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A Fair Day's Pay for a Fair Day's Work: Time to Raise and Index the Minimum Wage.

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"A FAIR DAY'S PAY FOR A FAIR DAY'S WORK": TIME TO RAISE AND INDEX THE MINIMUM WAGE

WILLIAM P. QUIGLEY*

Our Nation so richly endowed with natural resources and with a capable and industrious population should be able to devise ways and means of insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.[1]

I. INTRODUCTION

Millions of people are working for a living but not receiving a living wage in return for their work.[2] The value of the minimum

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1. 81 CONG. REC. 4960 (1937) (statement of Pres. Franklin D. Roosevelt).

2. *See* Jared Bernstein & Lawrence Mishel, *The Growth of the Low-Wage Labor Market: Who, What and Why*, 3 KAN. J.L. & PUB. POL'Y 12, 13–17 (1994) (reporting that there is "unequivocal evidence" of trend among prime-aged (25–54), full-time workers that shows increased proportion earning poverty-level wages, at least partially due to falling value of minimum wage). The scope of the social and economic problems created by the devalued minimum wage is not limited to workers actually paid the minimum wage; rather,

wage continues to erode, with the Congressional Research Service estimating that the minimum wage would have to rise to $6.75 per hour in 1996 to equal the purchasing power it represented in 1978.[3] It is not in the common interest, nor in the interest of justice, for people to work full-time, yet remain mired in poverty. Reforming the minimum wage by raising it and indexing it for inflation is a critical step toward attaining Franklin Delano Roosevelt's goal of assisting the nation's working poor by providing "a fair day's pay for a fair day's work."[4]

This Article will examine generally those who earn minimum wages today, as well as those who can be described as the working poor, and will identify means of achieving a living wage. Part II of this Article reviews the history of the state and federal legislation creating minimum wages, because much of the historical dynamic surrounding the minimum-wage debate remains today. Part III examines the current operation of the law, with particular attention to the fluctuations in the value of the minimum wage. Finally, Part IV advances two proposals. The first is to immediately raise the minimum wage to a level equivalent in purchasing power to that of the late 1960s and 1970s so that minimum wages will lift the work-

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it extends to those employees who, while not paid the minimum wage, are close enough that their wages are affected by the minimum wage. *Id.* at 23. Thus, as the value of the minimum wage stays low or even falls, wages of these other workers weaken along with those earning the minimum wage. *Id.*

3. 139 CONG. REC. S2779 (daily ed. Mar. 11, 1993) (statement of Sen. Wellstone).

4. 81 CONG. REC. 4960 (1937) (statement of Pres. Franklin D. Roosevelt); *cf.* ISAAC SHAPIRO & ROBERT GREENSTEIN, MAKING WORK PAY: THE UNFINISHED AGENDA 1 (1993) (observing that "[m]any liberals and conservatives have coalesced around the goal that work should pay sufficiently so that individuals employed full-time are not poor"); Robert H. Haveman & John K. Scholz, *The Clinton Welfare Reform Plan: Will It End Poverty As We Know It?*, FOCUS, Winter 1994–1995, at 1, 8 (asserting that "unless the operation of the bottom end of the labor market is changed or supplemented, no plan to substitute work for welfare can secure economic independence for the nation's large and growing pool of low-wage, low-skilled workers," and suggesting that actions like new job tax credits for hiring low-skilled workers and employee-based wage subsidy programs are long-range solutions).

Any discussion of raising the minimum wage, expanding the Earned Income Tax Credit, or any other procedure to help low-wage workers must acknowledge that decent wages are only one element of what necessarily must be a multi-pronged attack on poverty. Even two-parent, working-poor families need help on at least four fronts: (1) providing medical protection for all; (2) making work pay a living wage; (3) replacing food stamps and welfare with transitional assistance limited in time; and (4) providing jobs for those parents who have exhausted public transitional assistance. DAVID T. ELLWOOD, POOR SUPPORT 105 (1988).

ing person to at least the poverty threshold for a family of three. The second proposal is designed to perpetuate the effect of the first by indexing the minimum wage to reduce the consistent ravages of inflation.

II. A PROMISE OF A FAIR DAY'S PAY: THE HISTORY OF THE FAIR LABOR STANDARDS ACT

Careful consideration must be given to the history of the struggle for the creation of minimum-wage laws because many of the political and economic forces that originally supported or opposed such laws remain powerful in the debate over the creation of a true living wage.[5] The struggle for minimal compensation guarantees in the United States has been fought in state legislatures, Congress, and the courts.[6] The original campaign for minimum wage laws in the United States was the result of growing public concern about the prevalence of sweatshops, which primarily victimized recent immigrants, women, and the young.[7] Consequently, the early

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5. *Compare* JAMES M. BURNS, CONGRESS ON TRIAL: THE LEGISLATIVE PROCESS AND THE ADMINISTRATIVE STATE 70 (1949) (noting presence of representatives from local and national labor organizations at 1938 Fair Labor Standards Act debates) *with Business Praises Clinton's Decision to Delay Push for Minimum Wage Increase*, Daily Lab. Rep. (BNA) No. 109, at D-4 (June 9, 1993) (describing local and national labor leaders' lobbying efforts in connection with President Clinton's plan to delay implementation of "living wage" through increase and indexation of minimum wage), *available in* LEXIS, BNA Library, DLABRT File.

6. *See* GERALD STARR, MINIMUM WAGE FIXING 5 (1981) (noting that early United States minimum-wage coverage began on state level, was checked temporarily by constitutional challenges in courts, and was thereafter implemented nationally by Congress in 1938).

7. *See* VIVIEN HART, BOUND BY OUR CONSTITUTION: WOMEN, WORKERS AND THE MINIMUM WAGE 64 (1994) (reporting that female, immigrant, and child employment in early 1900s was disproportionately concentrated in sweated trades). The unsafe and unhealthy working conditions in which women and children were forced to work were exposed by a 19-volume report released by the Federal Bureau of Labor in 1910 and 1911. *See* Willis J. Norlund, *A Brief History of the Fair Labor Standards Act*, 39 LAB. L.J. 715, 716 (1988) (discussing Labor Bureau's multi-volume report). These are the exact same groups still subject to sweatshop conditions in the United States. *See* Lora J. Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2181–84 (1994) (discussing continuing exploitation of immigrants in America's sweatshops). The employers that typically paid very low wages were in the garment industry, the retail industry, canning, and cigar-making. VIVIEN HART, BOUND BY OUR CONSTITUTION: WOMEN, WORKERS AND THE MINIMUM WAGE 65 (1994). While unionized manufacturing workers earned just over $20 for a 50-hour week, and nonunionized manufacturing workers earned just under $15 for a 50-hour week, women in the garment industry earned $6 per week. *Id.* at 65–66.

struggle for minimum-wage laws was fought, primarily at the state level, by women's groups like the Women's Educational and Industrial Union (WEIU), the Women's Trade Union League (WTUL), and the National Consumers' League.[8]

A. *State Minimum-Wage Legislation*

Massachusetts enacted the first minimum-wage legislation in the United States in 1912.[9] The Massachusetts law, which covered only minors and women, was not compulsory because the minimum-wage commission could only *recommend* minimum-wage rates that would provide a living wage.[10] California, Oregon, and Washington quickly followed suit, each passing minimum-wage laws in 1913.[11] A total of thirteen states, the District of Columbia, and Puerto Rico, had enacted minimum-wage programs by 1920.[12]

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8. VIVIEN HART, BOUND BY OUR CONSTITUTION: WOMEN, WORKERS AND THE MINIMUM WAGE 67–68 (1994) (noting that WTUL emerged as leader in Massachusetts campaign, first pressing for minimum wage legislation in 1909, and recognizing that WTUL was eventually joined by coalition of labor groups, including powerful textile union, WEIU). The National Consumers' League was a socio-reform organization dedicated to improving the living conditions of working children and women. *See* John W. Chambers, *The Big Switch: Justice Roberts and the Minimum-Wage Cases*, 10 LAB. HIST. 44, 47 (1969) (stating that National Consumers' League sponsored Massachusetts campaign for minimum-wage legislation and noting that 14 other states enacted league-sponsored bills between 1912 and 1921).

9. *See* VIVIEN HART, BOUND BY OUR CONSTITUTION: WOMEN, WORKERS AND THE MINIMUM WAGE 66–72 (1994) (describing history of Massachusetts campaign to enact minimum-wage law).

10. *See id.* at 71 (noting that limited application of Massachusetts law to women and children was typical given that state had tradition of passing laws in interest of women and children, and observing that noncompulsory provision was last-minute concession justified by belief that it was wiser to pass bill with recommendary powers than to have bill rejected by legislature); *see also* Thomas R. Powell, *The Judiciality of Minimum-Wage Legislation*, 37 HARV. L. REV. 545, 545 (1924) (suggesting that enforcement of original Massachusetts minimum-wage law was mere public censure or praise that left recalcitrant free to bargain at will).

11. Louise Stitt, *State Fair Labor Standards Legislation*, 6 LAW & CONTEMP. PROBS. 454, 454 (1939).

12. *See* Willis J. Norlund, *A Brief History of the Fair Labor Standards Act*, 39 LAB. L.J. 715, 716–17 (1988) (noting that, by 1920, Arizona, Arkansas, California, Colorado, Kansas, Massachusetts, Minnesota, Nebraska, North Dakota, Oregon, Utah, Washington, Wisconsin, Puerto Rico, and District of Columbia all had minimum wage laws). Three basic models of minimum-wage legislation were used. *Id.* The Massachusetts model established a wage commission to recommend voluntary minimum-wage rates based on what the commission members determined was the best combination of a "living wage" for the employees (women and children only) and the "financial condition" of the employer's business. *Id.* A second model used most of the Massachusetts model, but disregarded the

During the Great Depression, the need for minimum-wage legislation became painfully obvious. For example, in New York, three of every ten women who had been working in 1929 were out of work by 1932, and of those who were still working, many earned less than ten dollars per week.[13] In the mid-1930s, one in every three workers in many industries was still making less than forty cents per hour.[14] Consequently, by 1938, twenty-five states had some form of minimum-wage law.[15]

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financial conditions of the employer, made the minimum wage compulsory, and established sanctions for noncompliance. *Id.* at 718. The third model, which was called the "Utah Model," established a flat rate of minimum compensation for all covered workers. *Id.*

13. John W. Chambers, *The Big Switch: Justice Roberts and the Minimum-Wage Cases*, 10 LAB. HIST. 44, 47–48 (1969).

14. *See* 81 CONG. REC. 7801 (1937) (containing table analyzing number and proportion of workers in 71 industries who were paid less than 40¢ per hour).

15. *See* Keith B. Leffler, *Minimum Wages, Welfare, and Wealth Transfer to the Poor*, 21 J.L. & ECON. 345, 346 (1978) (noting that 25 states had some form of minimum-wage regulation in effect at passage date of FLSA). These states were: Arizona, Arkansas, California, Colorado, Connecticut, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Washington, and Wisconsin. Comment, *The Federal Wages and Hours Act*, 52 HARV. L. REV. 646, 673 n.203 (1939). The Oregon law was the first to be challenged all the way to the Supreme Court, and its constitutionality was upheld in 1917. *See* Stettler v. O'Hara, 243 U.S. 629, 629 (1917) (per curiam) (reasoning that state minimum-wage law was constitutional because it was within Oregon's police power to protect health, welfare, and morals of women and children). Prior to 1917, the Supreme Court had allowed state regulation of hours worked by upholding a Utah statute regulating the hours worked in mines. *See* Holden v. Hardy, 169 U.S. 366, 397–98 (1898) (distinguishing regulation of wages paid to mine workers as necessary for employee health, which was valid exercise of state's police power). However, in 1905, the Court struck down a New York statute limiting working hours of bakers because it interfered with the ability to contract. Lochner v. New York, 198 U.S. 45, 64 (1905). Then, in 1908, the Supreme Court upheld an Oregon law that set maximum working hours for women. Muller v. Oregon, 208 U.S. 412, 423 (1908).

The significance of the *Muller* litigation reached well beyond the context of the regulation of hours. Louis Brandeis authored the brief to the Supreme Court for the State of Oregon and was later involved as a Justice in significant minimum-wage cases. Brief for Defendant in Error, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107), *reprinted in* 16 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 63–78 (Philip B. Kurland & Gerhard Casper eds., 1975). In his 113-page brief, Brandeis used world-wide statistical, sociological, economic, and psychological data to support the proposition that hours could be regulated. Alpheus T. Mason, *Brandeis Brief*, *in* 2 GUIDE TO AMERICAN LAW 148, 148 (1983). Fewer than three pages of the brief were devoted to the examination of the law in question, but Brandeis quoted over 100 extra-legal sources. *Id.* This was the origin of what came to be known as the "Brandeis brief." Thomas M. Feldstein & Stephen B. Preser, *Louis D. Brandeis*, *in* 2 GUIDE TO AMERICAN LAW 145, 146 (1983).

Although minimum-wage advocates were successful on the state level, the United States Supreme Court generally rejected state statutes that interfered with employers' freedom to contract with their employees regarding wages.[16] The Court's last stand against state minimum-wage legislation came on June 1, 1936, when it struck down a New York statute that guaranteed a minimum wage to women and children.[17] The New York statute, drafted by Felix Frankfurter and Benjamin Cohen at the request of the National Consumers' League, was passed by the New York Legislature in 1933.[18] The following year, New York brought charges under this statute against Joseph Tipaldo for failing to pay minimum wages to the women that worked in his Brooklyn laundry.[19] Tipaldo was paying the women $10.00 per week for forty-seven hours of work instead of the required $14.88 per week.[20] After his arrest but prior to trial, Tipaldo challenged his arrest on the grounds that the New York statute was unconstitutional.[21] Tipaldo appealed his subsequent conviction to the New York Court of Appeals, and won.[22] The State of New York sought a writ of certiorari from the United States Supreme Court, asking that the minimum-wage law

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16. *See* Adkins v. Children's Hosp., 261 U.S. 525, 558 (1923) (striking down congressionally mandated District of Columbia minimum wage as violative of 14th Amendment); *see also* John W. Chambers, *The Big Switch: Justice Roberts and the Minimum-Wage Cases*, 10 LAB. HIST. 44, 45–46 (1969) (noting that Court consistently ruled against constitutionality of minimum-wage legislation from 1923 to 1937).

17. *See* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 609 (1936) (invalidating New York minimum wage laws as violative of Due Process Clause of 14th Amendment).

18. *See* John W. Chambers, *The Big Switch: Justice Roberts and the Minimum-Wage Cases*, 10 LAB. HIST. 44, 48 (1969) (discussing legislative history of New York minimum-wage statute and noting that National Consumers' League was instrumental in securing passage of statute).

19. People *ex rel.* Tipaldo v. Morehead, 200 N.E. 799, 799 (N.Y.), *rev'd*, 298 U.S. 587 (1936).

20. *See* John W. Chambers, *The Big Switch: Justice Roberts and the Minimum-Wage Cases*, 10 LAB. HIST. 44, 49 (1969) (noting that state decided to take Tipaldo to court only after warning him that he should be paying employees $14.88 per week that was required). When state inspectors told Tipaldo to pay the women the difference, he issued checks to his employees in the required amount, but forced the women to return $4.88 per week with threats that he would fire them. *Id.* The inspectors later learned that Tipaldo had told the women to endorse the back of their checks without showing the women the face of the checks. *Id.*

21. *See Tipaldo*, 200 N.E. at 799 (noting that because Tipaldo sought to test legality of arrest under habeas corpus proceeding, only issue before court was constitutionality of statute).

22. *Id.* at 801.

be upheld.[23] In 1936, the Supreme Court, in a five-to-four decision in *Morehead v. New York ex rel. Tipaldo*,[24] overturned the New York minimum-wage law, holding that the law was repugnant to the Due Process Clause of the Fourteenth Amendment.[25] The Court reasoned that the Due Process Clause prohibited New York from interfering with the ability of employers to contractually negotiate appropriate wages with employees.[26]

Supporters of state minimum-wage laws were outraged by the *Tipaldo* decision, prompting Congressman Hamilton Fish to call the *Tipaldo* opinion "a new Dred Scott decision condemning millions of Americans to economic slavery."[27] With Congress yet to enact any federal minimum-wage legislation, the Court's decision in *Tipaldo* effectively removed all safeguards against oppressively low wage rates. In response to the deteriorating standard of living facing American workers, the 1936 Democratic Party platform urged national action, including a constitutional amendment, if necessary, to eliminate substandard working conditions.[28]

B. *Federal Minimum-Wage Legislation*

By the time *Tipaldo* was decided, and before Congress passed wage legislation that was national in scope, Congress had already attempted its own local minimum-wage legislation. Following the example set by state legislatures, Congress established a minimum-wage board in 1918 with the power to determine and enforce minimum wages for women and minors working in the District of Co-

23. *Tipaldo*, 298 U.S. at 603.

24. 298 U.S. 587 (1936).

25. *Tipaldo*, 298 U.S. at 618.

26. *See id.* at 611 (noting that "state is without power by any form of legislation to prohibit, change or nullify contracts between employers and adult women workers as to the amount of wages to be paid").

27. 80 CONG. REC. 9040 (1936) (statement of Rep. Fish).

28. *See* John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464, 464 (1939) (highlighting tension between President Franklin D. Roosevelt and Supreme Court over mid-1930s labor issues).

lumbia.[29] The board established a minimum wage of 34.5¢ per hour, $16.50 per week, or $71.50 per month.[30]

Congress's attempt to authorize a minimum wage was thwarted, however, by the Supreme Court's 1923 decision in *Adkins v. Children's Hospital*.[31] In *Adkins*, an opinion later described as "a classic of laissez-faire philosophy,"[32] the Court praised the end sought to be furthered by the statute, but dismissed its means:

> The feature of this statute, which perhaps more than any other, puts upon it the stamp of invalidity, is that it extracts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do. The declared basis, as already pointed out, is not the value of the services rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health, and morals. The ethical right of every worker, man or woman, to a living wage may be conceded. One of the declared and important principles of trade organization is to secure it. And with that principle and with every legitimate effort to realize it in fact, no one can quarrel; but the fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it.[33]

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29. Act of Sept. 21, 1918, ch. 174, 40 Stat. 960 (repealed 1923); *see* Brief for Appellants at ii, Adkins v. Children's Hospital, 261 U.S. 525 (1922) (No. 795) (discussing establishment of minimum-wage board with directions to determine "what wages are inadequate to supply the necessary cost of living to any such women workers to maintain them in good health and protect their morals"), *reprinted in* 21 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 369 (Philip B. Kurland & Gerhard Casper eds., 1975).

30. *See* Brief for Appellants at ii, Adkins v. Children's Hospital, 261 U.S. 525 (1922) (No. 795) (detailing board's order regarding women and children working in District of Columbia), *reprinted in* 21 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 370 (Philip B. Kurland & Gerhard Casper eds., 1975).

31. *See* 261 U.S. 525, 554–55 (1923) (distinguishing statute from those previously upheld by Court as valid exercises of police power because statute at issue was unconstitutional delegation of legislative authority).

32. John W. Chambers, *The Big Switch: Justice Roberts and the Minimum-Wage Cases*, 10 LAB. HIST. 44, 47 (1969).

33. *Adkins*, 261 U.S. at 558. One wonders how the ethical right of every employee to a living wage, a right the Justices conceded, was to be achieved if the law could not regulate the employee's wages. *See id.* (assuming that trade organizations would secure living wage).

The Court's opinion in *Adkins* provoked outrage and some referred to the decision as "the malfeasance of chance and of the calendar."[34]

Notwithstanding the Supreme Court's reaction to localized minimum-wage legislation, Congress forged ahead and passed national minimum-wage legislation. Congress's first attempt at nationwide, federal minimum-wage legislation was the National Industrial Recovery Act of 1933[35] (NIRA), which authorized the National Recovery Administration (NRA) to establish hundreds of "codes of fair practice," including minimum wages, in all branches of industry.[36] The minimum wage under the NIRA ranged from 12.5¢ per

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34. Thomas R. Powell, *The Judicializing of Minimum-Wage Legislation*, 37 HARV. L. REV. 545, 552 (1937). Powell was scathingly critical of the Supreme Court's decision and the tortured procedural and political path that the case took to arrive at the Court. *Id.* at 547–48. When *Adkins* was first appealed to the United States Court of Appeals for the District of Columbia, one of the judges was so ill that the other two judges designated Justice Stafford of the Supreme Court to sit with them and decide the case. *Id.* at 547. In June 1921, the court of appeals ruled two to one in favor of upholding the statute. *Id.* After the panel denied motions for rehearing; however, the previously ill appellate judge wrote the appellate chief that he was considering granting rehearing. *Id.* at 548. Ultimately, the original dissenter and the previously ill judge together granted rehearing and reversed the previous decision two to one. *Id.* In the meantime, the Supreme Court underwent a substantial personnel change when Chief Justice White was replaced by Chief Justice Taft, Justice Clarke was succeeded by Justice Sutherland, Justice Day was succeeded by Justice Butler, and Justice Pitney was succeeded by Justice Sanford. *Id.* at 549–52. Additionally, Justice Brandeis recused himself when the case reached the Supreme Court. *Id.* at 548. Because many of these prior Justices had voted to uphold the Oregon minimum-wage law, Powell saw a six-member majority in favor of the statute change into a five-to-three vote against the minimum-wage legislation. *Id.* at 551. As one commentator of the time noted:

> Suffice it to say that minimum-wage legislation is now unconstitutional, not because the Constitution makes it so, not because its economic results or its economic propensities would move a majority of judges to think it so, but because it chanced not to come before a particular Supreme Court bench which could not muster a majority against it and chanced to be presented at the succeeding term when the requisite, but no more than requisite, majority was sitting. In the words of the poet, it was not the Constitution but "a measureless malfeasance which obscurely willed it thus"—the malfeasance of chance and of the calendar.

Id. at 552.

35. National Industrial Recovery Act of 1933, ch. 90, 48 Stat. 195, *amended by* Act of June 14, 1935, ch. 246, 49 Stat. 375, *terminated by* Exec. Order No. 7323, 3 C.F.R. 149 (1936–1965).

36. *See id.* §§ 3(a), 7(b), 48 Stat. at 196 (authorizing establishment of codes of fair practice, maximum hours of labor, and minimum rates of pay); *see also* Willis J. Norlund, *A Brief History of the Fair Labor Standards Act*, 39 LAB. L.J. 715, 719–20 (1988) (describing fair labor practice codes implemented by NRA).

hour for the Puerto Rican needle trades to 70¢ per hour in the construction industry.[37] The NIRA was quickly declared unconstitutional by the Supreme Court in *Schechter Poultry Corp. v. United States*[38] as an invalid exercise of federal power under the Commerce Clause.[39] Even after the *Schechter Poultry Corp.* decision, though, President Roosevelt was determined to press forward in pursuit of a national minimum wage, noting later in an address to Congress: "The statute of NIRA has been outlawed. The problems have not. They are still with us."[40]

The Supreme Court was obviously not a hospitable place for Roosevelt's New Deal legislation. In addition to invalidating the minimum wage and other provisions of the NIRA, the Court held unconstitutional the Railroad Retirement Act,[41] the Farm Mortgage Act,[42] the Agricultural Adjustment Act,[43] and the Bituminous Coal Conservation Act.[44] The Supreme Court's persistent rejection of state and federal minimum-wage legislation "appeared to create, as Roosevelt said, a 'no-man's land,' in which neither the federal government nor any state government could act to protect the worker."[45]

Nevertheless, on May 24, 1937, just one year after *Tipaldo*, Senator Hugo Black of Alabama, with the full backing of the Roosevelt Administration, introduced Senate Bill 2475, the Fair Labor Stan-

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37. Frank T. DeVyver, *Regulation of Wages and Hours Prior to 1938,* 6 LAW & CONTEMP. PROBS. 323, 331 (1939). DeVyver noted that under the NRA codes, 55% of the covered employees were guaranteed a wage of 40¢ per hour or over, and about 5% of the covered workers were only guaranteed a wage of less than 30¢ per hour. *Id.*

38. 295 U.S. 495 (1935).

39. *See Schechter Poultry Corp.*, 295 U.S. at 548–51 (declaring federal attempt to regulate wages and hours of citizens employed in internal commerce of states unconstitutional exercise of federal commerce power).

40. 81 CONG. REC. 85 (1937) (statement of Pres. Franklin D. Roosevelt).

41. *See* Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330, 362 (1935) (reasoning that Railroad Retirement Act did not comport with intent and meaning of constitutional power to regulate interstate commerce).

42. *See* Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601–02 (1935) (striking Farm Mortgage Act as violative of Takings Clause).

43. *See* United States v. Butler, 297 U.S. 1, 68 (1936) (holding that Constitution prohibits federal regulation and control of agricultural production).

44. *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (holding that federal power to fix minimum wages and maximum working hours violates property and liberty rights protected by Fifth Amendment's Due Process Clause).

45. WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 133 (1995).

dards Act[46] (FLSA). Congressman Connery introduced an identical bill in the House of Representatives.[47] Joint hearings of the Senate Committee on Labor and the House Committee on Labor were scheduled for June 1937. During the hearings, supporters of the bill pointed out the prevalence of low-wage workers in the country, citing examples from constituent letters:

> I have one here on my desk from a gentleman in Mississippi, a father, who is unable to work because he is an invalid, and his son is working in a sawmill in the State of Mississippi 12 hours per day, 6 days per week, for 15 cents per hour.[48]

Halfway through these hearings, however, Congressman Connery, Chair of the House Labor Committee, died; with him, some of the momentum for the FLSA passed as well.[49]

The bill was vigorously opposed by representatives of national business lobbies and agricultural interests from the low-wage South.[50] It was not just business interests, though, that obstructed the enactment of the FLSA. Representatives of organized labor,

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46. S. 2475, 75th Cong., 3d Sess. (1938). Legislative history for the original FLSA can be found in several sources. *See generally* JAMES M. BURNS, CONGRESS ON TRIAL: THE LEGISLATIVE PROCESS AND THE ADMINISTRATIVE STATE 67–97 (1949) (detailing battle to secure passage of FLSA); John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464, 466–74 (1939) (summarizing history of FLSA from President Roosevelt's original proposals to ultimate enactment).

47. H.R. 7200, 75th Cong., 3d Sess. (1938).

48. 81 CONG. REC. 7643, 7648 (1937) (statement of Sen. Black).

49. *See* Willis J. Norlund, *A Brief History of the Fair Labor Standards Act*, 39 LAB. L.J. 715, 720 (1988) (suggesting that Connery's death slowed enactment of FLSA). Despite the loss of the bill's House sponsor, President Roosevelt pressed on and in July 1937 called for its passage: "All but the hopelessly reactionary will agree that to conserve our primary resources of man power, government must have some control over maximum hours, minimum wages, and the evils of child labor." *See id.* at 719 (recounting President Roosevelt's push for passage of FLSA).

50. *See* JAMES M. BURNS, CONGRESS ON TRIAL: THE LEGISLATIVE PROCESS AND THE ADMINISTRATIVE STATE 70 (1949) (noting that those opposed to original bill were National Association of Manufacturers, United States Chamber of Commerce, National Association of Wool Manufacturers, Cotton Textile Institute, and Anthracite Institute, and stating that individual businessmen were divided by region with some northern interests supporting bill to offset low-wage competition in South, and southern business interests opposing bill). The New York Times was also initially hostile to establishing a minimum wage, editorially suggesting perverse employment effects on southern agricultural workers from federal action: "Both directly and indirectly it might increase unemployment in the South. . . . The wisest solution is to leave minimum-wage laws to the individual States. Half of them already have adopted such legislation, mainly within the last five years." *Wages, "North" and "South"*, N.Y. TIMES, Feb. 15, 1938, at 24.

while generally favoring the bill, still had major reservations, and there remained major differences of opinion between the different organized labor groups.[51] These differences were described as "the worst threat to the bill."[52] Suffering a profound loss of momentum, the bill was tied up in the House for the remainder of 1937, even failing in a special session late in the year.[53] Ultimately, the bill was held over into 1938.[54]

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51. *See* JAMES M. BURNS, CONGRESS ON TRIAL: THE LEGISLATIVE PROCESS AND THE ADMINISTRATIVE STATE 70–71 (1949) (asserting that "[d]ifferences among factions of organized labor were greater than those among businessmen" and that both William Green, Chief of American Federation of Labor (AFL), and John L. Lewis, Chairman of Committee for Industrial Organization (CIO), were concerned with rights of labor unions, rather than being concerned with unorganized workers). Green feared that national minimum-wage standards would weaken the American Federation of Labor by interfering with collective bargaining. *Id.* at 70. Lewis opposed a national minimum wage on the grounds that the national rate might become the fixed wage, thereby weakening the CIO's ability to negotiate higher wages through collective bargaining. *Id.* at 70–71.

52. *Id.* at 72. Burns argued that union support, particularly from the powerful AFL, was ambiguous because of perceived threats to the union's existing contractual arrangements in the crafts. *Id.* Because of this lukewarm support, labor supporters in the Senate initially refused to commit to the bill until the AFL and others clarified their positions. *Id.* President Roosevelt had to summon William Green to a "peace parley" that resulted in three changes to the bill: prohibition of interference in areas of existing collective bargaining; no interference with the Walsh-Healy Act of 1936, which maintained labor standards on government contracts; and a prohibition on establishing minimum wages lower than regional prevailing wages. *Id.* at 73. Once these changes were adopted, Green supported the bill in the regular session. *Id.* However, according to Burns, even this effort was not enough. *Id.* When the bill was not enacted in the regular session, President Roosevelt called a late-1937 special session of Congress to take up wage-and-hour and other "must" legislation. *Id.* at 74. The national AFL convention had just repudiated Green's "lukewarm" endorsement of the original wage-and-hour bill, even with Green's amendments. *Id.* at 75. Green then proposed additional amendments, such as having federal attorneys enforce new standards in criminal proceedings, which reflected opposition to any effective wage-and-hour legislation. *Id.* at 76. When Green's proposals were voted down, the AFL asked all labor supporters to send the bill back to committee. *Id.* This recommendation, combined with existing business and southern opposition, doomed the bill for 1937. *Id.*

53. *See* Willis J. Norlund, *A Brief History of the Fair Labor Standards Act*, 39 LAB. L.J. 715, 719–21 (1988) (providing extensive review of procedural details of FLSA's legislative history); *see also* KENNETH S. DAVIS, FDR: INTO THE STORM 1937–1940, at 218–19 (1993) (contending that support weakened for FLSA while stalled in conservative rules committee through 1937 sessions and noting that FLSA received cool reception in second session of 1938, with many supporters gone). The bill was further jeopardized by the political turmoil surrounding Roosevelt's ill-fated Court-packing plan. *See* JAMES M. BURNS, CONGRESS ON TRIAL: THE LEGISLATIVE PROCESS AND THE ADMINISTRATIVE STATE 69 (1949) (noting that Court-packing plan nearly led to defeat of wage-and-hour bill).

54. Willis J. Norlund, *A Brief History of the Fair Labor Standards Act*, 39 LAB. L.J. 715, 720 (1988).

While Congress debated the FLSA, the Supreme Court began to undergo dramatic change. Ironically, although the Supreme Court had previously blocked state and New Deal efforts to create a minimum wage, the Court ultimately gave a green light to the minimum-wage reforms and other projects of the New Deal.[55] In 1937, only ten months after *Tipaldo*, the Supreme Court reversed its previous decisions in *Adkins* and *Tipaldo* in *West Coast Hotel Co. v. Parrish*.[56]

Elsie Parrish, the plaintiff in this groundbreaking case, worked as a hotel chambermaid in Wenatchee, Washington.[57] Ms. Parrish sued her ex-employer for back pay of $216.19, which was due under Washington's minimum-wage law.[58] The trial court ruled that *Adkins* was determinative as to the validity of the Washington state minimum-wage law and denied Elsie Parrish's plea for relief.[59] The Washington Supreme Court subsequently reversed and upheld the legislation, reasoning that the United States Supreme Court's decision in *Adkins* involved a federal law and the Court had never invalidated a state law.[60] Shortly after the Washington Supreme Court's decision, however, the *Tipaldo* decision did ex-

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55. *See* John W. Chambers, *The Big Switch: Justice Roberts and the Minimum Wage Cases*, 10 LAB. HIST. 44, 45 (1969) (asserting that concept of national governmental responsibility for state of economy and state minimum-wage legislation was focal point of Court's change from opponent to supporter of social and economic reform). One author suggested that state minimum-wage legislation lacked only the judiciary's acceptance: "An exceptional feature here is that the decline resulted almost wholly from adverse decisions on constitutionality, only one state repealing its law. The vigorous resumption of activity in 1933 and its continuance in 1937 and 1938 may be an indication of a thwarting of public sentiment by the courts." Orme W. Phelps, *The Legislative Background of the Fair Labor Standards Act*, *in* 9 STUDIES IN BUSINESS ADMINISTRATION 65 (1939).

56. 300 U.S. 379, 400 (1937).

57. Brief of Appellant at 3, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (No. 293), *reprinted in* 33 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 98, 100 (Philip B. Kurland & Gerhard Casper eds., 1975).

58. *Id.*

59. *See id.* at 100–01 (noting that trial court relied on *Adkins* in concluding that Washington minimum-wage law was violative of Fourteenth Amendment). The trial court did allow recovery of $17.00 that was admittedly owed to Elsie Parrish. *Id.* at 100. Ms. Parrish had previously refused to accept the $17.00 because it was tendered by her employer in full satisfaction of the money owed her. *Id.*

60. Parrish v. West Coast Hotel Co., 55 P.2d 1083, 1090 (Wash. 1936), *aff'd*, 300 U.S. 379 (1937).

actly that.[61] Consequently, when the employer appealed, the outlook for Elsie Parrish's case before the Supreme Court looked so grim that the Consumers' League, on the advice of Frankfurter and Cohen, did not even file an amicus brief.[62]

Shocking almost all observers, on March 29, 1937, the Supreme Court reversed its decisions in *Tipaldo* and *Adkins* and announced that minimum-wage laws were, indeed, appropriate subjects of legislation.[63] In deciding in favor of Elsie Parrish, the Court noted:

> The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest.[64]

The key to the Court's stunning reversal was a mysterious voting change by Justice Owen J. Roberts. Roberts, who just ten months earlier had voted with the *Tipaldo* majority to declare a state minimum-wage statute unconstitutional, now joined the *Parrish* majority to hold a similar state minimum-wage statute constitutional.[65]

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61. *See* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 618 (1936) (reversing conviction of laundry manager, Joseph Tipaldo, under New York state minimum-wage statute as repugnant to Due Process Clause of 14th Amendment because statute violated liberty of contract that safeguards equally rights of employee and employer to bargain over wages).

62. *See The Case of the Wenatchee Chambermaid* (asserting that, based on recent *Tipaldo* decision, National Consumers' League and Elsie Parrish had reason to expect worst), *reprinted in* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 167 (1995).

63. *Parrish*, 300 U.S. at 400.

64. *Id.* at 399–400. The story of the organizational and legal strategy involved in this reversal is itself a fascinating story. *See* VIVIEN HART, BOUND BY OUR CONSTITUTION: WOMEN, WORKERS AND THE MINIMUM WAGE 87–150 (1994) (describing chain of events, including public outrage after *Tipaldo* decision, that led to Court's reversal in *Parrish*); *see also The Case of the Wenatchee Chambermaid* (summarizing political and social revolution prompted by Roosevelt's New Deal reforms and suggesting that shift in Court's philosophy regarding minimum-wage legislation amounted to constitutional revolution), *reprinted in* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 163–79 (1995).

65. *See* John W. Chambers, *The Big Switch: Justice Roberts and the Minimum-Wage Cases*, 10 LAB. HIST. 44, 47 (1969) (detailing controversy among lawyers, historians, and scholars over why Justice Roberts changed his vote to support minimum-wage legislation).

Why Justice Roberts changed his vote, which apparently was cast, though not announced, before President Roosevelt publicly revealed his Court-packing plan, has been hotly debated since the day *Parrish* was decided.[66]

Although we may never know what persuaded Justice Roberts to change his vote, it is clear that *Parrish* not only opened the way for passage of the reforms of the FLSA, but also signalled an end to the Supreme Court's blockage of other New Deal legislation.[67]

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66. Some have argued that Justice Roberts did not actually switch, but instead merely narrowly ruled on the questions before him. *See* Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 *passim* (1955) (attempting to justify Roberts's switch on several nonpolitical grounds). However, several commentators now agree that Justice Roberts's swing was politically motivated. *See* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 132–43, 310 n.17 (1995) (arguing that because *Parrish* was apparently decided after Franklin D. Roosevelt's 10-million-vote margin of victory and before announcement of Court-packing plan, Roberts's "somersault" was merely enlightened reading of election returns); *see also* Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 641 (1994) (dissecting various versions of Roberts's switch, focusing on Felix Frankfurter's role in creating justifications for Roberts, and noting that before being elevated to Supreme Court and at time vote in *Parrish* was announced, Frankfurter himself accused Roberts of switching for political reasons).

67. One commentator observed in 1939 that the FLSA could hardly expect to survive constitutional challenge based on the Supreme Court's previous Commerce Clause decisions. Comment, *The Federal Wages and Hours Act*, 52 HARV. L. REV. 646, 647 (1939). The commentator went on to note:

> It is perfectly clear, however, that the pressure of public opinion and the change in the Court's personnel have, by altering its social balance, greatly affected the course of present constitutional history. There has resulted a series of decisions which have in part removed the commerce clause objection to direct regulation of industry and the due process difficulty. If the limits of such a course have already been reached, the Act will still fail of constitutionality. But the decisions thus far rendered would seem at once a prophecy of and authority for further extension.

Id. Other commentators agreed, observing that the decision on the constitutionality of the FLSA "indicate[s] the extent to which the recent liberal trend in the Supreme Court has opened the door to national solution of social and economic problems." Note, *The Fair Labor Standards Act of 1938*, 39 COLUM. L. REV. 818, 818 (1939).

The states responded to the new legal climate after *Parrish* by replacing and enforcing state minimum-wage laws previously invalidated by *Tipaldo*. *See The Case of the Wenatchee Chambermaid* (noting that while FLSA was moving through Congress, after *Parrish*, New York made plans to enact legislation to replace the law invalidated in *Tipaldo*), *reprinted in* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 178 (1995). After *Parrish* reversed *Tipaldo*, the Supreme Court upheld every New Deal statute that came before it. *See* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 228–36 (1995) (discussing Court's post-*Parrish* review of New Deal legislation). The Supreme Court also reversed 31 other prior decisions in the 10 terms between 1937 and 1946. *The Case of the Wenatchee Chambermaid*, *re-*

Parrish and subsequent decisions upholding New Deal legislation "served to take considerable pressure off of the drive to enact the Court Bill . . . [and] the Administration decided to go ahead with the introduction of a [1938 version of the] wage and hour bill."[68]

Despite President Roosevelt's inability to get Congress to pass the FLSA in 1937, he continued to push for its passage in 1938, challenging business leaders who opposed the law.[69] Some minimum-wage advocates still doubted that any wage-and-hour bill could be enacted in light of the continuing opposition from Southern Democrats, national business lobbies, and the American Federation of Labor.[70] Southern Democrats demanded that any wage-and-hour bill include North-South wage differentials to prevent increases in agricultural labor costs and industrial prices.[71] Additionally, organized labor lobbied for numerous exemptions and sought to curb the power of the proposed minimum-wage board by statutorily limiting the board's ability to fix wages at over forty cents per hour or a work week of less than forty hours.[72]

Substantially different versions of the bill passed the House and Senate, and a conference committee crafted a bill that ultimately gave labor the forty-hour work week and a forty-cent minimum wage, exempted a number of powerful industries from coverage, and vested a single labor department administrator with limited discretion.[73] With these modifications, both the House and Senate passed the FLSA, which was signed into law by President Roosevelt on June 25, 1938.[74] The 1938 FLSA was held constitu-

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printed in WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 178 (1995). *Parrish* was the first shot in what some scholars call "the Constitutional Revolution of 1937." *Id.*

68. John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464, 465 (1939).

69. *See* Willis J. Norlund, *A Brief History of the Fair Labor Standards Act*, 39 LAB. L.J. 715, 719 (1988) (detailing Roosevelt's campaign for national minimum wages).

70. JAMES M. BURNS, CONGRESS ON TRIAL: THE LEGISLATIVE PROCESS AND THE ADMINISTRATIVE STATE 78 (1949).

71. *Id.* at 77–78.

72. *Id.* at 71.

73. *See id.* at 81–82 (asserting that Senate and House bills differed so radically that conference committee had to act as third house of Congress, and further noting that 14-man committee was pledged to secrecy during deliberations because interest groups were so active).

74. Willis J. Norlund, *A Brief History of the Fair Labor Standards Act*, 39 LAB. L.J. 715, 721 (1988). As one historian of the time noted:

tional in 1941 by a unanimous Supreme Court in *United States v. Darby*.[75] Thus, by 1941, the fight for a judicially enforceable minimum wage for some workers was finally won. The fight for a real living wage, however, was only beginning.

III. A Promise Broken: The Fair Labor Standards Act's Failure to Maintain a Living Wage

The history of the FLSA indicates that a primary goal of the minimum wage was to provide a living wage. While other considerations certainly were also important to the passage of the FLSA, the quest for a living wage was central.[76] President Roosevelt characterized the goal of the FLSA as more than the creation of a national minimum wage meeting workers' bare subsistence requirements; he envisioned that the FLSA would guarantee "living wages" and a "decent living" to all Americans.[77] Commentators writing at the time the FLSA was passed also recognized the need to protect the living conditions of the lowest-wage workers:

> [O]ne might have assumed that no bill would have an easier journey through Congress than one seeking to shorten the working day and to abolish starvation wages. . . . As it turned out, the Fair Labor Standards Act emerged only after a stormy twelve-month period of gestation. Surviving a series of near-miscarriages and attempted abortions during three separate sessions of Congress, the infant bill finally appeared, crippled, undersized, and hardly recognizable to its progenitors.

JAMES M. BURNS, CONGRESS ON TRIAL: THE LEGISLATIVE PROCESS AND THE ADMINISTRATIVE STATE 68–69 (1949).

75. 312 U.S. 400, 462 (1941). The Court stated that "it is no longer open to question that the fixing of a minimum wage is within the legislative power and the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment." *Darby*, 312 U.S. at 462. This decision has been hailed as one of the most important cases in the history of American constitutional law. PAUL R. BENSON, JR., THE SUPREME COURT AND THE COMMERCE CLAUSE 1937-1970, at 89 (1970).

76. *See* 29 U.S.C. § 202(a) (1994) (noting that goal of FLSA is eradication of "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers").

77. 135 CONG. REC. S5481 (daily ed. May. 17, 1989) (statement of Sen. Mitchell) (quoting President Franklin D. Roosevelt). The United States is by no means alone in its quest to ensure a living wage. *See* GERALD STARR, MINIMUM WAGE FIXING 3–11 (1981) (offering review of international movements to establish minimum wage). The relative level of the minimum wage varies internationally from 17% of average manufacturing wages in Spain to over 40% in Australia, New Zealand, Puerto Rico, and Turkey. DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE 240 (1995). In the United States, the minimum wage is a "relatively modest" 26.3% of average manufacturing wages. *Id.* at 241.

> The most favorable implication of the Fair Labor Standards Act is the federal statutory recognition of the fact that the living conditions of those in the lowest income group should not be determined solely by the anonymous forces of the market mechanism. The Fair Labor Standards Act is a denial of the thesis that an [sic] competitive market without any regulatory interference will result in the greatest good for the greatest number of people. It postulates the necessity of considering human labor no longer as a "commodity" which is subject only to the iron laws of the market mechanism.[78]

Finally, subsequent reports to Congress support the conclusion that the goal of the minimum wage was a living wage: "The purpose of the [FLSA] was and is to establish a floor below which wages would not fall, a floor which is adequate to support life and a measure of human dignity. It is a laudable legislative effort to ensure a just wage in return for a day's work."[79]

Although the FLSA was expected to have a monumental impact on American industry, the Act was more of a promise of fair labor than actual protection for many workers, at least so far as the minimum wage was concerned.[80] The new law imposed a twenty-five-cents-per-hour federal minimum wage for some employees working in interstate commerce.[81] In comparison, the average hourly wage in the unionized automobile industry in 1937 was eighty-eight cents per hour.[82] Only 11 million workers were actually covered by the FLSA, and only about 300,000 covered workers earned less than the original twenty-five-cents per-hour minimum.[83]

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78. Otto Nathan, *Favorable Economic Implications of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 416, 416 (1939).

79. S. REP. No. 6, 101st Cong., 1st Sess. 12 (1989).

80. *See* Comment, *The Federal Wages and Hours Act*, 52 HARV. L. REV. 646, 648 (1939) (noting that FLSA was initially considered to "have more far-reaching effects on American industry than any other single piece of legislation").

81. Fair Labor Standards Act of 1938, ch. 676, § 6(a), 52 Stat. 1060, 1062 (current version at 29 U.S.C. § 206(a)(1) (1994)); *see* Keith B. Leffler, *Minimum Wages, Welfare and Wealth Transfers to the Poor*, 21 J.L. & ECON. 345, 346–47 (1978) (listing mandates of 1938 FLSA).

82. Samuel Herman, *The Administration and Enforcement of the Fair Labor Standards Act*, 5 LAW & CONTEMP. PROBS. 368, 368 n.4 (1939).

83. The estimated figures for FLSA minimum-wage coverage were as follows: (1) 11,000,000 employees covered; (2) 300,000 receiving less than 25¢ per hour; (3) 550,000 receiving less than 30¢ per hour; and (4) 1,418,000 receiving less than 40¢ per hour. Carroll R. Daugherty, *The Economic Coverage of the Fair Labor Standards Act: A Statistical Study*, 6 LAW & CONTEMP. PROBS. 406, 407 (1939); *see* VIVIEN HART, BOUND BY OUR CONSTITUTION: WOMEN, WORKERS AND THE MINIMUM WAGE 152 (1994) (arguing that

A. *Fair Labor Standards Act Exemptions*

One of the biggest problems with the FLSA, as originally enacted, was the number of exemptions it contained.[84] In fact, some commentators at the time suggested that the FLSA's exclusions, like those for intrastate industries, actually provided protection to sweatshops.[85] The law exempted the following employees from minimum-wage protections: those in executive, administrative, professional, or local retail (including outside sales); workers in retail or service industries operating in intrastate commerce; seamen; air carrier workers; workers in the fishing and seafood processing industry; anyone in agriculture; people in dairy processing; workers for small newspapers; local bus or trolley workers; and learners, apprentices, and handicapped workers.[86] Because of these exemp-

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concealed biases, itemized exemptions, and omissions undermined perceived universality of 1938 FLSA).

84. *See* SAR A. LEVITAN & RICHARD S. BELOUS, MORE THAN SUBSISTENCE: MINIMUM WAGES FOR THE WORKING POOR 41 (1979) (lamenting that "[s]o many exemptions had been written into the bill that at one point during the congressional debate Martin Dies filed a satirical amendment calling on the Labor Department to report back to Congress within 90 days after the bill's passage on whether any worker was covered by the act").

85. *See* Noel Sargent, *Economic Hazards in the Fair Labor Standards Act*, 5 LAW & CONTEMP. PROBS. 422, 423 (1939) (arguing that while FLSA subjects some intrastate industries to federal control in certain circumstances, limited exceptions do not apply to trades, occupations, and service industries thriving on sweatshop labor).

86. Fair Labor Standards Act of 1938, ch. 676, §§ 13–14, 52 Stat. 1060, 1067 (current version at 29 U.S.C. §§ 213–14 (1994)). These workers were not only exempted from the minimum wage, but also from maximum-hour laws as well. *Id.* In construing these and subsequent exemptions, the Supreme Court has noted:

> Any exemption from such humanitarian and remedial legislation must . . . be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.

A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945). Employers and business organizations have recently criticized these exemptions as too narrow and no longer appropriate because a "sea-change" has occurred in American industry since 1938 that demands changes in determining who is covered by the FLSA and who is not:

> The FLSA's exemption standards no longer effectively identify those who need the act's protection and those who do not. . . . [There is] a growing body of middle-echelon employees—engineers, accountants, computer professionals, and other skilled, highly compensated employees—who would not appear to need the FLSA's protection yet who are not clearly executives, administrators or professionals.

William J. Kilberg, *Rule of Law: A 1938 Law That Hurts Workers More Than It Helps Them*, WALL ST. J., May 10, 1995, at A15. To show the need for change, Kilberg pointed to a court decision that construed the FLSA to cover the writers and producers of the NBC

tions, the employees protected by the FLSA were predominantly white, male, industrial-class workers.[87] Indeed, the 1938 FLSA was politically crafted to exclude many workers from its minimum-wage coverage, particularly women and southern African-American workers.[88]

Though gender discrimination was officially abandoned in the FLSA legal terminology, lasting cultural prejudices and a gender-segregated economy combined to create discrimination.[89] The

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Nightly News. *Id.* The decision found the writers and producers to be more like shop-floor workers than administrators or professionals. *Id.* Thus, NBC owed them unpaid overtime at 150% of their putative hourly rates, which, according to Kilberg, were annual salaries in the high five-figures. *Id.* Kilberg suggested that the FLSA should incorporate some adaptability principle to allow the law to change with the times, and that instead of coverage being determined by descriptions of occupations, it might be more appropriate to determine coverage based on an earnings test. *Id.*

87. *See* VIVIEN HART, BOUND BY OUR CONSTITUTION: WOMEN, WORKERS AND THE MINIMUM WAGE 152 (1994) (arguing that contemporary definitions of "intrastate" and "commerce," along with FLSA exemptions, combined to exclude women and blacks from guarantee of minimum wage).

88. *See id.* at 152–53 (asserting that because women and blacks were employed primarily in intrastate and agricultural positions, they received little protection from 1938 FLSA). *See generally* Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1371–80 (1987) (reviewing legislative and economic history of racial issues associated with passage of FLSA). While promulgated to improve labor conditions, in application, the FLSA has a tendency to marginalize African-American workers:

> The dilemma, as viewed from the Negro angle, is this: on the one hand, Negroes constitute a disproportionately large number of the workers in the nation who work under imperfect safety rules, in unclean and unhealthy shops, for long hours, and for sweatshop wages; on the other hand, it has largely been the availability of such jobs which has given Negroes any employment at all. . . . When the jobs are made better, the employer becomes less eager to hire Negroes, and white workers become more eager to take the jobs from the Negroes.

GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 397 (1944); *see also* VIVIEN HART, BOUND BY OUR CONSTITUTION: WOMEN, WORKERS AND THE MINIMUM WAGE 158 (1994) (suggesting that agricultural workers were excluded from FLSA coverage as concession to farm bloc); David E. Bernstein, *Roots of the 'Underclass': The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 129–31 (1993) (criticizing FLSA as cause of "massive unemployment for blacks," as applied in South, where availability of unskilled, cheap labor was major advantage offered to relocating industries, and contending that resulting inequitable application of FLSA excluded many black workers from coverage).

89. *See* VIVIEN HART, BOUND BY OUR CONSTITUTION: WOMEN, WORKERS AND THE MINIMUM WAGE 152 (1994) (arguing that effect of interpretive openings and exemptions was disproportionate exclusion of women from 1938 FLSA coverage).

FLSA's definition of "employee"[90] resulted in primarily traditional male jobs, such as those of production-line workers in steel plants, being covered by the FLSA, while exemptions left traditional female jobs, such as file clerk, secretary, switchboard operator, and janitor positions, open to argument.[91] Other predominantly female occupations were indirectly excluded from coverage, including hotel workers, such as waitresses and chambermaids, retail clerks performing customer service, and janitors and nurses in hospitals.[92] Additionally, "domestic workers" were traditionally considered "help," rather than laborers, and they were generally not working in industry, but rather in the inviolable privacy of the home; therefore, they were not within the scope of the FLSA.[93] This consequence obtained despite Eleanor Roosevelt's plea for "extension of the law to define some standard of employment for domestic servants and farm laborers."[94]

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90. *See* Fair Labor Standards Act of 1938, ch. 676, § 3(e), 52 Stat. 1060, 1060 (current version at 29 U.S.C. § 203(e)(1) (1994)) (defining employee as "any individual employed by an employer," subject to exemptions).

91. *Id.* § 13(a), 52 Stat. at 1067 (current version at 29 U.S.C. § 213(1) (1994)) (exempting any employee employed in administration, local service, or retail establishments from FLSA coverage).

92. *Id.; see* PHYLLIS M. PALMER & SHARON L. GRANT, THE STATUS OF CLERICAL WORKERS 166 (1979) (suggesting that FLSA's exemptions are subtle form of gender discrimination and noting that occupations which are extended least amount of protection are those traditionally dominated by women). The exclusion of predominately female occupations is particularly ironic in light of the fact that it was Elsie Parrish's Supreme Court victory that helped create the judicial basis for the FLSA.

93. *See* PHYLLIS M. PALMER, DOMESTICITY AND DIRT: HOUSEWIVES AND DOMESTIC SERVANTS IN THE UNITED STATES 1920–1945, at 120 (1989) (noting that prior to enactment of FLSA, efforts were made to include domestics, or "household help," in coverage of 1933 National Industrial Recovery Act (NIRA)). The following response to a letter-writing campaign for NIRA coverage by workers, civil rights groups, and other organizations such as the National Association for Domestic Workers captures the traditional sentiments toward domestic workers:

> [W]e have received numerous communications concerning the status of household help. While we are in full sympathy, there is no possible way we can take direct action on their behalf. The homes of individual citizens cannot be made the subject of regulations or restrictions and even if this were feasible, the question of enforcement would be virtually impossible.

Id. Additionally, domestics were excluded from social security coverage in the original 1935 act and not incorporated at all until the 1950 amendments that covered women working two days per week. *Id.* at 155.

94. *See* VIVIEN HART, BOUND BY OUR CONSTITUTION: WOMEN, WORKERS AND THE MINIMUM WAGE 166 (1994) (noting that Eleanor Roosevelt advocated extension of FLSA coverage to include farm laborers and domestic servants).

The FLSA's exemptions, particularly the exemptions for agricultural workers, also had racial consequences. Initially, the FLSA was promoted, in part, to increase wages in the impoverished South and thus slow the migration of industrialized jobs from the unionized North to the nonunion South.[95] The political and business interests in the South, however, successfully raised substantial objections to widespread coverage in the South.[96] White southern interests feared that if the benefits of the FLSA were extended on an equal basis to blacks and whites, the southern economic and racial caste system would collapse.[97] Representative J. Mark Wilcox of Florida was especially open about this issue:

> I regard the wage and hour bill, in its present form as reported to the House, the most serious threat to representative democracy which has been proposed in this generation. . . . There has always been a difference in the wage scale of white and colored labor. . . . You cannot put the Negro and the white man on the same basis and get away with it. Not only would such a situation result in grave social and racial conflicts but it would result in throwing the Negro out of

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95. *See* WILLIAM GREIDER, WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY 197 (1992) (noting that original goal of federal wage laws was to slow migration of jobs from North to South and suggesting that rise of global economy requires more flexible version of federal wage laws recognizing disparities between rural and urban labor markets).

96. *See* VIVIEN HART, BOUND BY OUR CONSTITUTION: WOMEN, WORKERS AND THE MINIMUM WAGE 157 (1994) (asserting that "low-wage, antiunion economy of the southern states stood to lose its advantage if national labor standards were imposed"); *see also* JOSEPH P. LASH, DEALERS AND DREAMERS: A NEW LOOK AT THE NEW DEAL 339 (1988) (noting that biggest obstacle to enactment of FLSA was opposition from South because FLSA meant substantial wage increases in South's agricultural industries). *But see* ALAN BRINKLEY, THE END OF REFORM 41–42 (1995) (arguing that some major industrialists believed that FLSA would improve their own competitiveness against low-wage manufacturers, especially in South).

97. *See* Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1373 (1987) (noting that even President Roosevelt recognized potential impact of federal wage legislation on existing disparate treatment of southern blacks and considered issue to be of such magnitude that no statesman could wholly ignore it).

A report submitted to Congress of the number and proportion of workers in 71 industries that earned less than 40¢ per hour reveals the regional character of the potential minimum-wage impact. *See* 81 CONG. REC. 7801 (1937) (discussing potential disparity in impact of minimum-wage increase). While 36.7% of all the workers in those 71 industries earned less than 40¢ per hour, many industries were clearly *minimal* wage industries: 100% of those employed as cotton pickers were paid less than 40¢ per hour, as were 90% of southern, sugar cane refinery workers, 98% of those in cigarette factories, and 84% of southern, cotton garment makers. *Id.*

> employment and making him a public charge. There is just not any sense in intensifying this racial problem and this bill cannot help but produce such a result.[98]

The exemptions for agricultural workers resulted in a direct benefit to a few large farms and plantations in the Southwest and South that depended on cheap labor by nonwhite farm workers.[99] Southern business interests, which had opposed the FLSA in its entirety, were willing to consider substantial exemptions that protected their interests as the price for passage.[100] The main victims of these exemptions were southern, primarily nonwhite farmworkers earning only about ten cents per hour.[101]

Exemptions to the FLSA remain to a greater extent than many people might think.[102] Even as late as 1966, only forty percent of nonagricultural workers were covered by the minimum-wage laws.[103] Today, over 13 million workers are still exempt from minimum-wage protection, with an estimated 2.4 million of these persons actually earning less than the minimum wage.[104]

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98. 82 CONG. REC. 1402-04 (1937) (statement of Rep. Wilcox).

99. *See* Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1375–80 (1987) (arguing that because there were relatively few large farms in South that actually employed outside laborers, few farms benefitted from FLSA agricultural labor exclusions). Linder reported a couple of interesting facts. First, only one in seven farms hired outside laborers in 1938, fewer than 1% of farms hired more than four people, and of the latter group almost 77% were in the South and California, Arizona, and New Mexico. *Id.* Second, farmworkers outside of the South and Southwest were already making more than the 25¢ per hour mandated by the FLSA. *Id.*

100. *See* VIVIEN HART, BOUND BY OUR CONSTITUTION: WOMEN, WORKERS AND THE MINIMUM WAGE 155 (1994) (noting that "southern businessmen, for example, often combined outright opposition with claims for any or all kinds of special treatment if the worst should happen and a bill pass").

101. *See* Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1375–80 (1987) (recognizing that southern farm workers' average daily wage prior to FLSA was $1.00, or approximately 10¢ per hour).

102. *See* 29 U.S.C. § 213 (exempting professionals, executives, administrators, teachers, amusement or recreational park employees, babysitters, domestic workers, criminal investigators, and fishermen from FLSA coverage).

103. Colin D. Campbell & Rosemary G. Campbell, *State Minimum Wage Laws As a Cause of Unemployment*, 35 S. ECON. J. 323, 327 (1967).

104. *See* SAR A. LEVITAN ET AL., WORKING BUT POOR: AMERICA'S CONTRADICTION 49–50 (1993) (asserting that 2.9 million outside-sales workers and 10.8 million private, nonsupervisory employees are outside protection of FLSA, and observing that of these, 2.4 million hourly workers earned less than minimum wage in 1986). The 10.8 million private, nonsupervisory workers may be broken down as follows:

Despite amendments that increased FLSA coverage, persons classified as executive, administrative, or professional employees are still exempted from minimum-wage protection.[105] The AFL-CIO points out that the $250-a-week salary test, which exempts those workers classified as executive, professional, or administrative, results in less than minimum wages for those workers if they work more than sixty hours per week.[106] Furthermore, persons in lower-wage jobs are also exempted from minimum-wage protection. These workers include employees of seasonal amusement businesses, people doing outside sales, casual babysitters, some agricultural and seafood workers, some employees of small newspapers, and some retail and service workers.[107] Any attempt to reform the minimum wage must include these low-income workers; otherwise, substantial numbers of people will be left behind.[108]

Variation in the percentage of the work force denied minimum-wage protection by industry (1990 in millions)

Industry	*Total*	*Covered*	*Exempt*
Total private	81.7	70.9	10.8
Agriculture	1.7	.07	1.1
Manufacturing	16.9	16.4	0.5
Wholesale trade	17.9	16.2	1.7
Retail trade	17.9	16.2	1.7
Finance, insurance, and real estate	5.9	4.4	1.4
Service industries	21.7	17.2	4.5
Private Household	1.3	0.9	0.4
Other	10.8	10.7	0.1

Id. at 50. In 1984, 1.8 million people were reported as earning less than the minimum wage. Earl F. Mellor & Steven E. Haugen, *Hourly Paid Workers: Who They Are and What They Can Earn*, MONTHLY LAB. REV., Feb. 1986, at 20, 23. These 1.8 million were estimated to be in industries such as outside-sales work, low-volume retail trade and service firms, and seasonal amusement establishments. *Id.*

105. 29 U.S.C. § 213.

106. *Statements Adopted by AFL-CIO Executive Council at Mid-Winter Meeting*, Daily Lab. Rep. (BNA) No. 32, at F1 (Feb. 19, 1993), *available in* LEXIS, BNA Library, DLABRT File.

107. 29 U.S.C. § 213.

108. *See* U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-60, NO. 178, WORKERS WITH LOW EARNING: 1964–1980, at 8 (Mar. 1991) (noting that there were 14.4 million full-time, low-income workers in 1990). Many commentators cite a failure to enforce the mandates of the FLSA as the reason for the prevalence of modern sweatshops. *See* Alan Finder, *Despite Tough Laws, Sweatshops Flourish*, N.Y. TIMES, Feb. 6, 1995, at A1 (reporting that sweatshops were prevalent even in 1995, with as many as 2000 in New York City alone, some paying less than $2.50 per hour); *see also Labor Department Asks $5 Million for Alleged Enslavement*, WALL ST. J., Aug. 16, 1995, at B6 (re-

B. *Minimum-Wage Workers*

When the Clinton Administration proposed a ninety-cents-per-hour hike in the minimum wage, such a raise was widely reported as impacting as many as eleven million workers.[109] While there is some dispute over exactly how many people actually earn the minimum wage, with some commentators suggesting only a few million workers,[110] there are at least 61.8 million people who labor at, or within one dollar of, the minimum wage.[111] Additionally, as David Card and Alan Krueger noted in their recent book on the minimum wage:

> A widely held stereotype is that minimum-wage earners are teenagers from middle-class families who work after school for discretionary income. In fact, more than 70 percent of workers affected by recent increases in the minimum wage are adults—predominantly women and minorities. Thirty percent of those affected by a minimum-wage increase are the sole wage-earner of their family, and, on

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porting that Labor Department sought $5 million from clothing manufacturers who bought goods from sweatshops under 40-year-old "hot goods" provision of FLSA that makes manufacturers, but not retailers, liable for minimum-wage violations); Kenneth B. Noble, *Los Angeles Sweatshops Are Thriving, Experts Say*, N.Y. TIMES, May 6, 1995, at A6 (noting that some labor officials, economists, and labor organizers think as many as one-fifth of garment industry workers in Los Angeles may be working in unregulated sweatshop conditions, and reviewing 1994 random survey of garment manufacturers by California State Labor Department, which found that 50% of employers violated minimum-wage laws and 68% violated overtime laws).

109. *See Clinton's 90-Cent Hike in Minimum Wage Linked to Welfare*, Daily Lab. Rep. (BNA) No. 24, at D2 (Feb. 6, 1995) (observing that President Clinton's proposal involves "some 11 million workers along with an untold number of welfare recipients"), *available in* LEXIS, BNA Library, DLABRT File. The Minimum Wage Study Commission issued a report in 1981 finding essentially the same number of people impacted by minimum wages: "In the second quarter of 1980, 10.6 million wage and salary workers had jobs paying the minimum wage ($3.10 per hour) or less." MINIMUM WAGE STUDY COMMISSION, 1 REPORT OF THE MINIMUM WAGE STUDY COMMISSION 8 (1981).

110. *See* Daryl M. Shapiro, *Will an Increased Minimum Wage Help the Homeless?*, 45 U. MIAMI L. REV. 651, 660 (1991) (noting that approximately 10% of hourly wage earners are compensated at or below minimum wage); *see also* Earl F. Mellor, *Workers at Minimum Wage or Less: Who Are They and the Jobs They Hold*, MONTHLY LAB. REV., July 1987, at 34, 34 (suggesting that 7.8 million workers earned minimum wage or less in 1981, and that by 1985 that number was more like 5 million).

111. *See* SAR A. LEVITAN ET AL., WORKING BUT POOR: AMERICA'S CONTRADICTION 46 (1993) (stating that over 61.8 million workers earn minimum wage or within one dollar per hour of minimum, and noting that when minimum wage moves, wages of near-minimum workers move as well). The Levitan and Shapiro study found that, of the workers paid by the hour, 8.5 million earned between $4.26 and $5.00 per hour, 3.4 million earned the minimum wage, and 2.4 million workers earned less than the minimum wage. *Id.*

> average, minimum-wage earners account for one-half of their family's total earnings. Relative to other workers, those whose wages are affected by an increase in the minimum wage are three times more likely to live in poverty.[112]

The congressionally created Minimum Wage Study Commission profiled minimum-wage workers in the early 1980s and found minimum-wage workers in all segments of the population, but disproportionately concentrated among those groups who are traditionally poor.[113] The Commission found that eighteen percent of all working women earned minimum wages or less versus eight percent of all working men;[114] forty-four percent of those between the ages of sixteen and nineteen earned minimum wages or less, as did thirty-eight percent of those over age sixty-five;[115] and although whites accounted for over three-quarters of those who earned minimum wages, eighteen percent of all black workers earned minimum wages or less, while only eleven percent of all white workers did.[116] Surprisingly, seventy percent of all minimum-wage workers were adults twenty or older, and over fifty percent were twenty-five or older.[117]

Recent studies suggest that there may be many more people earning minimum wages than official government figures suggest.[118] The majority of these minimum-wage workers is concen-

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112. DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE 277 (1995).

113. MINIMUM WAGE STUDY COMMISSION, 1 REPORT OF THE MINIMUM WAGE STUDY COMMISSION 8 (1981).

114. *Id.*

115. *Id.*

116. *Id.* at 12.

117. MINIMUM WAGE STUDY COMMISSION, 1 REPORT OF THE MINIMUM WAGE STUDY COMMISSION 8 (1981).

118. *See* Bruce W. Klein, *Real Estimates of Poor Minimum Wage Workers*, CHALLENGE, May-June 1992, at 53, 53 (arguing that Bureau of Labor Statistics (BLS) estimates, which suggest that there are only 400,000 poor, low-wage workers, are inadequate because BLS failed to count people who were paid minimum wage but who were not paid on hourly basis). Concluding that the BLS underestimates the number of poor, low-wage workers by a factor of 10, Klein suggests that half of approximately 8 million poor workers were paid at or below the minimum wage in 1988. *Id.* Furthermore, another commentator has noted that the poor are not isolated into any one section of society:

> Nearly 9.3 million workers remain poor in 1992, 2 million of whom worked full-time, year round. Many poor people lived in families with at least one worker. Altogether, nearly three-fifths of the poor lived in households where someone worked during the year. The proportion rises to two-thirds for poor families with children. In 1990, 21.8

trated in the retail trade and restaurant industries.[119] Additionally, commentators have noted that the largest proportion of minimum-wage workers live in the South.[120]

C. *Low-Wage Workers*

While many of the minimum-wage workers are below the official government poverty line[121] and are officially counted as "poor," there are millions of other workers paid slightly above the minimum wage that can fairly be described as poor or near-poor.[122]

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million people lived in poor families with children. Of these, 14.5 million lived in families with a worker, and 5.5 million people lived in poor families with children that had at least one full-time, year-round worker.

SAR A. LEVITAN ET AL., WORKING BUT POOR: AMERICA'S CONTRADICTION 15 (1993).

119. DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE 140–42 (1995) (finding that 47% of minimum-wage workers were in retail trade and slightly more than 20% were in restaurants). Card and Krueger's study revealed that workers in retail trade were more likely to be younger than those in the overall work force (40% were between 16 and 24 versus 18% of this age range in the overall work force). *Id.* at 142. Retail workers were also more likely to be less-educated (24% were high school dropouts versus 15.7% overall), and female (53% versus 47% overall). *Id.* Workers in the restaurant industry were even more likely to be young (49% were between 16 and 24 years of age), less-educated (34% were high school dropouts), and female (57%). *Id.*

120. *See* Earl F. Mellor & Steven E. Haugen, *Hourly Paid Workers: Who They Are and What They Earn,* MONTHLY LAB. REV., Feb. 1986, at 20, 24-25 (noting that 40% of nation's minimum-wage workers in 1984 lived in South). Overall, 13% of all hourly-wage workers in the South in 1984 earned the minimum wage or less, compared with 12% in the North Central United States, 9% in the Northeast, and 8% in the West. *Id.*

121. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 475, tbl. no. 727 (114th ed. 1994) (indicating that in 1992, 36.9 million people fell below official government poverty line of $14,335 for nonfarm family of four); *see also* Mollie Orshansky, *Counting the Poor: Another Look at the Poverty Profile,* SOC. SEC. BULL., Jan. 1965, at 26, 26 (noting that official government poverty line in 1963 was $3,000 per year for families and $1,500 per year for individuals). Orshansky used a 1955 food-consumption survey that found food costs consumed roughly one-third of total family expenditures. Mollie Orshanksy, *Counting the Poor: Another Look at the Poverty Profile*, SOC. SEC. BULL., Jan. 1965, at 26,26. Orshansky also used Department of Agriculture food-budget calculations for minimally adequate nutrition and multiplied the cost of that food by three. *Id.* As a result, any family whose income was less than three times the food-budget was classified as poor. *Id.*

122. See Patricia Ruggles, *Measuring Poverty*, 14 FOCUS 1, 1-9 (1992) (pointing out that official poverty rates that presently hover around 13% may substantially underestimate real number of poor people). Other measures of poverty based on costs of housing, updated nutrition costs, or comparisons to the overall median income can almost double poverty rates. *Id.* at 8. In 1988, the official poverty rate was 13.1%. *Id.* Defining poverty as 50% of the median income creates a poverty rate of 19.5%. *Id.* Measuring poverty based on government figures for housing consumption yields a rate of 23%, while recalcu-

The vast majority of those workers who earn low wages is not officially counted as poor because other people in their household also work, raising the household income above the official poverty level.[123] Despite a fairly direct impact on fourteen million of these workers, some opponents of increasing the minimum wage still argue that adjustments of the minimum wage impact the poverty level of relatively few workers and families.[124] For example, while acknowledging that low earnings in the fast-food industry are closely tied to the minimum wage, opponents of a minimum-wage increase emphasize that seventy percent of the industry's 2.3 million workers are teenagers.[125] Nonetheless, a law that impacts the day-to-day lives of fourteen million workers, including one-million workers and their families who work full-time and yet remain impoverished, is certainly substantial enough to merit serious consideration.[126]

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lating the poverty rate using an updated cost for adequate nutrition based on Department of Agriculture indices sets the poverty rate at 25.8%. *Id.* at 8–9.

123. SAR A. LEVITAN ET AL., WORKING BUT POOR: AMERICA'S CONTRADICTION 28–29 (1993).

124. Jennifer M. Gardener & Diane E. Herz, *Working and Poor in 1990*, MONTHLY LAB. REV., Dec. 1992, at 20, 20 (stating that only 3.4 million full-time workers and their families remained mired in poverty in 1990); *see also* Ralph E. Smith & Bruce Vavrichek, *The Minimum Wage: Its Relation to Incomes and Poverty*, MONTHLY LAB. REV., June 1987, at 24, 27 (asserting that as few as five million workers were paid at or below minimum wage in 1985). After deleting teenagers (one-third of those earning poverty-level wages), two-earner families (70% of minimum-wage workers), part-time workers, and the 800,000 self-employed from the working poor, Smith and Vavrichek concluded that only 1.1 million minimum-wage workers were actually "poor." Ralph E. Smith & Bruce Vavrichek, *The Minimum Wage: Its Relation to Income and Poverty*, MONTHLY LAB. REV., June 1987, at 24, 29; *see also* LAWRENCE MEAD, THE NEW POLITICS OF POVERTY 70–71 (1992) (acknowledging that 45% of minimum-wage workers without other workers in the family were poor, making "rhetoric of minimum wage" increasingly irrelevant problem because only 710,000 people fit that category); Comment, *The Earned Income Tax Credit As a Tax Expenditure*, 28 U. RICH. L. REV. 701, 736–37 (1994) (arguing that over 98% of workers who would benefit from minimum-wage increases would not be poor, leaving "only 1.8% of full-time, year-round workers in occupations covered by the minimum wage [who] were poor").

125. *See* Robert W. Van Giezen, *Occupational Wages in the Fast-Food Restaurant Industry*, MONTHLY LAB. REV., Aug. 1994, at 24, 27 (finding that 75% of 45 metropolitan areas surveyed had pay averages in fast-food industry within 50¢ of minimum wage and citing research estimating that first job for 1 in 15 United States workers was at McDonald's restaurant). Even accepting these figures, at least 690,000 workers over 20 years old remain in the fast-food industry. *Id.* at 24.

126. *See* SAR A. LEVITAN ET AL., WORKING BUT POOR: AMERICA'S CONTRADICTION 46 (1993) (asserting that minimum-wage law indirectly and directly affects wages of at least 14 million workers, including 1 million full-time workers). One must wonder whether a

Other low-wage workers that earn slightly above the minimum wage must also be considered because their wages, and consequently their poverty, while not at the precise minimum, are directly impacted by the amount of the minimum wage.[127] For approximately 3.4 million full-time workers in 1990, earnings were inadequate to raise their families' incomes above the poverty level.[128] The working poor made up 5.5% of all persons in the labor force in the 1990 census, and 6.6 million workers in the labor force lived in families whose income fell below the poverty level at that time.[129]

Who are these low-wage workers? In general, the full-time working poor are more likely to be male than female.[130] More-

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federal law that would "only" impact the legal profession's 788,000 lawyers and judges would be substantial enough to merit serious study; or whether a law that "only" impacted the nation's 862,000 police and law enforcement officers should be seriously examined; or whether other laws that affected "only" the nation's 614,000 physicians, or 737,000 college and university teachers, or 317,000 clergy might qualify for in-depth review. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 405–07, tbl. no. 644 (113th ed. 1993) (listing occupational statistics for 1992). It seems a fair amount of attention has, on occasion, been directed to laws that impact those small groups of people, and the minimum-wage working poor deserve no less.

127. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-60, NO. 178, WORKERS WITH LOW EARNINGS: 1964 TO 1990, at 8 (1992). The growing number of low-wage workers is evidenced by

> a sharp increase over the past decade in the likelihood that a year-round, full-time worker (or a worker with a year-round, full-time attachment to the labor force) will have low annual earnings. In 1979, 7.8 million or 12.1% of all year-round, full-time workers had low annual earnings. By 1990, the number of year-round, full-time workers with low annual earnings was 14.4 million and the proportion was 18.0%. . . . [T]he rate has increased since 1979 for all age groups below 65 years of age.

Id. Any examination of the circumstances of the working poor must also take into consideration the progressive deterioration of the economic standing of all workers, except the most highly skilled. *See* SAR A. LEVITAN ET AL., WORKING BUT POOR: AMERICA'S CONTRADICTION 17 (1993) (suggesting that economic power of low- and middle-income workers has been eroding significantly for some time). Growing income disparities are evidenced by one study in particular, which indicated that from 1970 to 1990, the share of before-tax income of the poorest fifth and the broad middle of the population steadily declined, while the richest fifth's share increased. *Id.*

128. Jennifer M. Gardner & Diane E. Herz, *Working and Poor in 1990*, MONTHLY LAB. REV., Dec. 1992, at 20.

129. *Id.*

130. *See* SAR A. LEVITAN ET AL., WORKING BUT POOR: AMERICA'S CONTRADICTION 19 (1993) (noting that 60% of full-time, year-round working poor are male). While the working poor include more men than women, the poverty rate for women in the labor force in 1990 was higher than that for men. Jennifer Gardener & Diane Herz, *Working and Poor in 1990*, MONTHLY LAB. REV., Dec. 1992, at 20, 20-21. The higher rate for women

over, Black and Hispanic workers are much more likely to be working and poor than whites, although in raw numbers there were more working whites in poverty in 1990 than any other race.[131] While low-wage workers are generally found in many occupations and industries, they are disproportionately represented in service work, low-skill blue-collar work, and sales.[132]

Though there are many causes working in combination to create the working poor, low wages are certainly at the center of the phenomenon.[133] Many of the working poor are people who work less than full-time at low wages.[134] Various factors contribute to this

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was largely the result of two factors: (1) women were more likely to head single-parent families; and (2) women supported their families on lower wages. *Id.* at 21. Likewise, the Census Bureau points out that full-time female workers are *proportionately* more likely to have low earnings than males. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL BRIEF, THE EARNINGS LADDER: WHO'S AT THE BOTTOM? WHO'S AT THE TOP? 2 (1994) (stating that in 1992, 21.8% of females and 12.4% of males earned less than $13,091).

131. *See* Jennifer M. Gardner & Diane E. Herz, *Working and Poor in 1990*, MONTHLY LAB. REV., Dec. 1992, at 20, 21–22 (noting that while there are more whites among working poor than other races, black workers are 2.5 times as likely to be poor as white workers, and Hispanic workers are even more likely to be poor than black workers).

132. SAR A. LEVITAN ET AL., WORKING BUT POOR: AMERICA'S CONTRADICTION 31 (1993). Levitan points to unpublished data from the 1990 Current Population Survey supplied by Professor Andrew Sum of Northeastern University:

Occupations of poor workers (1989)

Occupational group	*All workers*	*Poor workers*
Total (millions)	131.6	8.3
Service	14.2%	29.5%
Low-skill blue-collar	15.4	22.2
Sales	12.5	12.4
Skilled blue-collar	11.4	9.9
Managerial, professional technical	27.7	8.9
Farming, forestry, fishing	3.1	8.6
Administrative support	15.8	8.4

Id.

133. *See* U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORT, SERIES P-60, NO. 178, WORKERS WITH LOW EARNINGS: 1964 TO 1990, at 6 (1992) (demonstrating statistical dependence between decrease in minimum wage and increase in working poor).

134. *See* Donald L. Williams, *Women's Part-time Employment: A Gross Flows Analysis*, MONTHLY LAB. REV., Apr. 1995, at 36, 36 (noting that "in 1957, the part-time employment rate was 12.1%, compared with 18.5% in 1990"). Part-time workers are almost twice as likely to be female than male. *See* SAR A LEVITAN ET AL., WORKING BUT POOR: AMERICA'S CONTRADICTION 19 (1993) (noting that females constitute 57% of part-time working poor); Donald L. Williams, *Women's Part-time Employment: A Gross Flows Anal-*

result, including a lack of opportunities for full-time employment, school or other responsibilities, disability or illness, and home or family obligations.[135] Lack of education is also a factor for low-wage workers. For instance, the percentage of male, full-time workers in 1992 with low earnings was thirty-one percent for those without a high school diploma, and just five percent for those with a college degree.[136]

IV. A PROPOSAL: THE CREATION OF A LIVING WAGE

Workers exempted from FLSA coverage, minimum-wage workers, and low-wage workers have yet to realize a true living wage. This result obtains despite the fact that the rhetoric surrounding the nation's antipoverty efforts has always emphasized work.[137] Although the economy has generated many jobs, the wages and benefits of these jobs often are not sufficient to lift a family above the poverty level.[138] Increasing incomes and creating jobs are in practice quite distinct goals.[139] Considering the increasing propor-

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ysis, MONTHLY LAB. REV., Apr. 1995, at 36, 37 (indicating that part-time employment rate of women is approximately twice part-time employment rate of men).

135. *See* SAR A. LEVITAN ET AL., WORKING BUT POOR: AMERICA'S CONTRADICTION 21 (1993) (reporting that, of poor workers who worked less than full time, 22.7% cited school or other responsibilities, 39.3% said home or family responsibilities influenced their decision, 28.7% were sick or disabled, 9.4% reported not being able to find work, and 4.9% were retired).

136. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL BRIEF, THE EARNINGS LADDER: WHO'S AT THE BOTTOM? WHO'S AT THE TOP? 2 (1994).

137. *See, e.g.*, 142 CONG. REC. E463-02 (daily ed. Mar. 27, 1996) (statement of Rep. Franks) (noting that Job Corps was created more than 30 years ago as part of war on poverty, and stating that at $1 billion per year, it is largest youth job-training program); Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1202–03 (1996) (reviewing historical tendency to blame poverty on refusal to work); Judy Mann, *Cutting Out the Girls*, WASH. POST, Apr. 3, 1996, at E19 (asserting that reason majority of poor people are women is lack of access to jobs).

138. *See* 142 CONG. REC. E499-02 (daily ed. Mar. 29, 1996) (statement of Rep. Vento) (lamenting that "hard-working men and women, holding down full-time jobs, cannot earn enough to bring their families out of poverty cycle"); 142 CONG. REC. S3091-01 (daily ed. Mar. 28, 1996) (statement of Sen. Wellstone) (stating that with minimum wage at its current level of $4.25 per hour, minimum-wage employees work 40 hours per week, 52 weeks per year, and still fail to bring family above poverty level); *see also* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACTS OF THE UNITED STATES 479, tbl. 835 (114th ed. 1994) (indicating that 11.2% of all families were below poverty level in 1992).

139. *See* Robert Haveman, *The Nature, Causes, and Cures of Poverty: Accomplishments from Three Decades of Poverty Research and Policy* (suggesting impracticability of

tion of workers receiving wages at or below the poverty level, it is time to both raise the minimum wage and index it to inflation.[140]

A. *Raising the Minimum Wage*

Since Congress set the original minimum at 25¢ per hour, the minimum wage has been increased incrementally to its current level of $4.25 per hour.[141] The value of the minimum wage, how-

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expecting federal regulation to increase both employment levels and income levels because of limited employer resources), *in* CONFRONTING POVERTY: PRESCRIPTION FOR CHANGE 441 (Sheldon H. Danziger et al. eds., 1994).

140. *See* Jared Bernstein & Lawrence Mishel, *The Growth of the Low-Wage Labor Market: Who, What and Why*, 3 KAN. J.L. & PUB. POL'Y 12, 24 (1994) (recognizing methods of assisting low-wage workers, including expanding Earned Income Tax Credit (EITC) or enacting health care reform that would provide coverage for these workers, and noting that "[g]iven the extent of wage decline attributable to the falling minimum [wage], raising and indexing the statutory minimum wage should help to raise the level to a non-trivial percent of the low-wage work force"). David Ellwood observed:

> My own weighing of the pros and cons leads me to favor a rise in the minimum wage in spite of its possible effects on employment. I favor raising it back to the level of the 1970s and adjusting it to the rate of inflation or the growth in other wages. Without such a change, it is virtually impossible to guarantee that work will pay enough to keep families out of poverty, even with the additional tax policies that I shall discuss momentarily [raising the EITC, increasing the child tax credit]. I also accept the argument of proponents that the lowest wage we pay workers, particularly those with families, sends an important signal about how valuable and important we think their efforts are.

DAVID T. ELLWOOD, POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY 112 (1988).

141. SOCIAL SEC. ADMIN., SOCIAL SEC. BULL., ANN. STAT. SUPP. 144 (1994). The minimum wage has been increased as follows:

MINIMUM WAGES UNDER THE FLSA

Minimum Wage	Effective Date
$0.25	October 24, 1938
0.30	October 24, 1939
0.40	October 24, 1945
0.75	January 25, 1950
1.00	March 1, 1956
1.15	September 3, 1961
1.25	September 3, 1963
1.40	February 1, 1967
1.60	February 1, 1968
2.00	May 1, 1974
2.10	January 1, 1975
2.30	January 1, 1976
2.65	January 1, 1978
2.90	January 1, 1979
3.10	January 1, 1980
3.35	January 1, 1981
4.25	April 1, 1991

ever, continues to erode, with the Congressional Research Service estimating that the minimum wage would have to rise to $6.75 an hour in 1996 to equal the purchasing power it had in 1978.[142] The fact that 1.7 million prime-aged workers worked full-time, year-round in 1992, yet remained poor, begins to suggest the seriousness of the problem.[143]

In the 1960s and 1970s, a full-time worker making minimum wage was ensured a working income adequate to satisfy the poverty level for a family of three.[144] By the 1980s, this full-time minimum-wage worker's earnings fell to the poverty threshold for a family of two.[145] To set the minimum wage at the poverty threshold for a family of three in 1994, the minimum wage would have had to be raised to $5.92.[146] Raising the minimum wage to the poverty threshold for a family of four would now demand a minimum wage of approximately $6.25.[147] If one of the main purposes for creating a minimum wage is to provide a decent living for a decent day's work, the minimum wage should be set at a realistic level so workers can actually live on the wages they earn.

Efforts to raise the minimum wage have received broad-based support in recent years. One force in support of raising the minimum wage is popular opinion—polls show public support in favor of an increase in the minimum wage.[148] Additionally, unions have

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Id.

142. *See* 139 CONG. REC. S2779 (daily ed. Mar. 11, 1993) (statement of Sen. Wellstone) (noting that Congressional Research Service projected that by 1996, minimum wage would have to be over $6.75 per hour to equal purchasing power it had in 1978).

143. *See* Jared Bernstein & Lawrence Mishel, *The Growth of the Low-Wage Labor Market: Who, What and Why*, 3 KAN. J.L. & PUB. POL'Y 12, 13 (1994) (detailing plight of working poor and supporting identification of "problem" with statistics).

144. Ralph E. Smith & Bruce Vavrichek, *The Minimum Wage: Its Relation to Incomes and Poverty*, MONTHLY LAB. REV., June 1987, at 24, 24–29; Timothy J. Eifler, Comment, *The Earned Income Tax Credit As a Tax Expenditure: An Alternative to Traditional Welfare Reform*, 28 U. RICH. L. REV. 701, 727–30 (1994).

145. Ralph E. Smith & Bruce Vavrichek, *The Minimum Wage: Its Relation to Incomes and Poverty*, MONTHLY LAB. REV., June 1987, at 24, 24–29; Timothy J. Eifler, Comment, *The Earned Income Tax Credit As a Tax Expenditure: An Alternative to Traditional Welfare Reform*, 28 U. RICH. L. REV. 701, 727–30 (1994).

146. *See* Program Announcement, 59 Fed. Reg. 32,614, 32,627 (1994) (noting that poverty threshold for family of three was $12,320 in 1994).

147. 142 CONG. REC. S3091-01, S3094 (daily ed. Mar. 28, 1996) (statement of Sen. Levin).

148. *See Excerpts from Department of Labor Materials on Minimum Wage Released at News Conference on Feb. 14, 1995*, Daily Lab. Rep. (BNA) No. 31, at D-30 (Feb. 15, 1995)

advocated raising the minimum wage.[149] However, union power has lessened dramatically in recent years, hampering the unions' ability to leverage increases in the minimum wage.[150]

Supporters of a raise in the minimum wage have seen their position bolstered by recent economic studies that suggest there is little real loss of jobs due to raises in the minimum wage.[151] At least one

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(noting that January 1995 national poll found that 72% of Americans support increase in minimum wage), *available in* LEXIS, BNA Library, DLABRT File; *Harris Poll*, Roper Center for Public Opinion Research, Apr. 15, 1996 (finding 85% of 1007 people surveyed favored increasing minimum wage from $4.25 to $5.15), *available in* Westlaw, POLL-C Database; *Time/C.N.N./Yankelovich Partners Poll*, Roper Center for Public Opinion Research, May 10, 1996 (finding 78% of people surveyed favored increasing minimum wage from $4.25 to $5.15), *available in* Westlaw POLL-C Database.

149. *See* Jonathan I. Silberman & Garey C. Durden, *Determining Legislative Preferences on the Minimum Wage: An Economic Approach*, 84 J. POL. ECON. 317, 319 (1978) (stating that much of pressure to increase minimum wage comes from unions and asserting that minimum wage is effective tool for unions to shelter members from low-wage competition). However, while the FLSA initially garnered general labor support, its passage was complicated by a controversy between the president of the AFL, William Green, who opposed minimum wages for men, and the president of the CIO, John L. Lewis, who supported the minimum wage. VIVIEN HART, BOUND BY OUR CONSTITUTION: WOMEN, WORKERS AND THE MINIMUM WAGE 159 (1994); *see* KENNETH S. DAVIS, FDR: INTO THE STORM 218–19 (1993) (noting that AFL officials opposed FLSA because they feared it would weaken appeal of unionization to those presently unorganized, while at same time conferring advantages upon industrial unionism in ongoing battle with CIO); *see also* JAMES M. BURNS, CONGRESS ON TRIAL: LEGISLATIVE PROCESS AND THE ADMINISTRATIVE STATE 70–71 (1949) (suggesting that both AFL and CIO were concerned only about union protection and not about needs of millions of low-wage workers).

150. *See* Jared Bernstein & Lawrence Mishel, *The Growth of the Low-Wage Labor Market: Who, What, and Why*, 3 KAN. J.L. & PUB. POL'Y 12, 24 (1994) (citing decline in union density as indicator of power shift away from labor and toward employers).

151. *See* Steven Pearlstein, *The Minimum Wage Debate Rages*, WASH. POST, NAT'L WKLY. EDITION, Jan. 16, 1995, at 21 (detailing survey of 437 fast-food restaurants in New Jersey when New Jersey was raising minimum wage and nearby Pennsylvania was not, and finding that contrary to predictions of conventional economic theory, businesses in New Jersey did not lay off workers but added employees while businesses in Pennsylvania remained unchanged). Even those who do not accept the conclusion that minimum wage has no employment impact concede that the effect may well be less than was once thought. *Id.*; *see also* Peter T. Kilborn, *A City Built on $4.25 an Hour*, N.Y. TIMES, Feb. 12, 1995, at F1, F5 (stating that evidence collected in low-wage North Carolina community shows that when minimum wage was last raised in 1990 and 1991, unemployment rates actually declined). As William Greider, who acknowledges the potential for some job loss, noted:

> [T]he straightforward effect of raising the minimum wage is not disputed among economists. Overall, it produces a net shift in incomes from employers to employees, from companies to workers. The secondary effect, if the wage floor is raised significantly, is to push up wage levels for jobs that are above the minimum but compete for workers in the same labor pools. . . . Labor and business both understand these effects well enough and that is why they will always be on opposite sides of the question.

commentator has challenged the conventional economic view that raising the minimum wage has a negative impact on jobs.[152] After studying the effects of raises in the minimum wage in four states over a five-year period, this commentator concluded that raises in the minimum wage did not reduce employment at all, and that raises may have occasionally had a slightly positive impact.[153] Similarly, organized labor historically has been unpersuaded by the arguments of business leaders that increased minimum-wage protections for low-wage workers will wreak economic havoc and hurt the cause of workers.[154]

WILLIAM GREIDER, WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY 195–96 (1992).

152. *See* DAVID E. CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE 387–90 (1995) (concluding that increases in minimum wage actually increase employment rates).

153. *Id.* The studies involved analyses of three situations: (1) a review of the impact of the 1988 minimum-wage raise in California from $3.35 to $4.25; (2) a survey of over 100 fast-food restaurants in Texas before and after the 1991 raise in the federal minimum wage from $3.80 to $4.25; and (3) a survey of 410 fast-food restaurants in New Jersey and eastern Pennsylvania both before and after New Jersey raised its state minimum wage from $4.25 to $5.05 in 1992. *Id.* at 388. The results were as follows: the raise in California had little or no effect except for teenage employment, on which it had a slightly positive effect; in Texas, federal minimum-wage increases were followed by increased employment; and in the higher minimum-wage state, New Jersey, employment actually expanded in comparison to the lower minimum wage in Pennsylvania. *Id.* at 389–90. *But see Minimum Wage: Republicans Say Administration Abandoning Support for Key Study*, Daily Lab. Rep. (BNA) No. 66, at D-18 (Apr. 6, 1995) (criticizing survey techniques and conclusions of Card and Krueger), *available in* LEXIS, BNA Library, DLABRT File.

154. 81 CONG. REC. 7662–63 (1937) (statement of Sen. Black). As Senator Hugo Black noted in 1937, the same arguments raised against passage of the Fair Labor Standards Act had been raised for quite some time against all efforts to improve the conditions of workers:

> [A]bout a hundred years ago there was a considerable controversy in England about wages and hours. A great controversy arose over whether or not children of 8 years of age should be permitted to work for 15 hours a day, and whether or not women should work 15 hours a day. There were those who said that if the hours of labor were reduced below 15 it would destroy English business; it would reduce England's production; that it would make England poor. . . . A historian writing about the movement in England to reduce the hours of labor from 15 to 12 or from 12 to 10 for children working in factories, said: This movement enjoyed the sympathy of all men except the manufacturers and the political economists of the day. . . . At each further curtailment of the working day, the latter demonstrated in the most positive manner that the proposed new limitation could not fail to rob them of all possible profit, to raise the price of goods, to lower wages, and to ruin the export trade.

Id.; *see also Excerpts from Department of Labor Materials on Minimum Wage Released at News Conference on Feb. 14, 1995*, Daily Lab. Rep. (BNA) No. 31, at D-30 (Feb. 15, 1995) (noting that standard criticism of minimum wage is that it increases employers' costs,

States continue to consider raising state minimum wages because of the erosion of the current rates from inflation.[155] Because the value of the minimum wage eroded significantly during the 1980s, falling over 30%, it is time for Congress to again follow the states' lead.[156] To meet its original goal, and to meet the demands of justice, the minimum wage should be raised to a level equivalent in purchasing power to the minimum wages of the 1960s and 1970s, at least to coincide with the poverty threshold for a family of three. If this is done, Congress will have taken a large step toward guaranteeing "a fair day's pay for a fair day's work."[157]

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thereby reducing employment opportunities), *available in* LEXIS, BNA Library, DLABRT File).

155. Only a few states do not have some form of state minimum wage. Willis J. Norlund, *A Brief History of the Fair Labor Standards Act*, 39 LAB. L.J. 715, 715 (1988). As of 1988, 42 states, Guam, Puerto Rico, and the Virgin Islands had minimum-wage statutes. *Id.* Alabama, Arizona, Florida, Iowa, Louisiana, Mississippi, Missouri, South Carolina, and Tennessee did not have minimum-wage statutes. *Id.* at 715 n.1. Currently, at least 10 states have minimum wages higher than the federal standard of $4.25 per hour—Alaska, Connecticut, the District of Columbia, Hawaii, Iowa, New Jersey, Oregon, Rhode Island, Vermont, and Washington. *Excerpts from Department of Labor Materials on Minimum Wage Released at News Conference on Feb. 14, 1995*, Daily Lab. Rep. (BNA) No. 31, at D-30 (Feb. 15, 1995), *available in* LEXIS, BNA Library, DLABRT File. The Massachusetts Legislature is currently considering raising its minimum wage by $1 per hour over 18 months, even though the governor may veto any such legislation. Doris Sue Wong, *House OK's Minimum Wage Hike*, BOSTON GLOBE, June 20, 1995, at 41. New Hampshire has considered raising the minimum wage to $5 per hour by 1997 and indexing it to inflation; however, its governor also raised the possibility of a veto. *King Opposed to Minimum Wage Hike*, BANGOR DAILY NEWS, Apr. 8, 1995, *available in* Westlaw, BANGORDN Database.

In Wisconsin, the Service Employees International Union (SEIU) filed a law suit in 1993 against the Wisconsin Department of Industry, Labor and Human Relations, alleging that the current minimum-wage law does not comply with the state law requiring the agency to set the minimum at a level high enough to "enable the employee receiving it to maintain himself or herself under conditions consistent with his or her welfare." *Wisconsin's Minimum Wage Targeted in SEIU Lawsuit*, Daily Lab. Rep. (BNA) No. 183, at D-14 (Sept. 23, 1993), *available in* LEXIS, BNA Library, DLABRT File. The SEIU sought to have the minimum raised to $5.50 per hour. *Id.*

156. *See* Jared Bernstein & Lawrence Mishel, *The Growth of the Low-Wage Labor Market: Who, What, and Why*, 3 KAN. J.L. & PUB. POL'Y 12, 23 (1994) (noting that real value of minimum wage fell steeply during 1980s). In 1992 dollars, the real value of the minimum wage in 1979 was $5.50 per hour. *Id.* The real value of that minimum wage dropped 30% by 1989. *Id.*

157. 81 CONG. REC. 4960 (1937) (statement of Pres. Franklin D. Roosevelt).

B. *Indexing the Minimum Wage*

To ensure that a minimum-wage earner's income does not fall below the poverty threshold for a family of three, Congress should also protect wages from the persistent ravages of inflation. The minimum wage has long fought a losing battle with inflation: Congress sets the wage and it continually erodes until Congress resets the wage.[158] For example, the decline in the real value of the minimum wage through the 1980s accounted for twenty to thirty percent of the increase in wage inequality during the decade.[159] If a living wage is enacted, an index to inflation similar to the indices already used in many other areas should be incorporated into the minimum wage to help prevent the erosion of the wage while awaiting congressional action.[160]

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158. *See* Timothy J. Eifler, Comment, *The Earned Income Tax Credit As a Tax Expenditure: An Alternative to Traditional Welfare Reform*, 28 U. RICH. L. REV. 701, 727–30 (1994) (demonstrating constant decline in purchasing power of minimum wage due to inflation). Eifler's comment provides an excellent table comparing the statutory minimum wage with inflation-adjusted 1992 dollars, illustrating that the minimum wage has fluctuated from a 1992-value high of $5.78 per hour in 1967 when the wage was raised to $1.40 per hour, to a low of $3.68 in 1988 when the wage was $3.35 per hour. *Id.* at 729; *see also* Ralph E. Smith & Bruce Vavrichek, *The Minimum Wage: Its Relation to Incomes and Poverty*, MONTHLY LAB. REV., June 1987, at 24, 24–29 (noting that purchasing power of minimum wage has fluctuated considerably and was less in 1987 than at any time since mid-1950s). For an illustrative example of the descending value of the minimum wage since the 1960s, see SAR A. LEVITAN ET AL., WORKING BUT POOR: AMERICA'S CONTRADICTION 48 (1993).

159. DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE ECONOMICS OF THE MINIMUM WAGE 394 (1995). Since 1949, the real value of the minimum wage has varied wildly as a percentage of the average wage for nonagricultural workers, from a low of 31% in 1949, raised to 58% in 1950, and down again to 35% in 1989. RICHARD B. MCKENZIE, THE TIMES CHANGE: THE MINIMUM WAGE AND THE NEW YORK TIMES 8 (1994).

160. Notably, inflation did not pose the same problem in the early years of the FLSA that it does today; thus, inflation was not a part of the original discussion:

> Astonishing as it may appear, the overall level of consumer prices by the end of World War II was about the same as it was in 1800. Consumer price increases during this period were associated with wars or new gold discoveries but were always short-lived. After each bout of inflation, prices fell sharply to their "customary" levels. Since 1945, in contrast, the price level in the United States has, almost without exception, steadily risen with marked acceleration in the 1970s and early 1980s. In contrast with the overall price stability of the 1800–1945 period, prices rose by about 460 percent from 1945 to 1983. Further, about three-quarters of this post-World War II inflation has occurred since 1970.

WALLACE E. HENDRICKS & LAWRENCE M. KAHN, WAGE INDEXATION IN THE UNITED STATES 1–2 (1985).

Indexation of wages is not a new subject.[161] Raises in social security payments have been triggered by cost of living increases since 1972 legislation indexed the benefits to keep pace with inflation.[162] Moreover, federal pensions are indexed for inflation,[163]

Proponents of indexing the minimum wage must answer the question of what the wage should be indexed to. Card and Krueger, who are lukewarm on the idea of indexing, have suggested that there are only two options: (1) the Consumer Price Index (CPI); or (2) some percentage of the national average wage. DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE 394–95 (1995). Card and Krueger argue that because the average wages for all less-skilled workers have not kept up with the CPI, the minimum would be increasing at a rate faster than all other wages, which could have a long-term adverse employment impact. *Id.* at 395. However, problems with indexing the wage to some percentage of the national wage could have similar effects. *Id.*

The Earned Income Tax Credit (EITC) can also certainly work in a complimentary fashion with a raised and indexed minimum wage. David Ellwood suggests a three-pronged approach in this regard. *See* DAVID T. ELLWOOD, POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY 119–21 (1988) (suggesting raising and indexing minimum wage, increasing EITC, and increasing refundable child tax credit). The minimum-wage adjustment makes it easier for the EITC to move families toward the poverty line. Rebecca M. Blank, *The Employment Strategy: Public Policies to Increase Work and Earnings, in* CONFRONTING POVERTY: PRESCRIPTIONS FOR CHANGE 194 (Sheldon H. Danziger et al. eds., 1994). Low or static minimum wages increase pressure on the EITC, and Blank suggests that lower minimum wages would mean that the EITC would have to be much larger to be effective. *Id.* at 194–95. For example, the increase in the EITC could be accomplished by making the "phaseout" of the EITC much higher. *Id.* at 195.

Some commentators have even suggested that the EITC is more effective relief for low-wage workers than raising the minimum wage. Timothy J. Eifler, Comment, *The Earned Income Tax Credit As a Tax Expenditure: An Alternative to Traditional Welfare*, 28 U. RICH. L. REV. 701, 737–38 (1994) (arguing that EITC is more targeted method of increasing standard of living for low-wage workers because it causes no unemployment, excludes teenagers, and targets poor family units rather than individual earners). Others argue for a negative income tax or a wage subsidy. *See* Jonathan B. Forman, *Improving the Earned Income Credit: Transition to a Wage Subsidy Credit for the Working Poor*, 16 FLA. ST. U. L. REV. 41, 77–89 (1988) (criticizing history of earned-income credit and recommending negative income tax to aid working poor).

161. There are several recent articles analyzing the economic and political dimensions of indexing. *See, e.g.*, Pablo E. Guidotti, *Wage and Public Debt Indexation*, 40 INT'L MONETARY FUND STAFF PAPERS 237 *passim* (1993) (analyzing relationship between wage indexation options chosen by private sector and public debt indexation options chosen by government); Edi Karni, *On Optimal Wage Indexation*, 91 J. POL. ECON. 282 *passim* (1983) (demonstrating that implementation of optimal indexation schemes is capable of eliminating friction caused by contracting for services in advance by duplicating equilibrium that exists when services are contracted for after stochastic disturbances are realized).

162. *See* WALLACE E. HENDRICKS & LAWRENCE M. KAHN, WAGE INDEXATION IN THE UNITED STATES: COLA OR UNCOLA 65 (1985) (describing history of social security indexation and noting that rising percentage of population at retirement age has put strain on system).

163. *Id.*

and indexing has been used in many union contracts since 1910.[164] Since World War I, government agencies, as well as state minimum-wage boards, have relied on the cost of living as one criterion for wage adjustments.[165]

Indices are also readily available. The most commonly used index of inflation is the cost-of-living allowance (Cola) that triggers raises in union contracts, social security payments, and home mortgages in response to increases in the consumer price index.[166] Additionally, the Bureau of Labor Statistics has been publishing its cost-of-living index since 1919.[167]

Not surprisingly, the concept of indexing is supported or opposed by essentially the same groups that historically have supported or opposed increases in the minimum wage. For example, as recently as 1993, the AFL-CIO demanded that a one-dollar-per-hour raise in the minimum wage be implemented in two annual installments and also demanded indexing the minimum wage at fifty percent of average hourly earnings.[168] Conversely, business groups such as the Employment Policies Institute Foundation (EPIF) adamantly oppose indexing minimum wages, charging that automatic raises in minimum wages to keep up with inflation, particularly in times of slow economic growth, would aggravate and expand unemployment.[169] The EPIF has argued: "Congress is paid to review policies like the minimum wage on a regular basis. Putting the minimum wage on automatic pilot where it is oblivious

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164. *See id.* at 15–28 (detailing history of America's early experience with indexation from 1880 to 1950).

165. *Id.* at 18.

166. WALLACE E. HENDRICKS & LAWRENCE M. KAHN, WAGE INDEXATION IN THE UNITED STATES: COLA OR UNCOLA 17 (1985). Not all cost-of-living increases are indexed to the CPI. As Hendricks & Kahn noted, "the formula relating inflation to wage increases varies, as do the timing of reviews, the presence of minimum or maximum adjustments, the definition of price indices, and the inclusion of Cola payments in the base wage." *Id.* at 240.

167. *See id.* (noting that Bureau of Labor Statistics data was primary source of cost-of-living information when wages were first indexed to prices).

168. *Business Praises Clinton's Decision to Delay Push for Minimum Wage Increase*, Daily Lab. Rep. (BNA) No. 109, at D-4 (June 9, 1993), *available in* LEXIS, BNA Library, DLABRT File.

169. *Clinton Challenged on Indexing the Minimum Wage*, U.S. Newswire, Jan. 13, 1995, *available in* Westlaw, USNWSW Database; *see* Kevin G. Salwen, *Business Groups Prepare to Square off Against Clinton on Minimum Wage Issue*, WALL ST. J., Feb. 8, 1993, at A2 (noting business opposition to Clinton's proposed increase of minimum wage).

to labor market conditions allows legislators to duck the responsibility to address current issues."[170]

The issue of indexing the minimum wage to allow it to rise over time has been proposed in Congress, albeit unsuccessfully, several times.[171] The first time indexing was proposed in Congress was in 1977 when Chairman John Dent of the House Labor Standards Subcommittee recommended that the existing minimum wage be indexed immediately to fifty-five percent of average industrial wages and soon to sixty percent of the average industrial wage.[172] The indexation proposal came about because of two factors: the election of a new, Democratic president and lobbying pressure from unions.[173] While the unions wanted a minimum of $3.00 per hour, the democratic proposal would have raised the existing $2.30 per hour minimum to $2.65, indexed to combat inflation.[174] In response to heavy industry lobbying, the House dropped the indexing provision, instead approving a three-step increase, and sent the matter to the Senate, which dropped indexing and substituted a four-step increase.[175]

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170. *Clinton Challenged on Indexing the Minimum Wage*, U.S. Newswire, Jan. 13, 1995 (quoting Richard Berman, Executive Director, Employment Policies Institute Foundation), *available in* Westlaw, USNWSW Database.

171. In 1986, House Bill 4493 was introduced to raise and index the minimum wage. *See* 132 CONG. REC. H1,597-02 (daily ed. Mar. 25, 1986) (statement of Rep. Biaggi) (introducing House Bill 4493 to raise and index minimum wage); *see also* 133 CONG. REC. H101-01, H374-01 (daily ed. Jan. 6, 1987) (statement of Rep. Biaggi) (introducing additional bills to increase and index minimum wage). House Bill 692, the Livable Wage Act of 1993, proposed raising the minimum wage to $5.50 and indexing it for inflation. 139 CONG. REC. H2133-03 (daily ed. Apr. 29, 1993) (statement of Rep. Sanders). House Bill 363, the Family Foundation Act, proposed in 1995, would raise the minimum wage from $4.25 to $5.50 and index it for inflation. 141 CONG. REC. H6682-08 (daily ed. June 30, 1995) (statement of Rep. Filner).

172. *See* RICHARD B. MCKENZIE, TIMES CHANGE: THE MINIMUM WAGE AND THE NEW YORK TIMES 52 (1994) (noting that union officials and democratic members of Congress favored indexed minimum wage because of costs required to get preceding minimum-wage increases).

173. *See* Keith Krehbiel & Douglas Rivers, *The Analysis of Committee Power: An Application to Senate Voting on the Minimum Wage*, 32 AM. J. POL. SCI. 1151, 1159 (1988) (noting that although President Carter and unions both favored wage indexation, Carter's proposal fell short of labor's expectations).

174. RICHARD B. MCKENZIE, TIMES CHANGE: THE MINIMUM WAGE AND THE NEW YORK TIMES 52 (1994).

175. *See* Fair Labor Standards Act Amendments of 1977, Pub. L. No. 95-151, § 2(a)-(d), 91 Stat. 1245, 1245-46 (codified as amended at 29 U.S.C. § 206 (1994)) (listing amounts of four-step increase). The four-step increase in minimum wages was described by Senator John Tower as "back door indexing." Keith Krehbiel & Douglas Rivers, *The Analysis of*

Progress on indexing was made because Congress ordered that indexing and its effects on the minimum wage be analyzed by the Minimum Wage Study Commission as part of the 1977 amendments to the Fair Labor Standards Act.[176] The Minimum Wage Study Commission arrived at three main conclusions from its research on indexation of minimum wages:

> First, the present system has not maintained the purchasing power of the minimum wage. Second, indexation is not necessarily inflationary if it is based on cost-of-living or other increases that have already taken place, as measured for example by average hourly earnings, the consumer price index without mortgage interest payments or the implicit deflator. Third, indexation would have a small beneficial effect on the economy in the long run. In the short run, indexation could have either a small beneficial or small harmful effect depending on underlying economic conditions.[177]

Having found indexation to be useful and needed, the Minimum Wage Study Commission went on to list its recommendations regarding indexation:

> The Commission recommends that the minimum wage be indexed on the basis of average hourly earnings in the private economy and adjusted each year on the basis of the previous year's overall rate of change in this index. The Commission further recommends that Congress confer with the Bureau of labor statistics to devise a suitable index that incorporates both average hourly earnings in the private nonfarm business sector and the farm sector. The Commission concludes that regular and predictable increases in the minimum wage would be non-inflationary and would be easier for business to adjust to than the irregular increases of the present system.[178]

Congress attempted to follow the Minimum Wage Study Commission's recommendations with the Minimum Wage Restoration

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Committee Power: An Application to Senate Voting on the Minimum Wage, 32 AM. J. POL. SCI. 1151, 1161 (1988) (quoting Sen. Tower). Although Krehbiel and Rivers concluded that the four-step increase was not indexing and that it actually substantially under compensated for inflation, they determined that indexing was not politically viable at the time. *Id.*

176. Fair Labor Standards Act Amendments of 1977, Pub. L. No. 95-151, § 2(e), 91 Stat. 1245, 1246–49 (codified as amended at 29 U.S.C. § 204 (1994)) (providing for establishment of Minimum Wage Study Commission to examine, among other items, inflationary and employment impact of increasing or indexing minimum wage).

177. *Id.*

178. MINIMUM WAGE STUDY COMMISSION, 1 REPORT OF THE MINIMUM WAGE STUDY COMMISSION 84 (1981).

Act of 1988.[179] This Act, which proposed to raise the minimum wage and index it to fifty percent of the average private-sector wage to keep up with inflation, was cosponsored by Senator Edward M. Kennedy, then Chair of the Senate Labor and Human Resources Committee, and Representative Augustus F. Hawkins, then Chair of the House Education and Labor Committee.[180] The bill would have created a minimum-wage review commission with the power to set future increases of minimum wages.[181] However, opposition to the indexing provisions by the Chamber of Commerce and the National Restaurant Association, as well as Democrats on the House Committee, eventually forced the leadership to abandon indexing so the bill could get out of committee and ultimately raise the minimum wage.[182]

Legislative proposals to index the minimum wage continue. For example, in 1993, Senator Wellstone introduced Senate Bill 562, the Fair Minimum Wage Guarantee Act of 1993.[183] The bill proposed an increase in the minimum wage to $6.75 per hour in four stages, and also proposed indexing the minimum wage to 50% of average hourly earnings for nonfarm, nonsupervisory private workers.[184] This bill would have increased the minimum to $4.85 beginning September 1, 1993, to $5.55 beginning September 1, 1994, to $6.20 beginning September 1, 1995, and to $6.75 beginning Septem-

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179. S. 837, 100th Cong., 2d Sess. (1988).

180. *See* Marvin H. Kosters, *Minimum Wages: A Deeper Look at '50s and '60s*, WALL ST. J., Oct. 19, 1987, at 30 (explaining that Kennedy-Hawkins bill would increase minimum wage from $3.35 to $4.65), *available in* Westlaw, WSJ Database. *But cf.* J.D. Foster, *A Better Alternative to a Higher Minimum Wage*, WALL ST. J., Mar. 3, 1988, at 16 (suggesting that Kennedy-Hawkins bill would primarily cause job losses among economically disadvantaged), *available in* Westlaw, WSJ Database.

181. *See* 135 CONG. REC. S14,707-05 (daily ed. Nov. 6, 1989) (statement of Sen. Kennedy) (reporting debates in Senate on proposed minimum-wage bill).

182. *See* 135 CONG. REC. S14,707-05, S14,713 (daily ed. Nov. 6, 1989) (statement of Sen. Mitchell) (urging adoption of minimum-wage compromise legislation); *see also* Frank Swoboda, *Minimum Wage: A Democratic Conflict: Infighting in Those Centers on Size of Increase, Link to Inflation*, WASH. POST, Feb. 29, 1988, at A15 (noting debate in Legislature over increase in minimum wage and efforts to keep bill alive).

183. S. 562, 103d Cong., 1st Sess. (1993).

184. *See* 139 CONG. REC. S2,778 (daily ed. Mar. 11, 1993) (statement of Sen. Wellstone) (introducing bill to amend Fair Labor Standards Act to increase and index minimum wage).

ber 1, 1996.[185] Indexing would have been determined under the proposed law as follows:

> [W]ith respect to the year beginning on September 1, 1997, and each succeeding year, not less than the amount applicable under this paragraph adjusted on June 1 of such year to equal 50 percent of the monthly average hourly earnings for nonfarm, nonsupervisory private workers for the proceeding 12 months, as determined by the Bureau of Labor statistics, rounded to the nearest multiple of $0.05, except that any amount determined under this subparagraph shall not be less than the amount applicable for the proceeding year.[186]

Senate Bill 562 was ultimately unsuccessful, and the current congressional and political climate does not indicate any hope for minimum-wage indexing in the near future.[187] However, the idea of indexing the minimum wage remains a part of the union-led agenda and will certainly be reargued. Minimum-wage indexing is an important issue and one that should not be ignored. To protect the earnings of full-time, minimum-wage workers from being devalued by inflation as soon as they are set, minimum wages must be indexed.

V. CONCLUSION

The struggle to create a real minimum wage continues. Obviously, many have recognized that "a fair day's pay for a fair day's work"[188] is not too much to ask. While some progress has been made, for millions of workers, the minimum wage remains a subminimum rather than an actual minimum wage because it is still not enough to escape poverty.

While the economic, political, and legal positions of supporters and opponents of a living wage have not changed much since the beginning of this century, and will likely remain constant as the struggle continues, it is important for the common interest to reargue this issue as one of fairness for those who labor. It is cer-

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185. 139 CONG. REC. S2,779, S2,780 (daily ed. Mar. 11, 1993) (statement of Sen. Wellstone).

186. *Id.*

187. There appear to be no realistic chances for passage of minimum-wage indexation prior to the presidential and congressional elections of 1996; however, the idea of indexing remains alive and will certainly be revisited if labor and its allies ever regain their waning congressional clout.

188. 81 CONG. REC. 4960 (1937) (statement of Pres. Franklin D. Roosevelt).

tainly in the interest of the nation and justice itself to encourage all who can to work, and raising and indexing the minimum wage would accomplish this goal.

Current legislative battles over raising and indexing the minimum wage will, and should, continue until those who work for a living, earn a living for their work. After all, "[w]ork with adequate pay for all those who seek it is the primary means for achieving basic justice in our society."[189]

189. NAT'L CONFERENCE OF CATHOLIC BISHOPS, PASTORAL LETTER, ECONOMIC JUSTICE FOR ALL: CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY 36 (1986). The Pastoral Letter recognized the mutual, social-justice obligations of productivity on the part of the individual and society:

> Social justice implies that persons have an obligation to be active and productive participants in the life of society and that society has a duty to enable them to participate in this way. . . . The meaning of social justice also includes a duty to organize economic and social institutions so that people can contribute to society in ways that respect their freedom and the dignity of their labor. . . . Economic conditions that leave large numbers of able people unemployed, underemployed, or employed in dehumanizing conditions fail to meet the converging demands on these three forms of basic justice.

Id.