Marquette Law Review

Volume 16
Issue 3 *April 1932*

Article 4

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HISTORY OF LEGISLATIVE CONTROL OF WAGES IN WISCONSIN

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WITH the general growth of population in the United States and the rise of an urban civilization out of a rapidly developing factory system, the doctrine of individualism as a philosophy of business enterprise was by the very nature of events forced to make way for a new theory of governmental regulation. This new theory, coupled with the entry of women in large numbers into the labor market, competing not only among themselves but also in many instances with men, forced the question of compensation into the spotlight, with the result that shortly after the beginning of the present century a substantial legislative interest was created in the establishment of minimum wage levels.

Out of this interest two types of state wage control have developed in practice.[1] One can be designated as rigid compulsory control, the law setting an absolute standard of minimum compensation in industry, and providing penalties for the failure of employers to attain such standard, as illustrated by the former law of Arkansas.[2] The other is flexible administrative control in which the general policy is determined by the legislature, with the power of classification of industry and the determination of reasonable wage levels lodged in an administrative agency, consisting of either a single individual or a commission. These flexible administrative controls differ as to the manner of enforcement. One is non-compulsory in that the only penalty for failure to comply with the agency's order is the pressure of public opinion[3]; the other is compulsory in that a failure to comply with the orders results in the application of specific legal remedies.

Wisconsin employs the flexible compulsory administrative type of control, the operating agency being an industrial commission of three members.

The records indicate that there have been no successful legislative interferences with this system, although three abortive attempts would

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[1] Cf. A. N. Holcombe, *The Effects of the Legal Minimum Wage for Women,* Ann. Am. Academy, Vol. 69, pp. 34-41.

[2] Chapter 107, Section 552, *Digest of the Statutes* (1916). An illustrative sentence reads: "All female workers who have had six months' practicable experience in any line of industry or labor shall be paid not less than one dollar and twenty-five cents per day."

[3] Chapter 706 Massachusetts acts of 1912.

have the effect of depriving the commission of a considerable amount of its usefulness. Two bills, one in 1915[4], and the other in 1917[5] were simple attempts to substitute a definite minimum in place of the determination of the commission; while a bill in 1919[6] would leave to a jury the determination of the amount of the living wage and reasonable compensation, the living wage under this bill not only providing for a reasonable standard of comfort so far as the necessaries of life are concerned, but, in addition, being sufficient for "reasonable leisure, education and entertainment." The penalty for the employer's noncompliance was to be an action by the attorney-general, upon a report by the commission, to abate as a public nuisance the business of such employers, but upon a finding that the business was essential and unable to pay a living wage under private management, the property must be condemned and then operated by the state.

While the idea of wage control is a very old one,[7] the first application of the minimum wage principle under the factory system was in Victoria, Australia, under a law enacted in 1896[8], and was next applied in 1909 in Great Britain[9]. In these countries it was confined only to certain industries at first, although the success of the experiment led to an extension of its scope.[10]

Beginning in 1911, the idea of minimum wage control made progress in the United States[11], Wisconsin leading with a legislative proposal to include male adults as well as women and children, the bill being so well-prepared that it received favorable comment in various parts of the country.[12]

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[4] Assembly Bill 666A.

[5] Assembly Mill 64A.

[6] Assembly Bill 145A.

[7] After the Black Death in England in 1349 the *maximum* wages of certain laborers were regulated by what is known as the Statute of Laborers. It states that the laborer "shall take only the wages which were accustomed to be taken in the neighborhood where is is bound to serve." J. R. Green, *Short History of the English People,* New York, 1897, p. 249.

[8] See Elizabeth G. Evans, *A Case for Minimum Wage Boards, The Survey,* Vol. 31, January 10, 1914, p. 440.

[9] The Trade Boards Act, 1909. (9 Edw. 7, c. 22.)

[10] The Survey, op. cit., p. 440.

[11] No state in the United States adopted minimum wage control before 1912; one state in 1912; and eight states in 1913. For a complete list, see *Bulletin of Women's Bureau,* No. 61, U. S. Department of Labor, Appendix A.

[12] "* * * It is so carefully thought out and even the constitutional objections so plausibly met, that it will not do to dismiss it as the mere vagary of a socialistic state." F. J. Stimson in *The Boston Evening Transcript,* March 22, 1911.

The main provisions of this bill, which was called by a Harvard professor a "shrewd piece of effective legislation,"[13] reads as follows:

"All employment property is hereby declared to be affected with a public interest to the extent that every employer shall pay to every employee in each oppressive employment at least a living wage. No employer shall fail or neglect to pay to every employee in each oppressive employment at least a living wage."[14]

As for the definition of important terms, 'employment property' was to mean "physical property used for the production and sale for profit of products of labor hired for wages;" 'oppressive employment' was to mean "an occupation in which employees are unable to earn a living wage;" and a 'living wage' was to be construed as "such compensation for labor performed under reasonable conditions as shall enable employees to secure for themselves and those who are or may be reasonably dependent upon them the necessary comforts of life."[15]

The enforcement of the proposed law was to be given to the commissioner of labor,[16] with power to ascertain what was to be an oppressive employment, to issue a license to employers using labor in an oppressive employment, and to revoke the license in case the employer "has paid or is paying less than the living wage stated therein," or has failed to do certain other prescribed things.

This legislation embodied certain established concepts and principles.[17] Concerning oppression, Professor Fruend had said: "The theory of legislative interference seems to be in some cases that oppression is, in itself, like fraud, immoral and a wrong either against the individual affected thereby or against the public at large."[18] "Necessary comforts of life," used as the fundamental standard for a living wage, appears in the constitution of Wisconsin, although it is employed there in connection with the privilege of debtors;[19] and to justify the assertion of legislative control over private property, there was a resort to the well known doctrine of "property affected with a public interest" —a doctrine first given currency in the United States in the case of Munn v. Illinois.[20] While the property in that case which was affected

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[13] A. N. Holcombe, *Minimum Wage Board, The Survey,* Vol. 26, p. 32.
[14] Senate Bill, 317S.
[15] Ibid, Section 1.
[16] The appointment was authorized by Chapter 319, Laws of 1883.
[17] See Constitutionality of the Proposed Law by Katherine Lenroot in a bulletin prepared for the Wisconsin Consumers League under the direction of John R. Commons, 1911.
[18] The Police Power, p. 285.
[19] Article I, Section 17.
[20] (1876) 94 U. S. 113.

with a public interest was a monopoly—an elevator "at the gateway of commerce,"—the language used in the majority decision was broad enough to give comfort to those interested in the extension of the doctrine.

"Property," says Chief Justice Waite, "does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good."[21]

It seems to be quite apparent from subsequent interpretations of the application of the doctrine that the legislature would have met a constitutional obstacle in the assumption of such general control. It was pointed out in a later case[22] that a mere legislative declaration that property is so affected is not conclusive; that the relation between the employer and the public must be "peculiarly close;" and that the circumstances must "raise an affirmative obligation" on the employer's part to deal in a reasonable way with the public. Furthermore, it was emphasized that it had never been thought that a State might regulate ordinary business activities such as those of the butcher, baker, or tailor.

Another constitutional question was raised by the provision that,

"Every order of the commissioner of labor classifying oppressive employments and fixing a living wage shall become operative thirty days after its publication,"

in that there was a delegation of legislative power to the commissioner. But in 1911 opinion was well-crystalized,[23] and the Supreme Court of the United States had made some authoritative statements regarding the constitutionality of such legislation,[24] although the question was not finally settled in Wisconsin until 1916;[25] and it is still the contention

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[21] Ibid, p. 126.

[22] Wolff Packing Company v. Industrial Court, (1923) 262 U. S. 522, 536.

[23] "Before these (administrative) agencies the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight." Elihu Root, *Public Service at the Bar,* Reports of the American Bar Association, Vol. XLI, (1916) p. 368.

[24] U. S. v. Grimaud, (1910) 220 U. S. 506. In Marshall Field & Company v. Clark (1892) 143 U. S. 694, the court, speaking through Mr. Justice Harlan, quoting from Locke's Appeal, 72 Penn. St. 491, 498, said: "The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend." Page 694.

[25] State v. Lange Canning Company, (1916) 164 Wis. 228.

of at least one eminent Wisconsin jurist that the constitutionality was supported in response to social forces rather than to the effectiveness of legal argument.[26]

The objection from an economic point of view to the definition of a living wage as one that "shall enable employees to secure for themselves and those who are or may be reasonably dependent upon them the necessary comforts of life" seems quite serious. The living wage for each employee would as a result of the application of this definition be a variable having relation to the number of his or her dependents. Laying aside the difficulties inherent in the determination of such a wage, it is quite probable that under such a law an employer would engage in discriminatory activities by employing those with no or few dependents, thus creating a new economic evil commensurate with or greater than the evil to be remedied.

However, the constitutional and economic questions were never answered in an authoritative way as the bill failed of enactment, and the fears of those who saw conservatism and laissez-faireism too firmly rooted at a time in economic evolution when the evil fruits of industry were getting too ripe were at least temporarily justified,[27] although a change so far as minimum wage control was concerned lay only two years ahead.

Without allowing interest to wane, the Legislature of 1913 passed a law dealing with a wage for women and minors containing these principal features:[28]

1. Women and minors to be paid not less than a living wage.[29]
2. Power in the industrial commission[30] to fix reasonable classi-

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[26] "* * * those who have opposed the creation and extension of administrative tribunals have as a rule had the best of the argument on legal and constitutional grounds, but have been obliged to yield to an irresistible social pressure." Marvin B. Rosenberry, *Administrative Law and the Constitution,* The American Political Science Review, Vol. XXIII, No. 1, February, 1929.

[27] Referring to this proposed Wisconsin legislation, it was said: "To a large proportion of American voters such legislation will seem socialistic or paternalistic to an absurd and dangerous limit * * * It (this idea) is rooted in the notion, which was once a true account of the facts, that this is a land in which every man who is good for anything has his chance, and it should be our patriotic care to maintain a job of the non-paternalistic type, interfering as little as possible with private initiative and management." Editorial, *The Independent,* Vol. 70, p. 806.

[28] Chapter 712.

[29] Governor McGovern suggested that in the beginning there should be experimentation in a limited field, dealing with the wages of women employees in the "most oppressive occupations." *Message of Francis E. McGovern,* (1913).

[30] Created by Laws of 1911, ch. 485, as the successor to the bureau of labor statistics established in 1883.

fications, to determine the living wage and to issue general and special orders.

3. The appointment of an advisory wage board representing employers, employees, and the public.

4. Provision for a license permitting those unable to earn a living wage to work commensurate with their ability.

5. Power in the industrial commission to obtain information from employers, the employer himself to keep a record of women and minors employed and the wages paid.

6. Power in the industrial commission upon complaint that less than a living wage had been paid to investigate and to take necessary proceedings to enforce payment of a wage not less than a living wage.

As a matter of historical interest, the first minimum wage law in this country was passed in Massachusetts,[31] but the payment of a minimum wage was not made compulsory. The commission was empowered only to recommend that a certain amount be recognized as a minimum wage, the pressure upon the employer to pay such a wage being the publicity given to the recommendation of the commission, although a newspaper refusing to publish its findings might be subjected to a penalty. In Wisconsin the commission was given the power of direct enforcement.

The Wisconsin law of 1913 showed considerable improvement over the proposed legislation of 1911. No attempt was made to regulate the wages of male adults, a feature of doubtful constitutionality.[32] An industrial commission had been substituted for a commissioner of labor, thus broadening the base of administrative control. An additional safeguard in the interest of justice was the creation of an advisory wage board, with representation on the part of all those whose interests were being controlled. There was, furthermore, a provision for those who, because of special reasons, were not capable of earning a living wage.[33] And, finally, the economic objection to the previous bill was met by the establishment of a living wage that had relation to the individual's cost of living, irrespective of dependents.

After this law had been declared unconstitutional so far as it applied

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[31] Chapter 706, Acts of 1912.

[32] The Supreme Court of the United State has never had occasion to pass upon the constitutionality of minimum wage laws for men. However, the language in Lochner v. New York, (1904) 198 U. S. 45, 61, would seem to be significant. Chief Justice Taft, with judicial caution, refrains from expressing any opinion that a minimum wage low hight be enacted for adult men. Adkins v. Childrens' Hospital, (1923) 261 U. S. 525, 566.

[33] The policy of the commission is to grant licenses only in those cases where physical and mental defects are revealed. Biennial Report of the Industrial Commission, 1918-20, p. 63.

to adult women,[34] the Legislature of 1925 proceeded to amend it by adopting the following provision:[35]

"No wage paid or agreed to be paid by an employer to any adult female employe shall be oppressive. Any wage lower than a reasonable or adequate compensation for the services rendered shall be deemed oppressive and is hereby prohibited."

Again, the industrial commission was given power, and placed under a duty to investigate as to oppressive and unjust wages, and to issue orders upon the basis of its findings.

While under the old law the wages paid to adult women must have a relation to the cost of living, under the new one there must be a relation to the employe's efficiency of service, as the expression, "reasonable or adequate compensation for the service rendered," would clearly indicate.

Another new feature was incorporated in the law showing some solicitude for the employer, but undoubtedly based, in view of the policy of minimum wage legislation, on the theory that it is better for the employee to receive some compensation than to be thrown out of work entirely by the retirement of the employer because of economic reasons. The law embodying this feature runs as follows:[36]

"The commission shall * * * grant to an employer a license to employ adult females at less than the wage so determined if said employer shall satisfactorily establish that he is unable to pay such wage, but the inefficiency of the employer shall not be a ground for granting such license."

Two other states—Massachusetts[37] and Nebraska[38]—granted exemption of this nature under their minimum wage laws, but in these states permits were obtained from the courts.

With flexible administrative control established by the law of 1913, it was necessary for the commission to begin its fact-finding activities. The advisory wage board, with its broad basis of representation, to which reference has already been made, was duly constituted. The research of the commission was not only extensive in its territorial application, but touched in a comprehensive manner the points having

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[34] Folding Furniture Works, Inc. v. Industrial Commission, (1924) 300 Fed. 991.

[35] Chapter 176, Laws of 1925.

[36] Chapter 176, Laws of 1925.

[37] Chapter 706, section 6, Laws of 1912

[38] Chapter 211, section 6, Laws of 1913.

a necessary bearing upon the cost of living and employee efficiency.[39]

In connection with its fact-finding activities, the commission encountered some very real difficulties with special industries in the administration of the minimum wage law, illustrating legislative inadequacy in applying the principle of direct rigid control. For example, it was found that telephone companies, large and small, rendered twenty-four hour service, with more or less intermittent calls, depending to a certain extent upon the size of the exchange. The basis of payment worked out was that the telephone companies must pay their operators for all of the time that could not be employed productively in some other field, and that night operators must be compensated for all of the time during which they were unable to obtain uninterrupted rest. It was also discovered that when the telephone exchanges were located in private homes a rate per telephone was more reasonable than an hourly rate. Night telephone work also presented a peculiar problem due to the varying sizes of the exchanges.[40]

Other industries presented their peculiar problems of control. Due to special conditions in sanitariums where women were theoretically on duty from twelve to twenty-fours hours a day, the commission found that the most reasonable basis of compensation must have a relation to a minimum number of hours per week.[41] In the tobacco stemming business where elderly women were customarily employed, it was discovered that compensation on a piece basis was the most reasonable.[42] There was also a special problem connected with work let out by factories to be done at home. In this instance the discovery was made that the basis of compensation should also be in terms of piece-rates, the rate having a relation to the compensation to be earned by an employee of average ability on an hourly basis.[43]

As a result of its activities, the commission has established certain well-defined principles. It has emphasized the necessity of a thorough investigation of the facts bearing upon wage control, coupled with a complete opportunity for everyone to give his views before a decision

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[39] These points included occupation, length of time in the industry, education, previous occupations, special training, amount and causes of unemployment during the past twelve months, wages received at the beginning of work and at the time of the investigation, the family and living conditions, the amount paid for room and board or contributions to the family, the cost of standard articles of clothing and staple articles of food, and estimates from the women themselves of annual expenditures. Report of Industrial Commission, *Cost of Living of Wage Earning Women in Wisconsin,* (1916) p. 2.

[40] Biennial Report of the Industrial Commission, 1918-20, pp. 60-62.

[41] Ibid, p. 62.

[42] Ibid, p. 63.

[43] Ibid, p. 66.

is made.[44] Industry can be raised to a higher plane through the educational value of investigation and the establishment of minimum standards. Progress comes with reiterated advice regarding the ultimate economy of paying a living wage.[45] Again, wage regulation must look to causes as well as results, the efficiency of the employee being the ultimate goal.[46] In the determination of more specific wage-control principles, the commission was committed because of the necessities of the case to a differentiation of compensation bases in certain industries, but found that the basic compensation must be measured per hour instead of per day. This was because it was found that those who worked shorter hours were able to do a great deal or all of their own work at home while those who worked longer hours were compelled to hire it done for them.[47]

On April 9, 1923, the Supreme Court of the United States held a minimum wage law for women in the District of Columbia unconstitutional[48], although a previous decision of the same tribunal with an evenly divided court upheld a similar minimum wage law in the state of Oregon.[49] However, the commission met with no opposition in the administration of the law until August 18, 1924, when the Folding Furniture Works of Stevens Point, Wisconsin, obtained a federal injunction[50] restraining the commission from the further enforcement of the law as it affected adult women in its factory. This decision was based upon the fact that the law of Wisconsin was similar to the law of the District of Columbia.

As a consequence of this decision, as has been stated, the Legislature of 1925 passed the oppressive wage law for women.[51] changing the principle of control from the cost of living to efficiency of service. It is interesting to observe that Wisconsin has been the only state to

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[44] Report on Allied Functions, 1918, p. 42.

[45] Report on Allied Functions, 1917, p. 39.

[46] "The underlying issue is largely the question of training for efficiency. The problem can be solved only through the cooperation of the employers in devising means of promoting the interests of the workers through increasing their capacity and value." Report on Allied Functions, 1914, p. 60.

[47] The commission also refers to the fact that the principle of the hourly basis was copied by Minnesota, and that the Supreme Court of that state had decided that there is a real relation between hours of labor and cost of living. Biennial Report of the Industrial Commission, 1918-20, p. 60. The Minnesota decision referred to is G. O. Miller Telephone Co. v. Minimum Wage Commission, (1920) 145 Minn. 262. p. 271.

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

[49] Stettler v. O'Hara, (1916) 243 U. S. 629.

[50] Folding Furniture Works, Inc. v. Industrial Commission, (1924) 300 Fed. 991.

[51] See Senate Bill 20S, 1931, which would make the oppressive wage law apply to *all* employees.

resort to a different theory of wage control after the old law was found to be unconstitutional.[52] It is important to note, also, that inasmuch as in the administration of the law of 1913 the commission not only took into consideration the cost of living but the effect on industry,[53] it could consistently under the new law, due to the existing correlation, consider the cost of living in connection with efficiency of service. As a matter of fact, the declaration of the unconstitutionality of the minimum wage law has had no effect on minimum wage administration in Wisconsin. It is stated that "pending a definite determination of oppressive wage levels, the Commission has advised employers that it will not take action when the wages paid are equal to or above the rate under the old law,"[54] and that there has been complete compliance with the enforcement of existing rates.[55] That there might be some administrative difficulties in case of non-compliance with the old rate is easily understood.[56]

Whether or not the new law is constitutional remains yet in the realms of prophecy.[57] The question has been raised,[58] but there is some support for its constitutionality in the dictum of Mr. Justice Sutherland in the Adkins case when he said that "a statute requiring an employer * * * even to pay with a fair relation to the extent of the benefit obtained from the service would be understandable."[59] However, Wisconsin has found a way around a five to four decision[60] that would

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[52] Development of Minimum Wage Laws in the United States, 1912-27, *Bulletin of the Women's Bureau,* No. 61, U. S. Department of Labor, p. 5.

[53] Biennial Report of the Industrial Commission, 1928-30, p. 39.

[54] Biennial Report of the Industrial Commission, 1924-26, p. 41; 1926-28, p. 44; 1928-30, p. 39.

[55] Biennial Report of the Industrial Commission, 1928-30, p. 39.

[56] Concerning this piece of Wisconsin legislation the following comment has been made: "Difficult as it has been to determine the cost-of-living basis for setting minimum rates, this seems a much more ambiguous statement on which to base a rate." Bulletin of the Women's Bureau, No. 61, op. Cit., p. 5.

[57] In the memorandum on Bill No. 20S, 1931, which is a duplicate of the law of 1925 except that it applied to all employees, it is said: "This bill attempts to construct a minimum wage law on lines which may possibly be constitutional * * * In the proposed draft, the precise language of the Supreme Court has been quoted in the statement of the principle governing the minimum wage. Even so, the court is very apt to hold the act unconstitutional." The consideration of such bill puts a legislature in an unenviable position. On the one side is the Scylla of no protection for male employees, while on the other is the Charybdis of a probable contest on the point of constitutionality due to such attempted protection.

[58] *Bulletin of the Women's Bureau,* op. cit., p. 5.

[59] (1923) 261 U. S. 525, 559.

[60] The decision was actually five to three, Mr. Justice Brandeis not acting. However, his views in favor of minimum wage legislation were well known.

have been as easily or perhaps more easily justified had one of the five judges found himself by chance on the other side. The legislature of Wisconsin has decided that wages of women must be controlled in the interest of health, morality, and general welfare, and has thus by its ingenuity, using some of the old concepts, and adopting the dictum of a judge, circumvented the effect of a decision which by the operation of the doctrine of the stare decises had annulled minimum wage legislation in twelve[61] states. Wisconsin has in effect, a minimum wage law although it is called an oppressive wage law.

[61] This is not including Massachusetts where payment was not compulsory. See Appendix A, *Bulletin of the Women's Bureau,* No. 61, op. cit.