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The Minimum Wage Law

Louis H. Rubinstein

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NOTES AND COMMENT

THE MINIMUM WAGE LAW.

In the main, a reading of the decisions concerning labor legislation reminds us strangely of the old *laissez-faire* doctrine espoused by Adam Smith, wherein competition was given full sway and all restrictive barriers were swept away. We recall that it resulted in the exploitation and degradation of labor, and that when the Industrial Revolution brought with it poverty, unemployment and crises, the labor movement became too important to ignore. Since then this movement has secured an increasing degree of prominence in economic literature and has been treated with greater sympathy and understanding.¹ More recently, it has brought to the fore the problems of minimum wage legislation.

The average layman often refers to a minimum wage law as one which is intended to secure a living wage. Actually this is not a true concept, for in the final analysis, whether a minimum wage is to be measured by a living wage or any other standard, depends upon the language used in the statute creating it. By increasing the minimum wage, we compel one class, that of the employers, to pay more and more of its wealth to another class, that of the employees. Whether our law-making bodies can compel such distribution within Constitutional means, or whether an amendment is necessary for that purpose, still remains to be seen. Concerning one thing there does seem to be general agreement, namely, that some form of minimum wage law is, for the time being at least, economically desirable.²

Although the statutory regulation of wages is a matter of comparatively recent development in the United States, it has been widely experimented with in other countries. It first appeared in Belgium in 1887 in the form of a minimum wage statute for laborers employed in public work, but the Province of Victoria, Australia, seems to have been the pioneer in adopting the first minimum wage legislation applying to private employment.³ This statute was soon followed by similar enactments in other Australian provinces and in New Zealand. During the next two decades, England, France, Canada and other countries followed a similar course. In the United

¹ See 16 Encyc. Am. 591 (1932), citing Ricardo, Malthus and John Stuart Mill.

² It is interesting to note that all the parties in the present presidential campaign have expressed themselves as being in favor of such legislation, differences only arising as to whether a Constitutional Amendment is necessary, and if so, as to the form it should take.

³ 1887.

States, the initiative was taken by Massachusetts in 1912, and although there was much doubt about the constitutionality of minimum wage laws, many of the states began to adopt similar legislation.⁴

In our country, the fight for minimum wage legislation has been the conflict of the police power⁵ with the constitutionally guaranteed right of freedom of contract found in the "due process" clause of the Fourteenth Amendment. Naturally, any minimum wage law which compels the payment of a fixed sum is an infringement upon the right to contract. However, many infringements upon the right to contract freely are permitted on the ground that they are necessary for the general welfare, and are therefore justified under the police power. Thus the Supreme Court once said,⁶ "There is no absolute freedom to do as one chooses. Liberty implies absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." Thus it appears that only an arbitrary restraint violates the right of freedom of contract, while a reasonable regulation in the interests of the community is justified. The question which then arises is, "What is a reasonable restraint?" An examination of the cases does not seem to clarify the situation.

For example, while a 10-hour day for bakers was held to be an unreasonable restraint, although it was shown that long hours of labor in the torrid atmosphere of bakeries were dangerous to the health of the worker,⁷ an 8-hour day for miners⁸ and a 10-hour day for those working in "any mill, factory or manufacturing establishment"⁹ were held reasonable restraints. It is submitted that this last decision¹⁰ cannot be reconciled with the holding in the bakery case.¹¹ While the Court reiterates the rule that regulating the hours of labor in a *hazardous* employment is a reasonable regulation, we are not

⁴ See 19 Encyc. Am. (1932); EDIE, *ECONOMICS: PRINCIPLES AND PROBLEMS* (1926) 375.

⁵ "*** the phrase Police Power is ordinarily limited in its application to the general power which the State, in cases of need, may employ without reference to the ordinary private rights of person and property of the individual." 3 WILLOUGHBY, *CONSTITUTIONAL LAW* (2d ed. 1929) 1588.

⁶ *Chicago, Burlington & Quincy R. R. v. McGuire*, 219 U. S. 549, 567, 31 Sup. Ct. 259 (1911).

⁷ *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539 (1905), where the Court said, "It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, *sui juris*), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution."

⁸ *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383 (1897).

⁹ *Bunting v. Oregon*, 243 U. S. 426, 37 Sup. Ct. 435 (1916) (The statute here was sustained although it also contained a minimum wage provision for overtime.).

¹⁰ *Bunting v. Oregon*, 243 U. S. 426, 37 Sup. Ct. 435 (1916).

¹¹ *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539 (1905).

enlightened as to what a hazardous employment is. Since this uncertainty exists, one cannot know when a statute regulating the hours of employment is a reasonable or arbitrary regulation.

With regard to statutes regulating hours of employment, there has been less uncertainty where women were concerned. Several years after the Court declared unconstitutional laws regulating hours of labor for men,¹² the United States Supreme Court upheld an Oregon law limiting the hours of labor for women to 10 a day "in any mechanical establishment, factory or laundry" in the state. It was there recognized that women might need laws for their protection in instances where such laws might not be sustained for men.¹³ Thereafter, many similar laws were passed and upheld,¹⁴ and in 1916 an Oregon statute not only limited working hours for women, but even provided a weekly minimum wage of \$8.64. The validity of the law was upheld under the police power by the Supreme Court of the United States.¹⁵ Thus far, we find that while there was some disagreement as to how far the legislatures might go in enacting laws limiting the hours of employment for men, there was little doubt but that the legislatures might enact laws limiting the hours of employment for women.

From a consideration of cases dealing mainly with statutes regulating *hours* of labor, we now turn to a consideration of cases dealing with statutes regulating *wages* of labor. One might have been of the opinion that a statute which regulates hours of labor is one which indirectly regulates wages at least to some extent, that whether a statute regulates wages or hours, it infringes upon the right to contract freely, and that if the regulation of hours is permissible when reasonable, then regulation of wages should be permissible when reasonable.

By 1918, we find that the Supreme Court had sanctioned laws regulating wages directly in one form or another. Thus, where a statute provided that store orders or other evidences of indebtedness issued in payment of wages should be redeemed in cash, the statute was upheld although it was a restraint upon freedom to contract.¹⁶ Similarly, a statute forbidding advance payment to seamen was

¹² *Ibid.*

¹³ *Muller v. Oregon*, 208 U. S. 412, 28 Sup. Ct. 324 (1908).

¹⁴ *Riley v. Massachusetts*, 232 U. S. 671, 34 Sup. Ct. 469 (1914); *Hawley v. Walker*, 232 U. S. 718, 34 Sup. Ct. 601 (1913); *Miller v. Wilson*, 236 U. S. 373, 35 Sup. Ct. 342 (1915); *Bosley v. McLaughlin*, 236 U. S. 385, 35 Sup. Ct. 345 (1915).

¹⁵ *Stettler v. O'Hara*, 243 U. S. 629, 37 Sup. Ct. 403 (1916); *Simpson v. O'Hara*, 243 U. S. 629, 37 Sup. Ct. 403 (1916). It is interesting to note that in previous cases limiting women's working *hours* only, the sanction of the Court had been for the most part unanimous (see cases cited under note 14, *supra*), but that when this Oregon statute provided, in addition, a minimum *wage*, the opinion of the Court was equally divided and its constitutionality was only upheld by a vote of 4-4, Judge Brandeis not participating.

¹⁶ *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22 Sup. Ct. 1 (1901).

upheld,¹⁷ as was a statute which limited hours of employment in manufacturing establishments and provided for a specified amount of overtime payment although this was undoubtedly a minimum wage statute.¹⁸ Despite these cases, and others upholding restraints upon freedom of contract,¹⁹ the Court, in the case of *Adkins v. Children's Hospital*,²⁰ held unconstitutional an Act of Congress providing for a board representing employers, employees and the general public, to investigate standards of living and establish a minimum wage "to protect women and minors of the District [of Columbia] from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain decent standards of living * * *." The former minimum wage statutes which had been upheld were sought to be differentiated on the ground that they had really been reasonable maximum hour enactments.

Claiming that the Act of Congress was an unreasonable restraint upon the right of freedom of contract, the Court in the *Adkins* decision, in stating the objectionable features of the Act, said that the basis of the compulsory living wage was²¹ "*not the value of the service rendered*, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals. * * * In principle there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker or the grocer to buy food, *he is morally entitled to obtain the worth of his money*,²² but he is not entitled to more. *If what he gets is worth what he pays*²³ he is not justified in demanding more simply because he needs more; and the shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any peculiar sense with the question of his customer's necessities. * * * A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, *to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit*

¹⁷ *Patterson v. Bark Eudora*, 190 U. S. 169, 23 Sup. Ct. 821 (1903).

¹⁸ *Bunting v. Oregon*, 243 U. S. 426, 37 Sup. Ct. 435 (1916). See also *McLean v. Arkansas*, 211 U. S. 539, 29 Sup. Ct. 206 (1909); *Strathearn S. S. Co. v. Dillon*, 252 U. S. 348, 40 Sup. Ct. 350 (1920).

¹⁹ *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383 (1897); *Booth v. Illinois*, 184 U. S. 425, 22 Sup. Ct. 444 (1902); *Schmidinger v. Chicago*, 226 U. S. 578, 33 Sup. Ct. 182 (1913); *Peterson Baking Co. v. Bryan*, 290 U. S. 570, 54 Sup. Ct. 265 (1934); *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 34 Sup. Ct. 612 (1914); *Armour & Co. v. North Dakota*, 240 U. S. 510, 36 Sup. Ct. 440 (1915); *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 37 Sup. Ct. 217 (1917).

²⁰ 261 U. S. 525, 43 Sup. Ct. 394 (1922).

²¹ Italics ours.

²² Since an analogy is made between the case where the worker goes out to sell his labor, and where he goes out to buy goods with his money, substituting the word "labor" for the word "money" that line would read, "** * * he is morally entitled to obtain the worth of his labor*, * * *" i. e., the value of his services.

²³ I. e., "*If what he gets is what his labor is worth*," by the analogy as explained in preceding note.

obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things and solely with relation to circumstances apart from the contract of employment, the business affected by it and *the work done under it*, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States."

With this criticism in mind, the New York Legislature, in 1933, added Article 19 to the Labor Law of New York.²⁴ As a preamble, the Legislature stated that unscrupulous employers were taking advantage of the financial need of women and minors, who were not as a class upon a level of equality in bargaining with their employers and that consequently "freedom of contract" as applied to their relations with employers, was illusory, and that the constant lowering of wages constituted a serious form of unfair competition against other employers, reduced the purchasing power of the workers and threatened the stability of industry. In order to protect against these dangers, then, provision for a minimum wage law seemed to have been made, which would compel employers who had been paying less than a living wage, to pay their female and minor employees a wage equal to at least the reasonable value of their services.²⁵ It was thought that this statute met the objections emphasized in the *Adkins* decision, and many other states adopted legislation similarly worded.²⁶

In 1934, a legislative attempt to fix the price of milk was upheld under the power of a state to regulate business in the public interest, where the price regulation is a reasonable means of rectifying the evil calling for regulation.²⁷ Here the Court said, "Times without number we have said that the [state] legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power. * * * The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." Bearing in mind these words, one would have felt confident that the

²⁴ N. Y. Laws 1933, c. 584, §§ 550-567.

²⁵ In determining the reasonable value of the services, the wage board was to be guided by such considerations as would guide a court in a suit for the reasonable value of services rendered. § 551 (8), 2.

²⁶ Connecticut, Illinois, Massachusetts, New Hampshire, New Jersey, Ohio and Rhode Island. N. Y. Times, June 7, 1936, p. 2E, col. 1. Under the law, the wages paid to more than 22,000 women and minor employees in the laundry industry in New York State were raised from an average of \$10.41 a week to \$13.42. N. Y. Times, Editorial, June 2, 1936, p. 26, col. 1.

²⁷ *Nebbia v. New York*, 291 U. S. 502, 54 Sup. Ct. 505 (1934).

New York Minimum Wage Law could successfully withstand charges of unconstitutionality.

One Tivaldo owned a laundry in Brooklyn. The minimum wage for women laundry workers had been set at \$12.40 a week. Tivaldo knew where he could get workers wholesale. These he paid about \$8.00 a week and was accused of falsifying his books to make it seem that he was respecting the law. Indicted for forgery, the New York Court of Appeals found that Mr. Tivaldo had acted within his rights,²⁸ and that the New York Minimum Wage Law was repugnant to the "due process" clause of the state constitution²⁹ and the "due process" clause of the Fourteenth Amendment to the United States Constitution, protecting freedom of contract. Upon appeal, the United States Supreme Court affirmed that decision.³⁰

An examination of the decision shows that the Court attacked Section 552 of the Minimum Wage Law, which section prohibits "an oppressive and unreasonable wage." The Court felt that since the prohibited "oppressive and unreasonable wage" was defined as one which means "both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health,"³¹ employers were being compelled to pay not only the reasonable value of services, but also a living wage. Since the *Adkins* case had decided that employers could not be compelled to pay women employees a living wage, and since a living wage was an essential element of the wage then under consideration, compelling the payment of such a wage was held unconstitutional upon the authority of the *Adkins* decision.

To us it appears that a grave error has been committed, for nowhere does the statute provide that an employer must pay a wage equal to the value of the services and a living wage. The State Industrial Commissioner is only authorized to define "minimum fair wage rates,"³² and a fair wage is defined as one "fairly and reasonably commensurate with the value of the service or class of service rendered."³³ Thus an employer is only compelled to pay a wage equal to the services he receives. The objectionable Section 552 as defined by Section 551 (7) does provide that the prohibited wage is one which is (a) less than the value of the services, and (b) less than a living wage. This means that an employer may not pay a wage which contains both elements. Let us assume that an employer is paying a wage which contains only one of these elements, *i. e.*, that the wage he is paying is equal to the value of his employee's services, but is not equal to a living wage. The statute prohibits only a wage having the two elements. Here is a man paying a wage having one element, *i. e.*,

²⁸ *Morehead v. Tivaldo*, 270 N. Y. 233, 200 N. E. 799 (1936).

²⁹ N. Y. Consr. art. 1, § 6.

³⁰ *Morehead v. Tivaldo*, — U. S. —, 65 Sup. Ct. 918 (1936).

³¹ § 551 (7).

³² § 557.

³³ § 551 (8).

less than a living wage. Since one essential element is missing, the wage which this employer is paying is not the prohibited wage under the statute. Thus an employer, even under the statute, may pay less than a living wage provided that it equals the value of the services. If this statute does not compel the payment of a living wage, then the *Adkins* case is not in point.³⁴

The argument advanced by the United States Supreme Court, that it is bound by the construction which a highest state court places upon a state statute,³⁵ and that therefore it must pass upon the statute as construed by the New York Court of Appeals, *i. e.*, as though it compels an employer to pay a wage equal to the value of the services and a living wage, does not impress us. To us, the statute does not appear ambiguous so as to admit of two constructions. If such freedom of construction were allowed, courts would be enacting legislation, not interpreting.

The Attorney General is now seeking a rehearing.† The great difficulty, as we see it, is that in the *Tipaldo* decision, the Court says that the *Adkins* case "clearly" shows "that the 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." We were not aware that the *Adkins* case had taken such a broad position,³⁶ but this interpretation probably will make the *Adkins* decision go down in history as authority for that proposition.³⁷ This will not mean that the state may not impose minimum wage laws altogether. It means that the state may not impose minimum wage laws to apply only to adult women workers.³⁸ It is interesting to note that the Court here, in citing from the *Adkins* case, reiterates the doctrine that legislative abridgement of freedom of the right to contract can be justified "by the existence of exceptional circumstances" and that "any measure that deprives employers and adult women of freedom to agree upon wages, leaving employers

³⁴ It will be recalled that in the *Adkins* case, 261 U. S. 525, 43 Sup. Ct. 394 (1922), the statute sought to compel the payment of a living wage.

³⁵ A state act, construed by her court of last resort, must be taken to express the intention and purpose of her lawmakers. *Knights of Pythias v. Meyer*, 265 U. S. 30, 44 Sup. Ct. 432 (1924); *Jones v. Prairie Oil Co.*, 273 U. S. 195, 47 Sup. Ct. 338 (1927); *International Harvester Co. v. Kentucky*, 234 U. S. 216, 34 Sup. Ct. 853 (1913); *Green v. Lessee of Neal*, 6 Pet. 291 (U. S. 1832).

† NOTE.—Since this article was submitted for publication, the U. S. Supreme Court, on Oct. 12, 1936, denied the rehearing sought. *N. Y. Times*, Oct. 13, 1936, p. 1, col. 1.

³⁶ We believe that the *Adkins* decision should be confined to the facts of that case, and that therefore it was only authority for the proposition that an employer cannot generally be compelled to pay female adult employees a living wage.

³⁷ Thus today we accept the interpretation of the facts which the court in *People v. Noblett*, 224 N. Y. 355, 120 N. E. 725 (1927) gave the case of *People v. Miller*, 169 N. Y. 339, 62 N. E. 418 (1902).

³⁸ Note that despite this position, the Court reaffirms the rule that "physical differences between men and women must be recognized in proper cases and legislation fixing hours or conditions of work may properly take them into account". It is submitted that "conditions of work" include wages.

and men employees free so to do is necessarily arbitrary.”³⁹ Does this mean that a state minimum wage law, applying equally to men and women during an emergency, would be sustained? We think it does.

Thus far, we have dealt mainly with the attempt of the states to establish labor legislation. We have seen that there may be enacted maximum-hour laws for workers engaged in hazardous occupations, but that the laws must be health measures, and that if they are intended as economic measures, they are unconstitutional.⁴⁰ We now find that the Federal Government is also powerless to enact what is characterized as economic legislation.⁴¹

Turning to the efforts of Congress in that direction, we find that the absence of this power in the states is not sufficient reason to authorize Congress to enact labor legislation.⁴² With the one exception involving railroad employees who were on the verge of a national strike,⁴³ all the efforts of Congress to enact legislation for the benefit of workers, have been held invalid by the Supreme Court. In reliance upon its power to regulate interstate commerce, Congress has attempted to enact labor legislation regulating each step in the course of goods (1) from their source at the mine or factory,⁴⁴ (2) on to the railroad or other carrier that ships them,⁴⁵ and (3) then into the

³⁹ Compare this with the language used in *Muller v. Oregon*, 208 U. S. 412, 28 Sup. Ct. 324 (1905), *supra* note 13.

⁴⁰ See *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539 (1905), *supra* note 7, and quotation there cited.

⁴¹ *Lucey, Labor and Law in THE COMMONWEAL* (July 3, 1936) 257.

⁴² *Guffey Coal Decision, Carter v. Carter Coal Co.*, 297 U. S. —, 56 Sup. Ct. 855 (1936), where the Court said, “The proposition often advanced and as often discredited, that the power of the federal government inherently extends to purposes affecting the nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted but always definitely rejected by this court.”

⁴³ In 1916, railroad employees threatened a general strike and to prevent this from happening, Congress enacted a law which provided for an eight-hour day for employees of interstate railroads, and fixed their wages at the same rate as it had been for the longer working day. On the ground that an emergency existed, such as the one threatened by a general strike which might have halted interstate railway commerce, this Act was declared constitutional. *Wilson v. New*, 243 U. S. 332, 37 Sup. Ct. 298 (1917).

⁴⁴ Where an Act of Congress established minimum wages and maximum hours, and provided for recognition of a miners' union, it was held unconstitutional on the ground that mining is a local activity. *Guffey Coal Decision, Carter v. Carter Coal Co.*, 297 U. S. —, 56 Sup. Ct. 855 (1936). Similarly, laws were declared unconstitutional which attempted to ban interstate transportation of goods made by child labor, *Hammer v. Daggenhart*, 247 U. S. 251, 38 Sup. Ct. 529 (1918), and which attempted to tax employers of child labor, *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 42 Sup. Ct. 449 (1922). All of these decisions rested on the ground that Congress was attempting to regulate purely local matters.

⁴⁵ The Court even held unconstitutional laws applying only to railroad employees unquestionably engaged in interstate commerce. See *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. 277 (1908) (where a statute making it a

hands of the middleman or retailer who sells them to the consumer,⁴⁶ and the Supreme Court, with one minor exception,⁴⁷ has invalidated every effort. The federal rulings seemed to indicate that the regulation of wages was generally a state matter, while the state rulings indicate that the states, too, are powerless in this regard.

Although it thus seems that neither the states nor the Federal Government are authorized by the Constitution to enact outright minimum wages for labor, no one knows how the Supreme Court will rule in the next important constitutional case. The phrases "due process", "equal protection of the law", and "regulating interstate commerce", contained in our Constitution, are at best vague, and do not tend to make definite law. What will be considered to be "due process" or within the "police power", depends principally on the individual views of the members of the Court. "These phrases are blank checks which the judge fills in in accordance with his personal opinion."⁴⁸ If five members of the Court agree that certain laws are required, then those laws are approved.⁴⁹ However, when the majority think a law economically unsound then the emergency theory is forgotten,⁵⁰ and the law declared unconstitutional.⁵¹

One cannot help but feel that the vast importance of social measures affecting millions of people, makes it particularly unfortunate

misdemeanor for any interstate railroad to unjustly discriminate against a railroad worker who joined a labor union was held unconstitutional); *Railroad Retirement Board v. Alton R. R.*, 295 U. S. 330, 55 Sup. Ct. 758 (1935) (where the Court held unconstitutional a compulsory pension system provided for the benefit of employees of interstate railroads).

⁴⁶ In its decision on the National Recovery Act, the Supreme Court declared that the workers who handle goods that have been shipped from another state and which have already left the interstate carrier that transported them, are not engaged in interstate commerce. Hence the federal government is without power to regulate their hours or wages. *Schechter v. United States*, 295 U. S. 495, 55 Sup. Ct. 837 (1935).

⁴⁷ See note 43, *supra*.

⁴⁸ From p. viii of Prof. Morris R. Cohen's introduction to *GOLDBERG AND LEVENSON, LAWLESS JUDGES* (1935). He also adds on p. x, "When the results of the actual decisions are felt to be oppressive to those in need of relief, it is vain to urge that the court was bound. A court bound by purely personal views of what is just or unjust (as in the Minimum Wage Cases) is only illustrating the Higher Lawlessness." See also *The Judiciality of Minimum Wage Legislation* (1924) 37 HARV. L. REV. 545, where Prof. Thomas Reed Powell, in referring to the *Adkins* decision, says, " * * * it was not the Constitution but 'a measureless malfeasance which willed it thus'—the malfeasance of chance and the calendar."

⁴⁹ See the mortgage moratorium case, *Home Building and Loan Ass'n v. Blaisdell*, 290 U. S. 398, 54 Sup. Ct. 231 (1933); the gold cases, *Norman v. Baltimore & Ohio R. R.*, 294 U. S. 240, 55 Sup. Ct. 407 (1934); *Nortz v. United States*, 294 U. S. 317, 55 Sup. Ct. 428 (1934); *Perry v. United States*, 294 U. S. 330, 55 Sup. Ct. 432 (1934) (which were approved upon the theory that the existing emergencies furnished the occasion for the exercise of legislative power).

⁵⁰ *GOLDBERG AND LEVENSON, LAWLESS JUDGES* (1935) 237.

⁵¹ See the railway pension case, *Railroad Retirement Board v. Alton R. R.*, 295 U. S. 330, 55 Sup. Ct. 758 (1935); the N. R. A. cases, *Schechter v. United States*, 295 U. S. 495, 55 Sup. Ct. 837 (1935).

to permit such uncertainty in the law, especially since the determination of the issues is often left to the mercy and discretion of one deciding judge. By this we do not mean to indicate that we believe that the judges wilfully disregard the law. We believe, as do so many others, that " * * * the Court is a human institution; that it has the fallibility of a human institution; that each of its members has his human limitations, his strength and his weaknesses; each has his own political, social and economic philosophies, some of them avowed and which are sought to be controlled and others entirely subconscious but woven into the very texture of his being."⁵²

Constitutional Amendments, seeking to extend the control of the government over the social and economic life of the nation, are now being proposed on all sides. Since the ultimate fate of such Amendments would depend upon the construction put upon them by the Supreme Court, we cannot say that this alone would solve the problem. We would suggest that in addition to such Amendment, provision should be made that no state or federal statute should be held unconstitutional save by a vote of two-thirds of the membership of the Court, and that such questions should be promptly submitted to the Supreme Court itself, without prior submission to the lower federal courts.⁵³

LOUIS H. RUBINSTEIN.

PROPORTIONAL REPRESENTATION: THE OUTLOOK FOR ITS
COSTITUTIONALITY IN THE STATE OF NEW YORK.

Proportional representation is an attempt to realize an equitable representation of sizeable political constituencies in city councils. There are many different plans which aim at this; but the "most carefully devised and promising system" of proportional representa-

⁵² Stated by Bernard L. Shientag, Justice of the Supreme Court of the State of New York in Book Rev. (1936) 10 ST. JOHN'S L. REV. 382, quoting CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) 168, wherein it is said, "The great tides and currents which engulf the rest of men do not turn aside in their course and pass Judges by."

⁵³ See Book Rev. (1936) 10 ST. JOHN'S L. REV. 385. See also N. Y. Times, June 28, 1936, p. 16L, col. 3, where Prof. Cohen suggests giving Congress power to pass Constitutional Amendments by a majority vote of both Houses, coupled with a clear-cut provision stripping the courts of the power to nullify legislation. He is here quoted as saying, "I think it would be safer for the people to be at the mercy of their representatives than at the mercy of a majority of one in a court whose members frequently are not familiar with the facts of the issue on which they are voting."