Migrant Workers and Minimum Wages

Regulating the Exploitation of Agricultural Labor in the United States

Marc Linder

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Minimum Wage Legislation as Anti-Sweatshop Regulation

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.1

I. The Purposes 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? "The historic starting point of minimum wage legislation was the wish to abolish sweating."2 Contemporary


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.


2Rudolf Broda, Minimum Wage Legislation in Various Countries 2 (BLS, Bull. No. 467, 1928). See generally, 3 John Commons et al., History of Labor in
debate over minimum-wage legislation has lost sight of that original intent to deal—exclusively—with those workers whose wage formation process was subject to "market failure" by forcing their employers to internalize the minimum social costs of maintaining a work force, which they had succeeded in shifting onto the workers or society: "The community is not bound to provide what is in effect a subsidy for unconscionable employers." Although the minimum wage was also intended to create micro-welfare effects, its primary function lay in removing labor costs from competition, increasing productivity macroeconomically by driving "parasitic" firms out of

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3"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." S. REP. NO. 884, 75th Cong., 1st Sess. 3-4 (1937). In other words, even if wage rates and exploitation were positively correlated, state intervention was not aimed at interfering with the exploitation of highly paid workers. This limitation was expressly reflected in the original FLSA 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) [FLSA Hearings].

4West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399-400 (1937). FLSA was "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...." Brookhyn Savings Bank v. O'Neil, 324 U.S. 697, 706 (1945). See also 82 CONG. REC. 1718-19 (1937) (Sen. Lodge). FLSA, in other words, 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. Fred 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).

5See FLSA Hearings at 177 (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." CHESTER BOWLES, TOMORROW WITHOUT FEAR 59 (1946).
business and concentrating production in the most competent firms, as well as in steering capital-labor relations.\footnote{This position is stated most clearly by Sidney Webb, \textit{The Economic Theory of a Legal Minimum Wage}, 20 \textit{J. Pol. Econ.} 973, 978-79, 983-88 (1912). \textit{See also} ALAN FISHER, \textit{SOME PROBLEMS OF WAGES AND THEIR REGULATION IN GREAT BRITAIN SINCE 1918}, at 178-209 (1966 [1926]); NAT'L INDUS. CONF. BD., \textit{MINIMUM WAGE LEGISLATION IN MASSACHUSETTS 5} (1927). The program appears to have been realized in Britain: "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." Hector Hetherington, \textit{The Working of the British Wage Board System, 38 INT'L LAB. REV.} 472, 479 (1938).}

[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.\footnote{\textit{See JOHN COMMONS \& JOHN ANDREWS, PRINCIPLES OF LABOR LEGISLATION} 48 (4th ed. 1967 [1916]).}

The victims of sweating were and remain largely women, children and non-whites.\footnote{93 CONG. REC. 1502 (1947) (statement of Rep. Klein). The preamble to FLSA containing the congressional "declaration of policy" is focused on findings relating to unfair competition. 29 U.S.C. § 202(a). Fair competition as the overarching goal of FLSA was taken to its logical conclusion where a judge would have enforced the Act even though Congress may have been indifferent to the welfare of prisoners on the ground that Congress meant to deny employers privileged access to uncovered exploited workers at the expense of competitors. Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1331-34 (9th Cir. 1991) (D.W. Nelson, J. dissenting).}

\footnote{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 (89 Parl. Pap. 1887); First Report from the Select Comm. of the House of Lords on the Sweating System (20 Parl. Pap. 1888); Clementina Black, Sweated Industry and the Minimum Wage (1907); Duncan Bythell, The Sweated Trades: Outwork in Nineteenth-Century Britain (1978); Jenny 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 Dorothy Douglas, \textit{American Minimum Wage Laws at Work, 9 AM. ECON. REV.} 701 (1919). Today the modal minimum-wage worker is 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, while white men between 25 and 64 years old made up only 6.8 per cent. Calculated according to}
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Statutory base wage was designed to function as a (minimalist) surrogate labor union.10

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."11

In the 1930s, such state intervention was welcomed by firms and industries facing "unfair" competitive practices.12 The political ramifications of this competition played an important part in the debates surrounding passage of FLSA in 1937-38. In his message to Congress accompanying submission of the wage and hours bill, President Roosevelt expressly motivated the need for state

unpublished data furnished by BLS, Characteristics of Workers Paid at Hourly Rates including those Paid At or Below the Prevailing Minimum Wage in 1987.

10In the earliest versions of the bill, which provided for employer-employee advisory wage boards, this intent was express. See, e.g., FLSA Hearings at 180-82 (testimony of Sec'y of Labor Perkins); 81 Cong. Rec. at 7652 ("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). 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. Curtis Gilroy, A Demographic Profile of Minimum Wage Workers, in 2 Report of the Minimum Wage Study Comm'N tab. 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 Int'l U. earn no more than four dollars per hour. Minimum Wage Restoration Act of 1987: Hearings before the Senate Comm. on Labor and Public Welfare, 100th Cong., 1st Sess. 341 (1987) (testimony of John Sweeney, Pres. SEIU).

1181 Cong. Rec. 7800 (statement of Sen. Walsh).

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intervention by reference 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.¹³

However the statutory purpose was described, the underlying notion amounted to a legalization of the social-moral revulsion at certain kinds of "socially offensive" labor exchange transactions.¹⁴ Given the overall level of productivity, payment of wages below a specified limit created an irrebuttable presumption that the worker's economically coerced acquiescence in take-it-or-leave-it offers had inverted and perverted his formal freedom to choose to contract or to refrain from entering market relationships into its opposite. 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."¹⁵ Because Anglo-American law courts had failed to void labor "sweating contracts" for unconscionability,¹⁶ legislatures intervened.

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¹³S. REP. NO. 884 at 1.


¹⁵ARTHUR OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF 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 at 992. See also A. 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").

¹⁶"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." KAHN-FREUND, LABOUR AND THE LAW at 23.
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II. An Impoverished Debate About Poverty

Recent theoretically truncated debates over raising the minimum wage have confined their focus to the empirical\(^{17}\) efficacy of the minimum wage in reducing poverty.\(^{18}\) Given the undisputed fact that the minimum wage has declined in terms of purchasing power as well as in relation to average wages,\(^{19}\) defenders urge that,

\(^{17}\)Most of the data on minimum wage workers derive from unpublished tabulations from the Current Population Survey (CPS) made available by the BLS. For a synopsis, see Earl Mellor, *Workers at the Minimum Wage or Less: Who They Are and the Jobs They Hold*, MONTHLY LAB. REV., July 1987, at 34. Although it is assumed here that the data are reliable, analysis of the underlying data collection methodology as well as of the results regarding migrant farm workers in another context revealed that the data on migrants are virtually worthless. See Marc Linder, Martin/Holt, "Draft Report, Migrant Farmworkers: Number and Distribution": 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 CPS minimum-wage data may be flawed. On the CPS, see U.S. BUREAU OF THE CENSUS [BOC], THE CURRENT POPULATION SURVEY: DESIGN AND METHODOLOGY (Technical Paper 40, 1978).

\(^{18}\)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.

Milton Friedman, *The Methodology of Positive Economics*, in *idem*, ESSAYS IN POSITIVE ECONOMICS 3, 5 (1953). The most prolific liberal writer on the subject of public policy toward low-wage workers agrees: "The acid test is whether the benefits of high wages outweigh the negative effects of lost employment opportunities." SAR LEVITAN & ISAAC SHAPIRO, WORKING BUT POOR: AMERICA'S CONTRADICTION 56 (1987). In trying to explain the defeat of the proposed increase in the minimum wage in 1988, Sen. Hatch claimed that: "We beat them intellectually; our facts were better than theirs." Donald Bacon, *A Victory on the Minimum Wage*, NATION'S BUSINESS, Nov. 1988, at 45.

\(^{19}\)Ralph Smith & Bruce Vavrichek, *The Minimum Wage: Its Relation to Incomes*
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."20 Opponents, having successfully maneuvered proponents onto this programmatic terrain, respond by offering similarly uncontested evidence that the vast majority of the poor do not earn the minimum wage,21 while the vast majority of minimum-wage workers are not poor.22 Alleging lack of employment

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21 Ninety-four per cent of AFDC families are said to have no working members. H.R. REP. NO. 560 at 35. This figure (for 1984) declined from 16.3 per cent in 1973 to 5.7 per cent in 1983. See HOUSE COMM. ON WAYS AND MEANS, BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMM. 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 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." BLS, LINKING EMPLOYMENT PROBLEMS TO ECONOMIC STATUS, 1984 SURVEY, tab. 23 at 30, 36 (Bull. 2270, 1986).

22 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 tab. 2 at 27, at 30 n. 4. If workers frequently move into and out of the minimum-wage population, however, the relationship between earning the minimum wage during one month of one year and poverty in the previous year 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. tab. 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 BLS found that 1,402,200 (or 31.1 per cent) of 4,492,000 year-round full-time workers earning the equivalent of or less than the minimum wage were members of families with incomes below the poverty threshold in 1984. BLS, LINKING EMPLOYMENT PROBLEMS TO ECONOMIC STATUS at 4, 33, tab. B-3 at 50. See also Edward Gramlich, Impact of Minimum Wages on Other Wages, Employment, and Family Income, BROOKINGS PAPERS ON ECON. ACTIVITY, No. 2, 1976 at 409; A DEMOGRAPHIC PROFILE OF MINIMUM WAGE WORKERS, in 1 REPORT OF THE MINIMUM WAGE STUDY COMM’N 7, tab. 1-9 at 18 (1981).
rather than low wages as the primary cause of poverty, opponents note that as an anti-poverty measure, the statutory minimum wage is inefficiently over-inclusive and under-inclusive: it aids more non-poor workers than poor ones while missing most of those who are poor. Moreover, because virtually all economists agree that raising the minimum wage will disemploy at least some low-paid workers, the costs may outweigh the meager benefits. Consequently, with only one per cent of all workers both poor and minimum wage earners, opponents favor enactment of more accurately targeted

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programs such as increased earned income tax credits keyed to family size.\textsuperscript{26}

In an effort to make minimum wage legislation politically more palatable in a period during which the social wage has 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.\textsuperscript{27} But by downplaying the degree of employment-destruction associated with a statutory minimum wage, proponents unwittingly undermine the most cogent grounds for supporting it--namely, that it destroys the basis that sustains low-wage, low-productivity, jobs. A minimum wage that did not significantly contribute to the elimination of such employment structures 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


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[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.
\end{quote}

\textit{The Effects of the Minimum Wage on Income Distribution}, in 1 REPORT OF THE MINIMUM WAGE STUDY COMM'N at 85, 85. An analogous criticism of inefficient over-inclusiveness has been leveled at the minimum old-age benefit under social security. Martha Derthick, Policymaking for Social Security 343 (1979).

chances are that it is so low that won't do anybody any good."28 Thus the familiar argument that the minimum wage hurts the very people it is supposed to protect by disemploying them overlooks the long-term objective of the minimum wage, which is to shift employment to efficient firms paying higher wages.29

III. Low-Wage Labor Markets and Allocative Efficiency

The continuing relevance of minimum-wage legislation to the political economy of the United States is grounded in two interconnected facts: its low degree of union organization and underdeveloped social wage. In Western Europe a greater proportion of workers are union members and/or are covered by national collective bargaining agreements; relatively fewer workers are isolated, vulnerable employees in need of this type of state intervention. Moreover, the much more extensive European social welfare systems furnish those who would otherwise need protection against sweated wages with living family incomes.30 Consequently, statutory across-the-board minimum-wages are not characteristic of Western European economies.31

28FLSA Hearings at 66 (testimony of Asst. Att'y Gen'l Jackson). See also Galbraith, Economics and the Public Purpose at 248.

29"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 Comm. on Education and Labor, 79th Cong., 2d Sess. 1421 (1946) (testimony of Chester Bowles, Adm'r, Office of Price Adm'n). On this so-called shock or efficiency effect, see C. O'Herlihy, Measuring Minimum Wage Effects in the United States 66 (1969); on the flanking measures that would be required to facilitate re-employment of those made redundant, see infra § III.


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To acknowledge that a statutory minimum wage is not an optimal anti-poverty measure is not to discredit it as obsolete depression-born state intervention. In an economy characterized by a chronic tendency to reproduce sub-standard working conditions, a measure designed to insure minimum standards has still not outlived its usefulness. 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 positions." Life-long employment at or below the minimum wage is particularly prevalent for the two occupations with the highest proportions of minimum wage workers--farm workers and domestic workers. Longitudinal studies, confirming dual-labor-market analysis, show that significant numbers of female and non-white male workers are trapped in minimum-wage secondary-sector employment.


33 In 1978 47.4 per cent of farm laborers and 74.8 per cent of private household employed were minimum wage workers. 1 REPORT OF THE MINIMUM WAGE STUDY COMM'N tab. 1-11 at 20. By 1987 these shares had reportedly dropped to 14.2 per cent and 54.7 per cent respectively. Calculated according to BLS, Characteristics of Workers. Both the decline and the absolute level for farm workers 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 tab. 1 at 16. These implausible figures may explain why these two groups reportedly account for less than one-tenth of all minimum wage workers.

35 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 remained such; the corresponding figures for a cohort of 20-24 year-old women were 30 per cent and 15 per cent. While 57 per cent of a cohort of black men 16-24 years old and out of school in 1967 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
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Second, regardless of the extent to which FLSA may increase the incomes of minimum-wage workers, a statutory minimum wage fosters macroeconomic productivity by interfering with the misleading messages sent by the pseudo-markets for sweated labor that disguise inefficiency in a bottom line swollen by extreme exploitation. An appropriately calibrated minimum wage, by eliminating the chief prop of such low-productivity firms and industries, will force out of business those that cannot modernize. Underlying this strategy is the assumption that, in the aggregate, 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.

Taken to its logical conclusion, this policy denies the possibility of "isolat[ing] the contribution of any industry, firm or individual worker" because no commodity is produced solely by the

corresponding figures were 60 per cent (for 1969) and 22 per cent (for 1977). \(1\) \textit{Report of the Minimum Wage Study Comm'n} fig. 1-5 & 1-6 at 27.

\(^{36}\text{See Galbraith, Economics and the Public Purpose at 248.}\)

\(^{37}\text{For empirical evidence suggesting that the minimum wage has indeed had the effect of reducing labor intensity among surviving firms and ousting marginal ones in low-wage industries, see David Kaun, Minimum Wages, Factor Substitution and the Marginal Producer, 79 Q. J. Econ. 478-86 (1965). The president of a small glass manufacturing firm offered confirming testimony to Congress:}\)

\begin{quote}
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 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.
\end{quote}

\(^{1}\text{Hearings on H.R. 1834 at 134 (testimony of W. Stone). For a critique of Kaun's use of the data, see Cornelia Motherall, Minimum Wages, Factor Substitution and the Marginal Producer: Comment, 81 Q. J. Econ. 343 (1967).}\)

\(^{38}\text{To be sure, the heterogeneity of the work force ensures that some workers will be less productive than others at the same job. At the extreme, FLSA authorizes compensation, pegged to individual productivity, to handicapped workers at levels below the minimum wage. 29 U.S.C. § 214(c).}\)
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workers in the end-product industry. If social wealth is "an indivisible activity of the whole community," then

the haphazard arrangements of the market give no assurance that the income drawn by an industry, or by the workers in an industry, from the national pool, shall be a fair measure of their share. Some groups are in a fortunate, others in an unfavourable position, and the varying "pulls" which scarcity and strategic accidents enable the several groups to exert upon national income, have no necessary or even usual relations to effort, skill or risk, and even less to need.39

This macrosocial theory underlies the Swedish "solidaristic wage policy." Advanced by the highly centralized trade union movement after World War II, this component of a national industrial policy stressed intra-occupational, inter-firm wage compression in order to eliminate the contingency of individual firms' profitability as a source of wage differentials. The ensuing profit squeeze in less productive firms was designed to cause them to become more efficient or to close.40 "If, in exceptional cases, weak firms had to be kept alive by subsidies, this should be a task for society as a whole and not for the workers who happened to have jobs in these firms."41

The statutory minimum wage is a diluted version of solidaristic wage policy. But as part of an industrial policy, a minimum wage cannot stand alone42 In support of market-mediated


40 See Andrew Martin, Trade Unions in Sweden: Strategic Responses to Change and Crisis, in Peter Gourevitch et al., Unions and Economic Crisis: Britain, West Germany and Sweden 189, 205-208 (1984). The Japanese minimum wage law, in contrast, specifically requires that the Minimum Wage Council, in setting a minimum wage, give consideration to "the ordinary enterprise's [tsuujoo no jigyoo] ability to pay wages." Saitei chingin hoo, Law No. 137 of 1959, § 3.


42 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.

displacement of workers and capital from low-productivity to high-productivity firms and sectors, the state must intervene to insure that individual workers do not bear the risk or costs of such macroeconomic rationalization policy. Such an "active manpower policy" would include retraining and education, coordinated employment exchange, and public employment.

At the time of the original FLSA debates, the president of the Int'l U. Operating Engineers, John Possehl, wrote to the president of the AFL, 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. In fact, the productive form of such capital may be morally obsolescent and thus incapable of being realized and transferred to more profitable investment.

An objection to this function of the minimum wage has been formulated by two leading advocates of the omniscience of unfettered markets. Rather than leading to enhanced economy-wide productivity, they see this use of the minimum wage as "causing 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" political-economic 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. They are thus blind to the fact that 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, their extreme free-market stance is disingenuous; for although the elimination of unions, minimum wages, and other kinds of labor protection might foster the ruthless pursuit of capitalist efficiency, Friedman understands that his idealized capitalist society would be self-destructive unless it enacted some form of income redistribution to bolster the depressed standard of living of unprotected workers. The decisions regarding the calibration of Friedman's negative income tax, for example, would be as political and hence "arbitrary" as those underlying a minimum wage. See infra § VI.

For a description of the most advanced policies of this type as practiced in Sweden, see Rudolf Meidner & Rolf Andersson, The Overall Impact of an Active Labor Market Policy in Sweden, in MANPOWER PROGRAMS IN THE POLICY MIX 117 (Lloyd Ulman ed. 1973); G. Esping-Andersen, Politics Against Markets: The Social Democratic Road to Power 229-36 (1988 [1985]). A highly developed system of employer-oriented wage subsidies (to employ 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 did not shore up inefficient employers. This
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This macroeconomic allocative function of the minimum wage, moreover, would not be superseded 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 credit adjusted for family size, or an extension of Medicare benefits to minimum wage workers might indeed be "more beneficial than a few extra cents per hour of work," they are neither inconsistent with, nor able to supplant the role performed by, a statutory minimum wage in preventing the allocative inefficiencies associated with sweatshop wages.46

IV. Industry Structure, Productivity, and Minimum Wages

A narrow microeconomic perspective is inadequate for


46H.R. REP. NO. 560 at 43. See also Peter Passell, Paying for Wider Health Insurance, N.Y. Times, May 18, 1988, at 26, col. 1 (nat. ed.). The earned income tax credit (EITC), which was enacted in 1975 and is codified at IRC § 32, merely offsets the regressive impact of social security taxes on low-income workers with children. See COLIN CAMPBELL & WILLIAM PIERCE, THE EARNED INCOME CREDIT (1980); Eugene Steuerle & Paul Wilson, The Taxation of Poor and Lower-Income Workers, in LADDERS OUT OF POVERTY 33, 37-39 (Jack Meyer ed. 1986). The EITC amounted to only $533 per family in 1986. HOUSE COMM. ON WAYS AND MEANS, OVERVIEW OF ENTITLEMENT PROGRAMS: 1991 GREEN BOOK 18 at 901 (WMCP 102-9, 1991). The federal government would have to commit a sizable block of revenue to the EITC in order to transform it into a significant working-family allowance. Even the increased EITC levels mandated by the Omnibus Budget and Reconciliation Act of 1990 are projected to increase the per family EITC to only $818 in 1992. Id. A very modest EITC supplement for families with more than one child is now in effect; IRC § 32(b) (Supp. 1991). For a detailed account of such an EITC, see Welfare: Reform or Replacement? at 237-61 (statement of Robert Reischauer). 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." Fred Blum, Marginalism and Economic Policy: A Comment, 37 AM. ECON. REV. 645, 650 (1947).
studying the overall consequences of quasi-captive employment in the secondary labor market, the contemporary industrial-racial-
gender-age counterpart to the sweated trades. In order, therefore, 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. These purposes include fostering (1) equity between wages and profits as well as inter-firm and inter-
industry wage equity; (2) fair competition between firms by reducing the leeway for competition based solely on low wages; (3) allocative efficiency and productivity by ensuring that private wage costs reflect the full social costs of reproducing labor power equally across firms and industries, so that the displacement of labor by capital is not impeded by low wages' acting as a subsidy to inefficiency; and (4) workers' welfare by increasing their income. The employment settings include low-wage efficient firms, low-wage industries, low-
wage firms in non-low-wage industries, and low-wage occupations in all industries.

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

Legislatures, in limiting freedom of contract between employee and employer by a minimum wage, proceed on the

47For an overview of theories of the dual labor market, secondary labor market and labor market segmentation, see Peter Doeringer & Michael Piore, Internal Labor Markets and Manpower Analysis (1971); David Gordon, Theories of Poverty and Unemployment (1972); Richard Edwards, Contested Terrain ch. 9 (1979); David Swinton, The Minimum Wage and Labor Market Fairness, in Minimum Wage Restoration Act of 1987 at 227-40.

48For 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); Barbara Armstrong, Insuring the Essentials: Minimum Wage Plus Social Insurance—A Living Wage Program (1932).

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 law.

Here Taft had in mind situations in which the state in effect enjoins an exploitative employer from mulcting self-defenseless employees; the employer then becomes a normal competitor with average profits. Since this analysis assumes that the firm 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."51

Taft's model, however, fails to distinguish between an efficient firm that takes advantage of a weak labor force and a technologically substandard firm that sustains itself by squeezing employees:

[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.]52

Abolition of this kind of exploitation enhances aggregate allocative

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52Id. at 563. Daniel Fusfeld, High Wages, Low Wages and Poverty 8 (Feb. 5, 1991) (unpub. MS), in asserting that "owners of low-wage, inefficient enterprises do not benefit" from low wages, overlooks the fact that such employers might otherwise become unemployed.
efficiency. This second scenario, in turn, must be distinguished from a third:

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.

Opponents of the minimum wage tend to focus exclusively on this third case—marginally productive employees (in all industries), whom it is allegedly no longer profitable for firms to employ at a higher minimum wage. Because they see no productivity-enhancing effects emanating from the imposition of a minimum wage, they foresee layoffs as such employers' only option for offsetting higher wage costs. Supporters of the minimum wage, on the other hand, in effect fix their view on the first case—that of relatively efficient firms that can be compelled to part with their super-profits without having to change their level of employment or capital-intensity. By concentrating on the two extreme scenarios, the protagonists of the debate have neglected the central case to which a statutory minimum wage is directed—namely, labor-intensive, inefficient firms buoyed by...
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low wages.\(^57\) Interdiction of such a method of competition 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--initially entails reduced employment in that industry.

This failure to attend to the representative case is ironic inasmuch as standard marginal productivity analysis 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...."\(^58\)

To be sure, marginalist economists, having assumed that such monopsonistic exploitation is not a real-world problem, 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.\(^59\) The underlying

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\(^{57}\)For the claim that, because low-paid labor is not cheap, there is no evidence that parasitic trades exist, see Lees Smith, Economic Theory and Proposals for a Legal Minimum Wage, 17 Econ. J. 504, 508-509 (1907).


\(^{59}\)[T]his case is little more than a theoretical curiosum, 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...." Milton Friedman, Price Theory: A Provisional Text 190 (rev. ed. 1968 [1962]). See also Bernard Anderson, Background Materials on the Minimum Wage, in 2 Hearings on H.R. 1834, The Minimum Wage Restoration Act of 1987: Hearings Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 100th Cong., 1st Sess. 62, 67 (1988). A standard textbook
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claim "that the occupations most affected by minimum wage legislation are in fact not monopsonistic but competitive" neglects the fact that firms selling their products in competitive markets may be--indeed, remain competitive precisely because they are--buying their labor oligopsonistically in a labor market, such as that for migrants, characterized by a virtually inexhaustible supply of workers willing to work at the prevailing wage rate. 

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61 See, e.g., Herrington Bryce, Alternative Policies for Increasing the Earnings 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). Hiring the marginal worker would therefore necessitate paying a higher wage rate. Marginalist theory further assumes that this step compels the firm to pay the same higher wage rate to all workers already in its employ. From these assumptions marginalists 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 curves. The end result is fewer workers employed at a lower wage than at competitive equilibrium. See, e.g., BAUMOL & BLINDER, ECONOMICS at 531-34. The critical assumption 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 oligopsonistic labor markets the buyers can take advantage of the sellers because the latter have few (if any) other opportunities to sell their labor. For want of an alternative, they are compelled to offer themselves at relatively low wage rates; in other words, poor members of the reserve army of the unemployed do not need to be coaxed into employment (they supply their labor relatively inelastically). Indeed, in the absence of an organized labor market, firms might be able to hire increasingly desperate workers at ever lower wage rates, which they could then impose on employees already on their payroll. 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
V. The Perils of Minimum Wages for Marginal Workers

A minimum wage is too crude an industrial policy to be able to take into consideration all the complexities of heterogeneous economic patterns. Although it is principally designed to undermine the viability of "wage-chiseling" firms within industries, if the wage-price-profit matrix of an entire industry required restructuring, the consequences might include higher consumer prices; if consumers adjusted their budgets 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 three-fourths of all minimum wage workers are concentrated in retail trade, clerical occupations, and services, which are by and large vulnerable neither to commodity imports nor to export of jobs, foreign dissipation of employment would not be a major risk.

Migrant farm workers, however, who hand-harvest fruits and vegetables in competition with producers in Latin America may be the only numerically significant group of workers whose employment might be jeopardized by international competition solely as a result of 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. A 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.

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; Z. Dickinson, The Organization and Functions of Industrial Committees under the Fair Labor Standards Act, 6 LAW & CONTEMP. PROBS. 353 (1939). Confining the committees to those industries--such as agriculture--with the greatest concentration of minimum-wage workers would provide rudimentary Ersatz-collective bargaining for workers who otherwise would not be able to engage in it. See infra ch. 7.

"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 at 390 (testimony of J. Sweeney, Pres. SEIU, and of J. Mazur, Pres. Int'l Ladies Garment Workers U.). The figure in the text is based on data in BLS, Characteristics of Workers. On retail trade, see Belton Fleisher, Minimum Wage Regulation in Retail Trade (1981).
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.

In order to gain a purchase on this issue, it is necessary to explore how these low wages work their way through the micro- and macroeconomic wage-profit-price matrix. This *cui bono* question asks whether low wages are passed on to consumers in the form of low prices of fruits and vegetables or whether producers receive above-average profits. To create a framework for analyzing this question, several key variables would have to be studied carefully. First: What share of final prices do wages represent? If wages represent ten per cent of final prices, even a doubling of wages would, if passed on fully, force a price increase of only ten per cent. In fact, field labor costs as a share of retail prices of fruits and vegetables generally remain well under ten per cent.

Second: To what extent could capital be substituted for labor to absorb wage increases? An adequate response to this question would require an inquiry into the technological underpinnings of a shift toward harvest mechanization and the potential consumer tastes that would sustain or resist purchase of the new varieties of fruits and vegetables that might have to be developed to accommodate mechanical harvesting. Each crop would have to be examined separately. Where nature, however, is no obstacle to machines, the

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64Daniel Fusfeld, *High Wages, Low Wages and Poverty* at 8-9, asserts apodictically that in general it is middle-class customers of low-wage industries that benefit. Sidney Weintraub & Stanley Ross, "TEMPORARY ALIWN WORKERS IN THE UNITED STATES 31-32 (1982), see both agricultural employers of exploited farm laborers and higher-income consumers as the gainers without quantifying the gains. "Producers" is too undifferentiated because it embraces farmers, packing sheds, processors, wholesalers, transporters, retailers as well as integrated entities performing several of these functions. Farmers receive about one-sixth to one-quarter of the retail price of fruits and vegetables. See Denis Dunham, *Food Costs...From Farm to Retail* in 1990, at 5 (ERS, Agric. Infor. Bull. 619, 1991).

65S. Rep. No. 1549: THE MIGRATORY FARM LABOR PROBLEM IN THE UNITED STATES, 89th Cong., 2d Sess. 23 (1966). Unlike sweated workers at the turn of the century who produced largely inferior goods for other low-income consumers, because migrants produce commodities exclusively for higher-income consumers, higher wages will be translated into higher real incomes for them. Pigou, *The Economics of Welfare* at 688-690.

66"Machines are not made to harvest crops; in reality, crops must be designed to be harvested by machines." Raymon Webb & W. Bruce, *Redesigning the Tomato for Mechanized Production*, in USDA, *Science for Better Living: The Yearbook of Agriculture* 1968, at 103, 104 (1968). On mechanization see, G. Brown, *Fruit and
level of skill and of productivity could be expected to rise while the supply of and demand for machine operators would increase vis-à-vis the prior supply and demand schedules for hand-harvesters. Some wage increase for a reduced labor force could be anticipated.

Enforcement of this process of increasing productivity and wages by means of substituting capital for labor represents one of the primary economic functions of labor unions. By the same token, employers consciously use the same process to discipline workers seeking to take advantage of a temporarily favorable constellation of supply and demand forces on the labor market. Where, however, mechanization is infeasible, and neither side can trigger the substitution process, producer-employers may have recourse to more overtly conflictual strategies that no longer carry the authority of quasi-automatic rational technical-economic processes. Although such responses may in fact be superfluous in the absence of an organized labor force, where employers are unable to resist demands for and to absorb wage increases without raising prices, the next critical turning point in the economic transmission belt is the final consumer product market.

Third: What is the price elasticity of demand for fruits and vegetables? Are they such a fixed staple of consumption that consumers devote a constant absolute amount of income or share of their budgets to them so that an increase in price will leave total expenditure unchanged? Or will consumers increase expenditures in order to consume the same physical amounts? Or will a price increase reduce total expenditures? Consumer responsiveness to price changes will vary from product to product and among consumers in accordance with their income levels. Relatively low-income consumers might stop buying luxury-discretionary items such as luxury items and instead buy basic necessities. 


as strawberries once the price exceeds a certain level, whereas their demand for lettuce or apples may be much more inelastic. But it is also possible that many low-income consumers consider the whole range of fruits and vegetables as one large discretionary item, so that a budget-sensitive price increase might lead to the substitution of other types of food not affected by the increases. Differential price elasticity is also relevant for union organizing efforts: whereas the United Farm Workers successfully organized a boycott of price-elastic grapes, a similar effort in lettuce foundered on the latter's price inelasticity.

Finally: To what extent will an increase in wages lead producers to shift production to Latin America, where much lower wages may offset higher transport costs and translate into lower total costs and higher profits? Even at this level of abstraction, this set of complicated and interlocking structural constraints on the scope of agricultural wages indicates that flanking measures would have to accompany any significant increase in the minimum wage for migrants.

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71 See infra ch. 7.
VI. Exploitation and a *Living Wage*\(^{72}\)

A minimum-wage could be set high enough either to secure a "living wage" or to prevent extreme exploitation by reducing profits to the societal average. A minimum-wage fixing that achieved both objectives would be coincidental; nothing in economic theory logically compels the compatibility in all sectors, industries, and firms of an average rate of profit with a "living wage."\(^{73}\) Productivity in some firms may be so low, and the ability to increase productivity so narrow, that the profit-wage conflict can become a zero-sum game. 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 in effect has to be made whether to eliminate a business altogether.

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 employed and fewer social welfare programs were available, was not seriously regarded as guaranteeing a "living wage."\(^{74}\) 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-

\(^{72}\) *Living wage* is used by minimum-wage advocates to refer to some statistically representative family budgets for basic necessities. See, e.g., SEIU, *Americans Deserve a Living Wage* at 14-15. When introduced at the turn of the century, the concept also rested on a theory of natural right as interpreted by Catholic moral theology. See Pope Leo XIII, *Rerum Novarum* ¶¶49-50 (1891); John Ryan, *A Living Wage* (1906). See also Philip Snowden, *The Living Wage* (1912). The living wage at that time was also understood to be high enough to make it unnecessary for wives and children to work for wages. But see Brailsford et al., *The Living Wage* at 20-26, 33 (minimum wage would have to be supplemented by family allowance). On the so-called family wage, see Michèle Barrett & Mary McIntosh, *The "Family Wage": Some Problems for Socialists and Feminists*, Capital & Class, Summer 1980, at 51; Wally Seccombe, *Patriarchy Stabilized: The Construction of the Male Breadwinner Wage Norm in Nineteenth Century Britain*, 11 Soc. Hist. 53 (1986).


minimum-wage workers excluded from the Act, it could not have been seriously considered as a general anti-poverty measure. Today, when two-thirds of all minimum wage workers are employed only part-time, even the most ardent proponents of minimum wage legislation concede that no politically plausible higher minimum wage could alone enable the families of such workers to escape poverty.

Calibrating the minimum wage to a "living wage" involves complicated issues, some of which were dealt with by Justice Sutherland in Adkins v. Children's Hospital. 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. 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 transparently deploring was—as Taft alluded to in his dissent—the fact that interference with market forces deprived employers of the advantages that stemmed from transacting urgent business with needy individuals.

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76 Calculated according to BLS, Characteristics of Workers. See generally, Martha Chamallas, Women and Part-Time Work: The Case for Pay Equity and Equal Access, 64 N.C.L.Rev. 709 (1986).

77 See, e.g., Isaac Shapiro, No Escape: The Minimum Wage and Poverty 13 (Center on Budget and Pol'y Priorities, 1987). Immediately after World War II, Senator Taft argued that the minimum wage was designed to protect single persons against extreme hardship and poverty: "you can't hope to put a minimum at a point where it will support a family." Amendments of the Fair Labor Standards Act of 1938: Hearings Before the Senate Comm. on Education and Labor, 79th Cong., 2d Sess., pt. 2 at 1421 (1946). See also Brailsford et al., The Living Wage at 22.


79 261 U.S. at 555.

80 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 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 Comm.
land thereby neglected the fact that labor contacts in the sweated trades were hardly an instantiation of the ideal consensualism act against which to judge state imposition of a minimum wage. On the contrary: they mediated and disguised--and thus helped to reproduce--a process of coercion. In that sense they were an exemplar of market failure.

Present-day opponents of the minimum wage have vindicated Sutherland’s position by maneuvering proponents into conceding in principle that the minimum wage is intelligible as a welfare policy only as a quasi-means-tested entitlement. Although this strategy dovetails with opponents’ emphasis of the fact that most minimum-wage workers are not members of families living below the government-defined poverty level, they 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 all their financial resources to employers. Such a procedure implies that the employment, at sweatshop wages, of the teenage children and spouses of non-poor family heads by inefficient firms does not constitute exploitation and therefore need not be prohibited. Even if it were conceded that a different moral quality inheres in such transactions, a conception of justice is only one aspect of the minimum wage; the subsidy to allocative inefficiency associated with

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81See Burns, Wages and the State at 20.
82FLSA itself provides for a prime example of such employment of teenagers: retail stores and service establishments are permitted to pay full-time students eighty-five per cent of the minimum wage. 29 U.S.C. § 214(b). 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 COMM’N, tab. 1-9 at 18. 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 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 (and 47.6 per cent of those earning more than $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. BLS, LINKING EMPLOYMENT PROBLEMS TO ECONOMIC STATUS, 1984 SURVEY tab. 13 at 22.
extremely low wages remains regardless of who receives those wages. Since implementation of a means test that would authorize sub-minimum wages for the non-poor is politically untenable, such a notion may be regarded as an argument ad absurdum designed to underscore the futility of minimum-wage standards altogether.

Sutherland reserved his severest criticism for the economic and moral havoc that state-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 conceding every worker's ethical right to a living wage, he considered it fallacious 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 mandatory minimum wage ignored the moral requirement of "just equivalence" implicit in every contract of employment. In adopting an inchoate marginalism, Sutherland in effect objected to institutionalizing a Ricardian-Marxist conception of the wage—as an equivalent for the value of the worker's labor power fixed at a level of subsistence adjusted for a historical-moral component—since it was unrelated to a level of productivity that would guarantee profitability:

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 responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.\[^{83}\]

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 perpetual redistribution of income to indigent workers could sustain certain labor markets.\[^{84}\]

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\[^{83}\]261 U.S. at 557-58.

\[^{84}\]Believers in 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 WALTER BLUM & HARRY KALVEN, JR., THE UNEASY CASE FOR PROGRESSIVE TAXATION 84-85 (1976 [1953]); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 190-94 (1962).
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Sutherland then generalized this implicit concession in the context of contesting the liberal and Marxist 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.®5

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 de-commodification of labor exchange transactions became necessary. Why that process historically has taken the form of a minimum wage, on the one hand, and Speenhamland-like wage allowances, negative income taxes, and food stamps (that is, expropriation of all sources of revenue through taxation), on the other, rather than of state-imposed discounts at stores, is, in this context, of subsidiary importance.®7

Of primary interest here is why such a sweated stratum as migrant farm workers remained totally barred from minimum-wage protection for so long. The following chapter examines the historical reasons.

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®5261 U.S. at 558-59.


®7Nevertheless: "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." THOMAS REED, JUDICIALITY OF MINIMUM-WAGE LEGISLATION, 37 HARV. L. REV. 545, 564-65 (1924).