moratorium case[9] did not render the contract-impairment clause of the constitution unimportant. It would seem that the moratorium case merely holds that the state may alter remedies and for that reason is to be distinguished from the earlier decision in *Bronson v. Kinzie*[10] where the right was impaired as the statute provided for a minimum of two-thirds of the indebtedness against the property on foreclosure sale of the mortgaged premises. L. H. F. '36.

Editor's Note.—By an order signed June 18, 1936, by Mr. Justice Roberts the decision in the instant case has been stayed and a rehearing will probably be granted.

CONSTITUTIONAL LAW—DUE PROCESS: FREEDOM OF CONTRACT—MINIMUM WAGE LAWS.—The Supreme Court, once again, has refused to remove the impediment it placed in the path of minimum wage legislation thirteen years ago.[1] In the most recent case[2] the court has declared unconstitutional the New York Minimum Wage Law for women and children.[3] The case arose on an application for a writ of habeas corpus by the relator, a laundry operator, who was arrested and charged with having paid a woman employee less than the "minimum fair wage" set by the Industrial Commissioner. The official was ordered by the law to establish a "minimum fair wage" rate where he found an oppressive wage to exist in any industry or trade, excluding domestic and farm occupations. The Act defined an unreasonable and oppressive wage as one which is less than the fair value of the employee's services and insufficient to meet the cost of living. Adequate standards to guide in the establishment of the wage rate were provided. The relator's attack upon the Act was based solely on the invalidity of wage-regulation as such. The state sought to distinguish the instant law from that which was declared unconstitutional in the *Adkins* case.[4] *Held*, four justices dissenting, that the law was unconstitutional in that it deprived employers and employees of that freedom of contract guaranteed by due process of law.

While it is important to preserve to persons the freedom to contract about their affairs, it is likewise necessary to prevent the abuse of this liberty so that it may not be used to defeat all public interests and thereby destroy the very freedom of opportunity which it is designed to safeguard. The guaranty of liberty of contract simply implies the absence of arbitrary restraint, not immunity from reasonable regulation and prohibitions designed to promote public welfare.[5]

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[9] Home Bldg. & L. Ass'n v. Blaisdell (1934) 290 U. S. 398, 88 A. L. R. 1481.

[10] (1840) 1 How. 311, 11 L. ed. 143.

[1] Adkins v. Children's Hospital (1923) 261 U. S. 525.

[2] Morehead v. Tipaldo, People ex rel. (June 1, 1936) 56 S. Ct. 918. Affirming 270 N. Y. 233, 200 N. E. 799.

[3] Laws of 1933, chap. 584.

[4] (1918) 40 Stat. 960.

[5] Chicago, etc. R. R. v. McGuire (1911) 219 U. S. 549, 567; German Alliance Ins. Co. v. Lewis (1914) 233 U. S. 389, 417.

The constitutionality of minimum wage laws for women and children was first presented to the Supreme Court in 1917.[6] An even division of the court prevented a binding determination of the constitutionality of such measures, but had Mr. Justice Brandeis participated in the consideration of the case there can be no doubt that his vote would have enabled the court to establish a precedent for the validity of this type of legislation. Five years later the Court by a vote of five to three invalidated a minimum wage law for women and children passed by Congress for the District of Columbia.[7] Since that decision the doctrine of the *Adkins* case has been affirmed twice.[8]

The New York law was drafted to meet the objections made to the District of Columbia law.[9] In the instant case the court explains that the ruling that the prescribed standard in the District of Columbia Act stamped the act as arbitrary and invalid were simply additional grounds, and that the chief basis for the holding was that the states have no power to prescribe the wages to be paid employees.[10]

The Court's intimation that it might sustain a wage law as an emergency measure[10a] but not as a permanent measure is not convincing when it is recognized that we are confronted with a situation which is continually baneful. Not only are wages fixed partly by chance and caprice or by the necessities of those seeking employment and their dependents, but women are seriously handicapped in their bargaining power and hence are more often than men paid oppressive wages.[11]

Numerous regulations restricting the fredom of contract have withstood judicial destruction. Such are: prescribing the hours of labor in particular occupations[12] and in all occupations;[13] reducing night work for women[14]

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[6] Stettler v. O'Hara (1917) 243 U. S. 629.

[7] Supra, note 2 and 4.

[8] Murphy v. Sardell (1925) 269 U. S. 530 (Arizona law); Donaham v. West Nelson Mfg. Co. (1927) 273 U. S. 657 (Arkansas law).

[9] Among the objections to the District of Columbia Act were that the standard of a "living wage" was considered too uncertain to be valid (*cf.* U. S. v. Cohen Grocery Co. (1921) 255 U. S. 81) as well as improper since dependent upon the needs of employees without regard to the value of their services. The New York Act provides for a "fair wage" which is defined as one "fairly and reasonably commensurate with the value of the service." The criterion of *quantum meruit* has often been declared sufficient. Note (1933) 42 Yale L. J. 1250. See also statement of Sutherland, J., at p. 559 of 261 U. S.

[10] Note that Taft, C. J., dissenting in the *Adkins* case assumes that the decision rests solely on this basis.

[10a] Majority opinion at p. 920.

[11] Elliott & Merill *Social Disorganization* (1934) p. 289; U. S. Dept. of Labor, Bulletin of the Women's Bureau, No. 97 (1932); note 12 of 42 Yale L. J. 1250. In Mueller v. Oregon (1908) 208 U. S. 412 the Supreme Court emphasized the disadvantage at which women are placed in the struggle for existence and that protective regulation is proper in order to preserve the strength of the race. See also Quong Wing v. Kirkendall (1912) 223 U. S. 59.

[12] Holden v. Hardy (1898) 169 U. S. 366; B. & O. R. R. v. I. C. C. (1911) 221 U. S. 612.

[13] Bunting v. Oregon (1917) 243 U. S. 426.

[14] Radice v. N. Y. (1924) 264 U. S. 292.

and reducing day work for women;[15] fixing the time for payment of wages;[16] requiring the redemption in cash of store orders issued for wages;[17] required the measuring of coal for miners' wages before screening;[18] prohibiting the assignment of unearned wages;[19] regulating interest rate on loans to workers;[20] and establishing a system of compulsory workmen's compensation.[21] Although none of the cited regulations imposed a minimum wage, they did take away from the employer the freedom to agree as to how the wage should be fixed, the mode of payment, etc.

State courts have generally considered minimum wage laws to be a proper subject for the exercise of the police power[22] and have sustained such legislation.[23]

Logically there does not seem to be any difference in the encroachment upon the liberty to contract whether it is hours or wages that are being regulated.[24] Nor does there seem to be any greater objection to requiring industry to bear the subsistence costs of the labor which it employs than to the imposition upon it of the cost of industrial accidents.[25] There is grim irony in speaking of freedom of contract when dealing with persons who because of economic necessity give their service for a sum less than is needful for decent subsistence.

The decision in the instant case is unfortunate, for it clearly indicates that the Court has no reluctance to nullify legislation designed to meet social maladjustments however much support such legislation may have among reasonable people.[26] It is to be regretted that the Court did not feel that prior divisions in its own ranks, plus recent economic trends which have prevailed a necessity for wage legislation not appreciation at the time of the *Adkins* decision, pointed to the desirability of considering the entire

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[15] Mueller v. Oregon (1908) 208 U. S. 412; Riley v. Mass (1914) 232 U. S. 671; Miller v. Wilson (1915) 236 U. S. 373.

[16] Patterson v. Bark Eudora (1903) 190 U. S. 169; St. Louis, etc. Ry. Co. v. Paul (1899) 173 U. S. 404; Erie R. R. v. Williams (1914) 233 U. S. 685.

[17] Knoxville Iron Co. v. Harbison (1901) 183 U. S. 13; Keokee Coke Co. v. Taylor (1914) 234 U. S. 224.

[18] McLean v. Arkansas (1909) 211 U. S. 539.

[19] Mutual Loan Co. v. Martell (1911) 222 U. S. 225.

[20] Griffith v. Connecticut (1910) 218 U. S. 563.

[21] N. Y. C. R. R. Co. v. White (1919) 243 U. S. 188; Mountain Timber Co. v. Washington (1917) 243 U. S. 219.

[22] State v. Crowe (1917) 130 Ark. 272, 197 S. W. 4; Williams v. Evans (1917) 139 Minn. 32, 142 N. W. 495.

[23] The most recent case is that decided on April 2, 1936. Parrish v. West Coast Hotel Co. — Wash. —, 55 P. (2d) 1083. So too a minimum wage law on public works is valid. Metropolitan Water District of So. California v. Whitsett (1932) 215 Calif. 400, 10 P. (2d) 751; Atkin v. Kansas (1903) 191 U. S. 207; Campbell v. New York (1927) 244 N. Y. 317, 155 N. E. 628; see annotation 50 A. L. R. 1480. Minimum wage laws for children are valid. Stevenson v. St. Clair (1925) 161 Minn. 457, 201 N. W. 629; (1925) 38 Harv. L. Rev. 980.

[24] Holmes J., dissenting, in Adkins v. Children's Hospital (1923) 261 U. S. 525, 569.

[25] Stone, J., dissenting in the principal case.

[26] (1936) 3 U. of Chicago L. Rev. 657.

problem de novo. The doctrine of *stare decisis* does not require that the court worship *ex post facto* rationalization.

If it is the settled rule that underlying facts of past conditions determine the constitutionality of legislation[27] then the *Adkins* case should not have been considered as binding precedent in any regard.[28] The march of events dictates the desirability of minimum wage legislation.

There is nothing explicit in the Constitution which denies to the states the right to protect women from the exploitation of employers: the concept of due process is purely "judge-made".[29] Admitting that the support of women employees who do not earn subsistence cannot be transferred to employers who pay the reasonable value of the service obtained, the Act invalidated in the principal case does not seem an unreasonable measure on the part of a government which is compelled to deal with problems of poverty, subsistence, and morals. W. F. '37.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — GUFFEY ACT. — Once again the Supreme Court has declared that national economic needs cannot be attained through legislative enactments which exceed constitutional limitations. In the most recent decision[1] the Court has declared invalid the Guffey Act[2] which was a statutory plan to regulate the Bituminous Coal Industry throughout the country. *Inter alia* the act provided for the regulation of working conditions of the miners and for protection to collective bargaining. The majority of the court rejected the theory that interstate commerce is "directly" affected by strike and lockouts resulting in curtailment of production or by resultant changes in the sale price. It was held on the contrary that the evil incidents of strikes, etc., are local in their nature and that their effect upon commerce is merely secondary and indirect. The dissenting opinion upholds more particularly the "price-fixing" provision of the Act, which were invalidated in the eyes of the majority by their connection with labor control, but intimates that the labor provisions might be sustained through similar reasoning.

The Court has been fairly consistent in holding that production is not commerce but merely a step in the preparation for commerce.[3] The possibility or certainty of the exportation of articles into another state does not impart to their production the character of interstate commerce.[4] Hence

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[27] O'Gorman & Young v. Hartford Fire Ins. Co. (1931) 282 U. S. 251; Abie State Bank v. Bryan (1931) 282 U. S. 765, 776.

[28] The Permanence of Constitutionality (1931) 40 Yale L. J. 1101.

[29] Thomas Reed Powell, Judiciality of Minimum Wage Legislation (1924) 37 Harv. L. Rev. 545. This article also points out that minimum wage laws would probably had been sustained had the issue been presented to the court at some other time.

[1] Carter v. Carter Coal Co. (May 18, 1936) 56 S. Ct. 855.

[2] (1935) 49 Stat. 991.

[3] Chassaniol v. Greenwood (1934) 291 U. S. 584, 587; U. S. v. E. C. Knight Co. (1895) 156 U. S. 1; Kidd v. Pearson (1888) 128 U. S. 1.

[4] Heisler v. Thomas Colliery Co. (1922) 260 U. S. 245, 259; Coe v. Errol (1886) 116 U. S. 517.