designed to compel the monopsonist to act more rationally by hiring more workers at a higher rate, thereby increasing his total profits.

84. On secondary labor markets, see *supra* notes 36, 45. For an overview of theories of the dual labor market, secondary labor market and labor market segmentation, see P. DOERINGER AND M. PIORE, *INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS* (1971); D. GORDON, *THEORIES OF POVERTY AND UNEMPLOYMENT*, (1972); and R. EDWARDS, *CONTESTED TERRAIN* ch. 9 (1979). The economist David Swinton presented a variant of dual labor market theory to Congress; see *Minimum Wage Restoration Act of 1987: Hearings before the Senate Committee on Labor and Public Welfare*, 100th Cong., 1st Sess. 227-40 (1987).

Thus in order to evaluate the effectiveness of a statutory minimum wage, it is crucial to distinguish among its potential purposes in relation to the various microeconomic and macroeconomic employment settings in which it may be brought to bear.⁸⁵ These purposes include fostering: 1. *equity* between employees' wage and employer's profits as well as between employees' wage and wages of employees in other firms and industries; 2. *fair competition* between firms by reducing the leeway for competing solely by virtue of paying low wages; 3. *allocative efficiency and productivity* by ensuring that private wage costs reflect total social costs of the reproduction of labor power equally across firms and industries, so that the rational displacement of labor by capital is not impeded by low wages acting as a subsidy to inefficiency⁸⁶; and 4. *workers' welfare* by increasing their income.⁸⁷ The employment settings include: 1. Low-wage industries; 2. Low-wage firms in non-low-wage industries; and 3. Low-wage occupations in all industries.⁸⁸

A host of questions and contradictions must be addressed in fixing a minimum wage level that takes all these factors into consideration. Minimum-wage determination could, in accordance with the two principles set forth above, proceed along either of two lines—setting a wage high enough: 1. to secure a “living wage”; or 2. to prevent extreme exploitation by reducing profits to the societal average. Although one minimum-wage fixing might achieve both ends, that would be a coincidence; for nothing in economic theory logically compels that in all sectors, industries, and firms an average rate of profit will be compatible with a “living wage.”⁸⁹

Productivity in some firms might be so low, and the ability to increase productivity so narrow, that the profit-wage conflict becomes a zero-sum game; indeed, an extremely low wage level might be necessary for continuing profitability and thus for entrepreneurial incentive for further capital investment. Where imposition of a minimum wage reduces above-average profits to average profits, this problem does not arise; but where it makes the difference between average or low profits and no profit at all, a decision is in effect being made whether to eliminate a business altogether. Obviously, the minimum wage is too crude a tool to be able to take into consideration all the complexities of heterogeneous economic patterns.⁹⁰ Rather than destroying whole industries, it is principally

85. The current round of hearings on increasing the minimum wage has failed to recognize these distinctions only in part because the participants have been victimized by their own public relations rhetoric. For examples of sophisticated pre-FLSA studies that did distinguish among purposes and situations, see E. BURNS, *WAGES AND THE STATE: A COMPARATIVE STUDY OF THE PROBLEM OF STATE WAGE REGULATIONS* (1926); B. ARMSTRONG, *INSURING THE ESSENTIALS: MINIMUM WAGE PLUS SOCIAL INSURANCE—A LIVING WAGE PROGRAM* (1932).

86. See M. DOBB, *WAGES* 148 (1956 [1928]).

87. For a somewhat different formulation, see INTERNATIONAL LABOUR OFFICE, *MINIMUM WAGE FIXING AND ECONOMIC DEVELOPMENT* (1970 [1968]).

88. C. CRAIG, *LABOUR MARKET STRUCTURE, INDUSTRIAL ORGANISATION AND LOW PAY* 138 (1982).

89. See Kaun, *The Fair Labor Standards Act*, 33 S. AFR. J. ECON. 131, 133 (1965).

90. For that reason it is worth considering whether it would be appropriate to return to a modified form of the tripartite industry wage committees that operated under the original FLSA through the 1940s and are still in effect for Puerto Rico and the Virgin Islands. 29 U.S.C. §§ 205, 208; Dickinson, *The Organization and Functions of Industrial Committees under the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 353-67 (1939). Confining these committees to those industries—such as agriculture—with the greatest concentration of minimum-wage workers would both fit the remedy and provide rudimentary ersatz-collective bargaining for workers who otherwise would not be able to engage in it.

designed to undermine the viability of wage-cutthroats within industries. If the wage-price-profit matrix of an entire industry required restructuring, then presumably the results would include higher prices that ultimate consumers would have to bear; with their budgets readjusted to devote a larger share of their resources to the commodities of this industry, a smaller share would be available to purchase the output of others. Since fully three-fourths of all minimum wage workers are concentrated in retail trade,⁹¹ clerical occupations, and services,⁹² which are by and large vulnerable neither to commodity imports nor to export of jobs,⁹³ foreign dissipation of employment is not a major risk.⁹⁴

VI. Poverty and a "Living Wage"

Rhetorically, New Deal supporters also cast the issue of a minimum wage in terms of a "living wage." Yet at twenty-five cents an hour in 1938, the minimum wage, which at forty to fifty hours weekly would have generated a worker's family ten to twelve dollars at a time when relatively few wives were employed⁹⁵ and fewer social welfare programs were available, was not seriously regarded as guaranteeing a living wage.

The committee feels that a minimum wage of 40 cents per hour, which will yield more than an annual income of \$800 a year to the small percentage of workers fortunate enough to find 50 weeks employment in a year, can not give a wage sufficient to maintain what we would like to regard as the minimum American standard of living. But 40 cents per hour is far more than millions of American workers are receiving today.⁹⁶

Moreover, with only 2.7 per cent of all newly covered workers (who in turn represented only one-third of all employees) earning below, and thus benefiting directly from the introduction of, the minimum wage, and the vast majority of sub-minimum-wage workers excluded from the protections of the Act,⁹⁷ it could not have been seriously considered as a general anti-poverty measure. With two-

91. On retail trade issues, see B. FLEISHER, *MINIMUM WAGE REGULATION IN RETAIL TRADE* (1981).

92. Calculated according to unpublished data tabulated from the CPS and furnished by the U.S. BUREAU OF LABOR STATISTICS, *CHARACTERISTICS OF WORKERS PAID AT HOURLY RATES INCLUDING THOSE PAID AT OR BELOW THE PREVAILING MINIMUM WAGE IN 1987*.

93. "You cannot export a building janitor's job or a clerical worker's job or an orderly in a nursing home." "They will find a way." *Minimum Wage Restoration Act of 1987: Hearings before the Senate Committee on Labor and Public Welfare*, 100th Cong., 1st Sess. 390 (1987) (testimony of J. Sweeney, Pres. SEIU, and of J. Mazur, Pres. International Ladies Garment Workers Union).

94. Most vulnerable are migrant farmworkers who hand-harvest fruits and vegetables. Such workers and the agricultural capital employing them are in competition with those of Latin America. Migrants may constitute the only numerically significant group of workers whose employment might be jeopardized by international competition solely as a result of an increase in the minimum wage—if their low wages are primarily a function of low consumer prices rather than of high agribusiness profits. But even in the latter event, international agribusiness capital might (continue to) shift production from the United States to Latin America in order to maintain profits and markets.

95. 11.7 per cent in 1930. U.S. BUREAU OF LABOR STATISTICS, *BULLETIN NO. 616: HANDBOOK OF LABOR STATISTICS* 1103 (1936).

96. S. Rep. No. 884, 75th Cong., 1st Sess. 4 (1937).

97. Daugherty, *The Economic Coverage of the Fair Labor Standards Act*, 6 *LAW & CONTEMP. PROBS.* 406, 407 (1939).

thirds of all minimum wage workers today employed only part-time,⁹⁸ even the most ardent proponents of minimum wage legislation must concede that no politically plausible higher minimum wage could alone enable the families of such workers to escape poverty.⁹⁹

Calibrating the minimum wage to a "living wage" involves complicated issues,¹⁰⁰ some of which were dealt with by Justice Sutherland, a "staunch conservative,"¹⁰¹ in the opinion he wrote for the U.S. Supreme Court in *Adkins v. Children's Hospital*.¹⁰² Sutherland was troubled by the fact that man-made wages did not bear any necessary relation to the employee's capacity or earning power or necessarily take into account any independent resources she might have.¹⁰³ He was, in the abstract, correct in pointing out that if the intention was to transform the wage into a means-tested entitlement, consistency required disallowance of such resources. But since the typical minimum-wage worker had no such income or wealth on which to fall back, what Sutherland was in fact deploring was—as Chief Justice Taft alluded to in his dissent—the fact that interference with market forces deprived the typical employer of the advantages stemming from transacting urgent business with needy individuals. Sutherland thereby neglected the fact that the labor exchange in the sweated trades was hardly an ideal act of voluntary contractualism against which to judge imposition of a minimum wage. On the contrary: the labor exchange mediated and disguised—and thus helped to reproduce—a process of coercion. In that sense it was an example of market failure.

Present-day opponents of the minimum wage have promoted Sutherland's viewpoint by maneuvering proponents into conceding in principle that the minimum wage makes sense as a welfare policy only as a quasi-means-tested entitlement. Although this strategy supports their emphasis of the fact that most

98. Calculated according to unpublished data tabulated from the CPS and furnished by the U.S. BUREAU OF LABOR STATISTICS, CHARACTERISTICS OF WORKERS PAID AT HOURLY RATES INCLUDING THOSE PAID AT OR BELOW THE PREVAILING MINIMUM WAGE IN 1987.

99. See, e.g., I. SHAPIRO, NO ESCAPE: THE MINIMUM WAGE AND POVERTY 13 (1987).

100. In particular: what standard should supplant supply and demand? See E. BURNS, WAGES AND THE STATE 20 (1926).

101. S. COHEN, LABOR AND THE LAW 40 (1964).

102. 261 U.S. 525 (1923). For contemporary praise of this decision from the businessman's viewpoint, see Ryan, *The Wage Bargain and the Minimum Wage Decision*, 2 HARV. BUS. REV. 207 (1924). For a compilation of critical comment, see NATIONAL CONSUMER LEAGUE, THE SUPREME COURT AND MINIMUM WAGE LEGISLATION (1925). A preliminary question that must be posed about the living wage is whether it must take into account the size of the family which the wage-worker must support. For a brief historical discussion, see 3 J. COMMONS, HISTORY OF LABOR IN THE UNITED STATES, 1896-1932 at 522-23 (1935). In an era when relatively few married women were employed for wages, the answer obviously had to be yes; but even where the labor force participation rate of married women is high, as long as individuals bear the responsibility for reproducing the next generation, a living wage would have to accommodate child support. In this event, an undifferentiated living wage would carry with it a premium or windfall for a wage-earner who had only himself or herself to support. In point of fact, the minimum wage for a full-time year-round worker in the United States has always exceeded the official poverty level for a single person—and until very recently for two persons—and has been insufficient to support a family of four or more. Smith & Vavrichek, *The Minimum Wage: Its Relation to Incomes and Poverty*, MONTHLY LAB. REV., June 1987, at 24, chart 2 at 26. But in this regard a living minimum wage merely tracks market-determined wages. For a proposal that single men be paid a minimum wage and wage earners with families receive employer-funded allowances, see P. DOUGLAS, WAGES AND THE FAMILY (1927 [1925]).

103. 261 U.S. at 555.

minimum-wage workers are not members of families living below the government-established poverty level, opponents fail to explain why this particular segment of the labor market should be uniquely subject to a wage formation process that obliges employees to disclose fully their financial resources to the employer. Such a procedure implies that the employment, at sweatshop wages, of the teenage children and wives of non-poor family heads¹⁰⁴ by inefficient firms does not constitute exploitation and therefore need not be prohibited.¹⁰⁵ Even if one assumes for the sake of argument that such employment has a different moral quality, a conception of justice is only one aspect of a statutory minimum wage.¹⁰⁶ For extremely low wages subsidize allocative inefficiency regardless of who receives those wages.

Sutherland reserved his severest criticism for the socio-economic and moral havoc that the newly imposed contractual incommensurability would wreak: "The declared basis . . . is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health, and morals." Even while Sutherland conceded that every worker had an ethical right to a living wage, he deemed it a fallacy to assume that every employer was bound to furnish it. Because "[t]he necessities of the employee alone are considered, and these arise outside of the employment," the moral requirement of "just equivalence" implicit in every contract of employment was ignored.¹⁰⁷ Sutherland thus objected to requiring a wage that was unrelated to a level of productivity that would guarantee profitability¹⁰⁸:

To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar

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104. In 1978, 13.9 (1.5) per cent of all minimum-wage workers were members of families with incomes in excess of \$25,000 (\$50,000); 9.4 (11.8) per cent of all families with incomes in excess of \$25,000 (\$50,000) included members who were minimum-wage workers. 1 REPORT OF THE MINIMUM WAGE STUDY COMMISSION, Table 1-9 at 18 (1981). At this family income level, approximately three-quarters of minimum-wage workers were children rather than spouses. *Id.*, Fig. 1-3 at 18. In 1984, 27.6 (47.6) per cent of 4,492,000 year-round full-time minimum-wage workers (defined as those earning less than \$6,700 for forty hours per week for fifty weeks) were members of families with incomes in excess of \$25,000 (\$15,000). 62.2 per cent of such workers who were children of two-parent families lived in families with incomes in excess of \$25,000 in 1984. U.S. BUREAU OF LABOR STATISTICS, BULLERIN 2270: LINKING EMPLOYMENT PROBLEMS TO ECONOMIC STATUS, 1984 SURVEY, Table 13 at 22 (1986).
 105. One manufacturing employer seemed to suggest that entry-level workers should be grateful to receive any wages at all: "They look upon the \$3.35 as their tuition to get a business education, if you will. It is an internship." 1 *Hearings on H.R. 1834, The Minimum Wage Restoration Act of 1987: Hearings before the Subcommittee on Labor Standards of the House Committee on Education and Labor*, 100th Cong., 1st Sess. 139 (1987) (testimony of William Stone, Pres., Louisville State Glass Co.). And of those in the inner city he opined: "[T]hose kids would love to work for \$2 an hour. They'd love it. You'd be doing a great thing for 16-, 17-, 18-year-old kids, to get the work, to feel responsible. That would be great. From a social justice kind of view, that would be a great thing." *Id.* at 135.
 106. Indeed, implementation of a means test that would authorize sub-minimum wages for the non-poor is probably politically untenable. To argue for such a means test may thus be regarded as an argument *ad absurdum* designed to underscore the futility of minimum-wage standards altogether.
 107. 261 U.S. at 558.
 108. Specifically, Sutherland objected to institutionalizing the Ricardo-Marx conception that the wage is an equivalent for the value of the worker's labor power, fixed at a level of subsistence adjusted for a historical-moral component.

responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.¹⁰⁹

Sutherland thus implicitly made the Friedmanesque concession that giving completely free reign to market forces would ultimately undermine the market: only state intervention in the form of constant transfers of non-labor-equivalent income to indigent workers can maintain market capitalism.¹¹⁰

Sutherland further makes this concession in contesting the Marxist and liberal commonplace that labor is a unique commodity because of its inseparability from its owner:

Certainly the employer, by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. ... In principle, there can be no difference between the case of selling labor and the case of selling goods. ... If what he gets is worth what he pays, he is not justified in demanding more simply because he needs more; and the shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any peculiar sense with the question of his customer's necessities.¹¹¹

Here Sutherland unwittingly proved more than he intended. For by equating labor markets and consumer markets, he implied that economic development had reached a stage in which it was no longer possible to contain the growth of productivity within the existing set of property relations. Consequently, partial decommodification of labor exchange transactions¹¹² became necessary. That process has historically taken the form of partial expropriation of the direct employer's profits (i.e., minimum wages) and expropriation of all sources of revenue through taxation (i.e., Speerhamland-like¹¹³ wage allowances, negative income taxes¹¹⁴, and food stamps). Why this process has taken these forms, rather than that of state-imposed discounts at stores, is in this context of secondary interest.¹¹⁵ To recognize that a statutory minimum wage can encourage employers to channel investment so as to create more productive jobs, however, is to promote maximum realism about the minimum wage.

109. *Id.* at 557-58.

110. Proponents of the omniscience of free markets regard such transfers—whether in the form of progressive taxation or of negative income tax programs that would supplant the current welfare system—as having the virtue of reducing the size of government without interfering with the markets for factors of production. See W. BLUM & H. KALVEN, *THE UNEASY CASE FOR PROGRESSIVE TAXATION* 84-85 (1976 [1953]); and M. FRIEDMAN, *CAPITALISM AND FREEDOM* 190-94 (1962).

111. 261 U.S. at 558-59.

112. See *infra* n. 51.

113. A system of tax-supported wage subsidies widely adopted in Britain between the 1790s and the inception of the New Poor Law in 1834, which assured workers a minimum income. K. POLYANI, *THE GREAT TRANSFORMATION* 77-102 (1944); 7 S. WEBB & B. WEBB, *ENGLISH LOCAL GOVERNMENT: ENGLISH POOR LAW HISTORY. PT. I: THE OLD POOR LAW* 168-69 (1927).

114. A state-financed income subsidy determined by three variables: a minimum income guarantee; the rate at which benefits are taxed; and a break-even income level at which no further subsidy is forthcoming. M. FRIEDMAN, *CAPITALISM AND FREEDOM* 190-94 (1963).

115. Nevertheless, as was noted at the time: "Only a crass legal formalism could fail to see the far-reaching practical differences" between a grocer and an employer—in particular, the fact that "[a] housewife who buys a can of peas from a grocer does not thereby devote to his enterprise the whole of her working hours." Reed, *Judiciality of Minimum Wage Legislation*, 37 HARV. L. REV. 545, 564-65 (1924).

