1935

Present Status of the Adkins Case

Norman Macbeth Jr.

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Labor and Employment Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Available at: https://uknowledge.uky.edu/klj/vol24/iss1/5

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
NOTES

PRESENT STATUS OF THE ADKINS CASE

The first minimum wage statute in the United States was passed by Massachusetts in 1912. A permanent commission was created with power to establish standard minimum rates for minors of both sexes and for adult women workers. This action was to be advisory rather than mandatory, enforcement relying solely on moral pressure through publication of the names of those refusing to comply. In 1916, the commission recommended the addition of a penal sanction to render the statute more effective, but this motion was rejected by the legislature.

In the next few years about a dozen states and territories enacted minimum wage laws. These laws were of two main types, each of which avoided the Massachusetts reliance on more publicity. In Oregon the commission system was followed, which system has the advantage of flexibility in varying the rates from time to time and from industry to industry, as circumstances demand. In Utah, a flat minimum of $1.25 per day for experienced adult women was prescribed by statute, and no commission was provided for. The great majority of the legislating states have preferred the commission system.

The constitutionality of the Oregon law was attacked in 1914. After being sustained by the Oregon Supreme Court in the case of Stettler v. O'Hara, it was taken to the United States Supreme Court, where the case was argued in December, 1914. No opinion was handed down until April, 1917, a delay which provoked bitter comment. The decision of the Oregon court was affirmed per curiam by an evenly divided court, Mr. Justice Brandeis not sitting. All of the statutes had been more or less in abeyance until the constitutional point should be

---

1 Acts of 1912, Section 706.
2 Stat. 1913, Chap. 62.
3 Stat. 1913, Chap. 63.
4 69 Ore. 519 (1914).
6 243 U. S. 629 (1917).

K. L. J.—6
settled, most of the commissions confining themselves to gathering information and reconciling employers to the law. Taking the Stettler case as sufficient warrant, some ten or twelve states now began active enforcement of the minimum rates. Since labor was at a premium and the cost of living in violent fluctuation, it was difficult to maintain the proper ratio for some years, and the commissions were required to act with statesmen-like caution; but by 1920 an adjustment had been reached and the law was functioning well in several states, notably in California. This was the situation existing at the time of the Adkins decision.

The famous case of Adkins v. Children's Hospital arose under the minimum wage law of the District of Columbia. This statute created a board to investigate, with hearings for evidence from all interested parties, what wages would be equal to the necessary cost of living in each occupation for women workers in order to maintain their health and protect their morals. This board was to fix and enforce the standards. The plaintiff was a female elevator-operator, receiving $35.00 per month and two meals a day in clean and moral surroundings. The board declared this too low and ordered an increase, which was alleged to have compelled the employer to dismiss plaintiff. Averring that she could get no other work equally attractive, plaintiff sought to enjoin enforcement of the statute as unconstitutional. This injunction was granted by the Court of Appeals of the District of Columbia. On appeal this was affirmed by Mr. Justice Sutherland; McKenna, Van Devanter, McReynolds, and Butler JJ. concurring, and Taft C. J., Holmes, and Sanford J. J. dissenting, Brandeis J. not sitting.

Since our later discussion is dependent on a correct analysis of the majority opinion, it is worth while to summarize its reasoning with some care.

---

\(^1\) Here the exceptionally high minimum of $16.00 per week was maintained, and the commission was successful in recovering for the workers large amounts of "back wages."

\(^2\) Most of the information so far set forth was derived from Armstrong, Insuring the Essentials (1932), pp. 46-58, 90-106.

\(^3\) 261 U. S. 525 (1923).

\(^4\) 49 Stat. 960 (1918); 43 U. S. C., Sec. 183.

\(^5\) 261 U. S. 525 (1923).

\(^6\) For a devastating and thorough criticism of the opinion, see Powell, "The Judiciality of Minimum-Wage Legislation" (1924), 37 Har. L. R. 545.
The fundamental premise is contained in the statement that, while there is no such thing as absolute freedom of contract, still freedom is the rule and restraint the exception; legislation is justified only under exceptional circumstances. This reduces the question of constitutionality to a judicial inquiry into the existence of exceptional circumstances, on which Mr. Justice Sutherland at once embarks. First he disposes of a number of cases which had upheld similar social legislation by showing that they either did not apply to wages or were justified by a temporary emergency. Then he takes up the contention that the statute is valid because it relates to women, an oppressed class of workers. His answer to this is the extraordinary non sequitur that since women now have the vote, they no longer need special protection. Thus the two stock arguments for the statute are out of the way without finding any exceptional circumstances, and he is free to consider it as an original economic question. As such, he condemns it on the following grounds: (1) The standard which the statute prescribes for the direction of the board, i.e., the cost of living, "is so vague as to be impossible of practical application with any degree of certainty." (2) It cannot be shown that high wages improve morals. (3) The minimum should not be the cost of living, because that has nothing to do with the employment or with the value of the work done. (4) The statute takes account of the necessities of only one party to the contract. Having exposed these flaws in the statute, Mr. Justice Sutherland now points to the danger that an admission of the power to fix minimum wages will lead to a fixing of maximum wages for labor and maximum prices for commodities. These considerations combined lead him to conclude that the statute is an arbitrary and unreasonable deprivation of liberty, hence void under the Fifth Amendment.

The effect of the Adkins decision was to nullify all state laws on minimum wages except, oddly enough, the unsatisfactory advisory type current in Massachusetts. It is interest-
ing to note that in California a fairly effective enforcement has continued, though admittedly extralegal. The majority of employers are converted to a belief in the economic soundness of the law, and voluntarily follow the rates set by the commission. Most of those unwilling to comply are even more unwilling to pursue a costly lawsuit, hence they pay the standard rates. Those wealthy enough to litigate are discreetly avoided by the commission.\textsuperscript{14} However in all other states attempts to enforce the law were abandoned, and the subject of minimum wage legislation appeared to be a closed issue. Not until 1933 did it again spring into life.

The first exhibition of this renewed vitality was the passage of the Eberhard-Wald Bill\textsuperscript{15} in New York, in April, 1933. This is a long statute, very well drawn, providing an elaborate administrative system to determine and enforce minimum fair wages.\textsuperscript{16} A description of this machinery being slightly removed from our present inquiry, I shall quote only two of the most significant passages of the statute. Section 550 [Factual Background]:

\begin{quote}
\textquote{"In the absence of any effective minimum fair wage rates for women and minors, the constant lowering of wages by unscrupulous employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the stability of industry. The evils of oppressive, unreasonable, and unfair wages . . . are such as to render imperative the exercise of the police power of the state for the protection of industry and of the women and minors employed therein and of the public interest of the community at large in their health and well-being and in the prevention of the deterioration of the race."}
\end{quote}

Section 551-8:

\begin{quote}
\textquote{"'A fair wage' shall mean a wage fairly and reasonably commensurate with the value of the service or class of service rendered. In establishing a minimum fair wage for any service or class of service, the commissioner and the wage board . . ., (1) may take into account all relevant circumstances affecting the value of the service or class of service rendered, and (2) may be guided by like considerations as would guide a court in a suit for the reasonable value of services rendered at the request of an employer without contract as to the amount of the wage to be paid, and (3) may consider the wages paid in the state for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards."}
\end{quote}

This statute was highly praised by President Roosevelt in

\textsuperscript{14} See Armstrong, \textit{op. cit.}, \textit{supra}, note 8, at 152-155.

\textsuperscript{15} L. 1933, c. 584, April 29. Cahill's Consolidated Statutes, 1933 Supp., p. 89.

\textsuperscript{16} For an excellent summary, see helpful note in 42 Yale L. J. 1250 (1933).
a telegram to the governors of thirteen leading industrial states, in which he urged the adoption of similar legislation.\textsuperscript{17} I believe a few of these states have adopted the identical statute.\textsuperscript{18}

The next step was action by the national government in the President’s Re-employment Agreement,\textsuperscript{19} The Blanket Codes, and the codes for specific industries. I believe the wage provisions of the Code for the Wet Primary Battery Industry may be taken as typical of the specific codes, and since it is likely to be the subject of the first Supreme Court decision on the question it is worth quoting.

Article IV—Wages:

A. No factory employee engaged in processing and in labor incident thereto, shall be paid at a rate of less than 40c per hour; unless the rate per hour for the same class of labor on July 15, 1929, was less than 40c, in which case the rate per hour shall be not less than the rate per hour paid on July 15, 1929, but in no-event shall the rate per hour be less than 90% of the highest minimum rate per hour established in this paragraph; provided further that learners may be paid not less than 80% of such rate. . . .

"B. No other employee shall be paid at a rate of less than $15.00 per week. . . ."

It may be well to point out the differences between these two types of legislation before discussing their joint relation to the Adkins case. First is the matter of declared aims. I have quoted the preamble to the New York statute\textsuperscript{20} and the reader will have noted that it expresses a coherent and \textit{prima facie} intelligent economical theory. The Codes begin by saying: "To effectuate the policies of Title I of the N. I. R. A." It will be

\textsuperscript{17} "May I call your attention to minimum wage law just passed by Legislature of New York and approved by Governor Lehmann which declares it against public policy for any employer to pay women and minors a wage which is 'both less than the fair and reasonable value of services rendered and less than sufficient to meet the ultimate cost of living necessary to health.'

"This represents a great forward step (in suppressing what constitutes) a serious form of unfair competition against other employers, reduces purchasing power of the workers and threatens the stability of industry. I hope that similar action can be taken by the other states for protection of the public interests."


\textsuperscript{19} N. H. and Conn. have done so; R. I. is now in travail. The work of the Interstate Compact Commission of New England has been effective in this movement.

\textsuperscript{18} July 27, 1933. (A B C of N. R. A.; Appendix D.)

\textsuperscript{20} \textit{Supra}. 
recalled from the discussion in the course on Government Con- 
trol of Business that the economic theories expressed in Title I 
of the N. I. R. A. are incoherent and mutually contradictory. 
Second, the standards to determine and the administrative ma-
chinery to achieve minimum wages in the New York stat-
ute are vastly superior to the flat rate prescribed by the Codes. 
The latter have no way of varying the rates in different dis-
tricts or of raising and lowering it with fluctuations in prevail-
ing wage scales and the cost of living. Third, the codes apply 
to men as well as to women.

Now let us consider the probable reception of these stat-
utes in the United States Supreme Court, or in other words the 
present status of the Adkins case. It is just twelve years 
since that opinion was handed down, but that short period has 
seen significant changes of many sorts. I will discuss first, as 
most pertinent, a doctrinal change in the law. Mr. Justice 
Sutherland's major premise was that a restraint on liberty of 
contract could be justified only by exceptional circumstances, 
and that the burden of proving the existence of such circum-
stances lay on the party supporting the statute.21 In the later 
case of O'Gorman & Young v. Hartford Fire Insurance Co.,22 
the defendant challenged the constitutionality of a New Jersey 
statute regulating strictly the rates which insurance companies 
could pay to their agents in that state. The state courts upheld 
the statute, and were affirmed in the United States Supreme 
Court in a decision which departs widely from the approach of 
the Adkins case. The majority opinion, per Brandeis J. con-
cludes:

"As underlying questions of fact may condition the constitu-
tionality of legislation of this character, the presumption of constitu-
tionality must prevail in the absence of some factual foundation of record 
for overthrowing the statute. It does not apper upon the face of the 
statute or from any facts of which the court must take judicial notice, 
that in New Jersey evils did not exist in the business of fire insurance 
for which this statutory provision was an appropriate remedy. The 
action of the legislature and of the highest court of the state indi-
cates that such evils did exist. The record is barren of any allegation 
of fact tending to show unreasonableness."

Since a good case can be made out for most statutes sustained 
by the state courts, and particularly for those aiming to remedy

---

21 Supra.
22 282 U. S. 251 (1931).
social conditions, this alteration in the burden of proof will be
decisive in the majority of instances. The basic premise of the
Adkins case is seriously impaired. The vigorous joint opinion
in dissent by Van Devanter, McReynolds, Sutherland, and But-
ler JJ. shows their appreciation of the bold change of front by
the majority; and their disapproval.

The second pertinent change in conditions since 1923 is the
current economic depression. This has had the interesting effect
of altering the theories of minimum wage legislation. Whereas
in earlier days the declared purpose of such statutes was the
protection of the health and morals of woman workers, it is
now the promotion of national economic recovery. The pre-
amble to the Eberhard-Wald Bill speaks of unfair competition,
reduction of purchasing power, and threatened stability of in-
dustry; it subordinates the matter of health and omits all refer-
ence to morals. The N. I. R. A. is primarily an economic mea-
ure. This is significant because it means that minimum wage
laws are no longer class legislation; it cannot be said that the
interests of only one party to the contract are considered, and
it is no longer relevant to object that higher wages cannot be
shown to improve morals.

Will the Adkins case be overruled? After the O'Gorman
decision removed its legal basis and the depression added eco-
nomic importance to its ancient social advantages, one might
have thought that the reasons for the holding had been lost and
that the case might be allowed to follow them. But in such a
speculation the personality of the court must be reckoned as a
vital factor. It is here that we find a third significant change
since 1923. Mr. Justice Sutherland and three of those who con-
curred with him in the Adkins decision remain on the bench.
It is often suggested that that case was decided by their convictions in respect to *laissez faire*, and that it would be futile to point out subsequent developments because their convictions are unaltered, witness the *Nebbia* case.\(^2\) I myself incline to this view, but their failure to dissent in the *Hegemann* and *Borden* cases\(^2\) may warrant "all the noble substance of a doubt." In any event, they no longer hold the balance of power. The deciding votes are now those of Mr. Chief Justice Hughes and Mr. Justice Roberts, since there is no doubt about the sentiments of Justices Brandeis, Stone, and Cardozo. Mr. Hughes and Mr. Roberts have indicated in a number of cases\(^2\) their willingness to sustain state or federal statutes challenged on grounds of due process. Had they been on the court in 1923, it is highly improbable that they would have concurred in the *Adkins* decision. Since they participated in the revision of attitude embodied in the *O'Gorman* case and have shown a good deal of sympathy for governmental recovery measures, it seems even more probable that they will now refuse to follow the *Adkins* doctrine. But I am instructed that Mr. Hughes is extremely reluctant to overrule a case expressly, especially when such action would result, as it almost certainly would here, in a five to four decision. Therefore, in order to placate the minority and to save the face of the court, it is my prediction that the *Adkins* case will be distinguished rather than directly overruled.

In distinguishing the *Adkins* case, the differences between the Eberhard-Wald Bill of New York and the N. R. A. Codes become important. Mr. Justice Sutherland objected to the District of Columbia statute because it fixed the cost of living as the standard instead of the value of the services, and because this standard was too vague to be applied with accuracy. He said further, on page 559:

"A statute requiring an employer to pay in money, to pay at regular and stated intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable."

The New York statute was carefully drawn to avoid these objec-

\(^2\) *Supra*, note 23.
The standard is clearly stated to be the value of the services rendered, and no reference is made to the cost of living. Then the commission is given three distinct criteria for the accurate application of this standard. It may take into account "all relevant circumstances" affecting the value of the service, which must mean benefit to the employer and general ability of the industry to pay. It may be guided by the considerations which would guide a court in a suit for quantum meruit, which the Supreme Court can hardly condemn for uncertainty. Finally, it may consider the wages paid in the state for similar work. The average of these three methods must be conceded to be a just figure.

But consider the average Code. Usually there is no statement of standards, whether the wage is to be the cost of living, the value of the services, or some third quantity. Nor is there any commission to vary the rate in different districts. There is only a flat declaration that the minimum wage shall be 40c per hour. You can distinguish this from the Adkins case only by saying that the statute is much worse; it is better to have an objectionable standard than no standard at all, especially when there is no administrative body with discretion over the actual application. The added fact that the Codes apply to men as well as to women, thus introducing a new and highly controversial element, makes the case for them very weak. One can only praise the wisdom of the framers of the New York statute in presenting the matter so discreetly.

Although the foregoing discussion leads to the conclusion that the Eberhard-Wald Bill will be sustained and that the minimum wage provisions of the Codes will be invalidated, the cases to date do not bear out the latter proposition. Three cases in the lower courts have not only accepted the validity of the Code provisions, but have extended them to allow the employee a civil action to recover the difference between the wages paid him and the prescribed minimum. These cases are unimportant as

---

29 See supra.
30 There is a strong sentiment against such laws for men within the ranks of organized labor itself. Armstrong, op. cit., supra, note 8, at p. 64.
Canton v. The Palms, Inc., 273 N. Y. S. 239, 162 Misc. 347 (July 17, 1934); Lane v. Smith, Mun. Ct., Marion Co., Ind., No. 51647 (June 6, 1934); Laney v. Milner Hotel Co., J. P. Ct., Grand Rapids,
authority, being all in municipal courts, but show a surprising liberality in the judges. The only really significant case is *United States v. Perkins*, now reported to be pending in the Supreme Court. This is a criminal action for paying less than the minimum wage under the Wet Primary Battery Code, but since defendant pleaded guilty, no legal issues were passed upon. Until its final adjudication by the Supreme Court we are limited to speculation, but I think it unfortunate that a case under the New York statute could not be the first to reach that body, as better calculated to work the destruction of the *Adkins* case.

NORMAN MACBETH, JR.,
243 Muirfield Road, Los Angeles, Calif.

---
