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Labor Law: Challenges to the Living Wage Movement: Obstacles in a Path to Economic Justice

Rachel Harvey

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NOTE

LABOR LAW: CHALLENGES TO THE LIVING WAGE MOVEMENT: OBSTACLES IN A PATH TO ECONOMIC JUSTICE

*Rachel Harvey**

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I. INTRODUCTION

In 1994, an alliance of churches, labor unions, and low-wage service workers succeeded in their campaign for the passage of a living wage

* B.S.F.S. in Foreign Service, May 2001, Georgetown University Edmund A. Walsh School of Foreign Service; J.D., expected in December 2003, University of Florida Fredric G. Levin College of Law. I would like to dedicate this Note to my grandfather, Cyril Harvey, a long-time union member, whose memory speaks inspiring volumes about hard work, compassion, and generosity. Thanks to my parents, Marcia and Gary Harvey for always encouraging me to think independently.

ordinance in Baltimore.¹ The ordinance, which went into effect in July 1995, established a minimum wage of \$6.10 per hour for individuals working under a city contract.² Under the ordinance, the minimum wage increased incrementally over time until the income of the full-time worker was ninety percent of the poverty threshold for a family of four.³ Once the minimum wage reached that level in 1999, it was indexed to inflation in order to ensure city workers would continue to receive a wage that was about ninety percent of that threshold.⁴ The Baltimore ordinance was the first of its kind in the United States.⁵ The success of the Baltimore living wage campaign in passing the ordinance touched off a living wage movement that has resulted in the passage of eighty-three living wage ordinances in cities and counties throughout the United States.⁶ More than seventy-five living wage campaigns continue to push for a living wage for individuals working under contracts with cities, counties, states, and college campuses throughout the country.⁷

The Association of Community Organizations for Reform Now (ACORN), a grassroots organization at the forefront of the living wage movement, sums up the rationale behind the movement:

The concept behind any living wage campaign is simple: Our limited public dollars should not be subsidizing poverty-wage work. When subsidized employers are allowed to pay their workers less than a living wage, tax payers end up footing a double bill: the initial subsidy and then the food stamps, emergency medical, housing, and other social services low wage workers may require to support themselves and their families even minimally.⁸

1. William Quigley, *Poverty: A Symposium: Full-Time Workers Should Not Be Poor: The Living Wage Movement*, 70 MISS. L.J. 889, 892 (2001).

2. BALTIMORE, MD., ORDINANCE 442, § 26 (1994).

3. *Id.*

4. *Id.*

5. ROBERT POLLIN & STEPHANIE LUCE, *THE LIVING WAGE: BUILDING A FAIR ECONOMY* 46 (1998).

6. ACORN, *LIVING WAGE SUCCESSSES: A COMPILATION OF LIVING WAGE POLICIES ON THE BOOKS*, available at <http://www.livingwagecampaign.org> (last visited Apr. 8, 2003).

7. *Id.*

8. *Id.*

The movement responds to the trend of outsourcing, in which governments contract out government services to private firms.⁹ The private firms pay lower wages in order to have the lowest bid and win the government contract.¹⁰ Thus, by contracting out work to private companies, the city saves money at the expense of low-wage workers.¹¹ Living wage advocates reason that, because low-wage workers' wages then fall so far below the poverty level, these workers must turn to the government for support. However, with a living wage these workers could have supported themselves.¹²

The living wage campaign aims to halt this process and prevent workers from living in poverty and having to rely on government programs in order to survive.¹³ Although the Fair Labor Standards Act (FLSA) applies a minimum wage to almost all employees of both public and private sectors throughout the United States,¹⁴ that minimum wage falls below the wage necessary to keep families out of poverty.¹⁵

This occurs because, although the Act effectively ensures a minimum wage to the working poor, the real buying power of the minimum wage has diminished to the point at which it no longer provides enough income to support a family.¹⁶ The current federal minimum wage is \$5.15 per hour.¹⁷ The value of the current minimum wage has declined since its peak in the 1960s and is currently worth eighteen percent less than its value in 1979.¹⁸ At \$5.15 per hour, a worker would only make \$10,300 a year working full time for 50 weeks.¹⁹ Thus, the income of a full-time worker at the minimum wage falls far below the poverty threshold of \$11,940 for a family of two.²⁰ A single mother with only one child would be unable to

9. POLLIN & LUCE, *supra* note 5, at 14.

10. *Id.*

11. ACORN, *supra* note 6.

12. *Id.*

13. *Id.*

14. The Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201-219 (2001).

15. EMPLOYMENT STANDARDS ADMIN. WAGE & HOUR DIV., U.S. DEP'T OF LABOR, MINIMUM WAGE AND OVERTIME HOURS UNDER THE FAIR LABOR STANDARDS ACT 12 (2001).

16. *Id.*

17. EMPLOYMENT STANDARDS ADMIN., WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, COMPLIANCE ASSISTANCE FAIR LABOR STANDARDS ACT (FLSA) (2002), available at <http://www.dol.gov/esa/whd/flsa/> (last visited Feb. 5, 2003).

18. Scott D. Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1, 28 (2001).

19. POLLIN & LUCE, *supra* note 5, at 2.

20. Dep't of Health and Human Serv. 2002 Poverty Guidelines, 67 Fed. Reg. 6931-33 (2002), available at <http://aspe.hhs.gov/poverty/02fedreg.htm> (last visited Feb. 5, 2003). The poverty

support both herself and the child and still remain above the poverty level without some form of public assistance. Although most individuals work at wage ranges well above the minimum wage, more than eight percent of workers spend at least fifty percent of their first ten years out of school working at jobs that pay less than the minimum wage plus one dollar.²¹ That eight percent of workers is a significant subpopulation for which the minimum wage has important and lasting effects.²² It is in the context of a minimum wage insufficient to keep full-time workers above the poverty level that the living wage movement has developed.

Actors in the living wage movement respond to that context by pushing living wage legislation through governmental bodies or through ballot initiatives. The living wage ordinances that have passed throughout the course of the living wage movement vary in their scope of coverage, their terms, and the degree to which they raise wages.²³ Considerations that living wage campaign leaders must make in proposing legislation and that legislators must take into account in drafting legislation include where to set the wage level, how to include a requirement of health benefits, which contractors the legislation will reach, and which employees the legislation will reach.²⁴ In defining the wage level, proponents of an ordinance choose a base wage and determine some means to index the wage; for instance, to the consumer price index or to the state median wage increase.²⁵ In ensuring that employers will provide health benefits, most proponents define a two-tiered living wage, with one lower wage to be paid by employers who provide health benefits and another, higher wage to be paid by employers who do not provide health benefits.²⁶ Again, proponents index-accommodate for the changing costs of healthcare.²⁷ Determining which employers will be covered involves both defining what relationship an employer must have with the government to be covered, as well as defining thresholds of coverage.²⁸ Existing ordinances limit the groups to which they apply in a variety of ways, with some ordinances covering only

threshold for one person is \$8,860. *Id.* For a family of three, it is \$15,020. *Id.* For a family of four, it is \$18,100. *Id.*

21. Miller, *supra* note 18, at 26.

22. ACORN, *supra* note 6.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. ACORN, *supra* note 6.

28. *Id.*

city and county employees, others covering contractors and subcontractors that do business with the cities and counties, and still others even applying to all employers within a given area or within city limits.²⁹ Thus, living wage campaigns respond to the particular economic needs of their cities, counties, states or campuses, and within the set of laws of regulations of their jurisdictions to develop appropriate ordinances.

In the almost six years that have passed since the enactment of the 1994 Baltimore living wage ordinance, economic research and economic arguments have emerged both in favor of living wage ordinances and against them. The impact of a living wage ordinance will depend largely on the scope of coverage of the ordinance and on the wage rate set by the ordinance.³⁰ Proponents of the living wage movement argue that implementing living wage laws will make a significant difference by raising the income of low-wage workers fighting poverty, while only costing affected companies and taxpayers a miniscule percentage of profits and taxes respectively.³¹ Opponents of living wage ordinances argue that creating a mandatory living wage would lead to job loss, particularly among low-skill employees, resulting in wage gains for mostly higher income employees rather than the poorest employees.³² In addition, opponents argue that the wage costs to employers and the cost of contracts to jurisdictions adopting living wage laws will rise and thereby decrease the marketability of city contracts to some contractors and raise the cost of contracts for service to the city and, by extension, to taxpayers.³³

In addition to facing the economic arguments of opponents, living wage movement proponents increasingly face legal challenges. Once a living wage ordinance is in place two types of legal battles spring up: (1) challenges by opponents of living wage ordinances to the authority of a

29. *Id.*

30. Quigley, *supra* note 1, at 936.

31. See ACORN, LIVING WAGE IMPACT RESEARCH SUMMARIES AND CITATIONS (2001), available at <http://www.livingwagecampaign.org> (last visited Feb. 5, 2003) (providing a list and summaries of research studies on both enacted and proposed living wage laws in Baltimore, San Jose, Detroit, Los Angeles, Miami-Dade County, Knoxville, San Francisco, Oakland, Chicago, and New Orleans).

32. See, e.g., DAVID MACPHERSON, THE EMPLOYMENT IMPACT OF A COMPREHENSIVE LIVING WAGE LAW: EVIDENCE FROM FLORIDA, EMPLOYMENT POLICIES INSTITUTE (2002) (assessing the potential impact of a minimum wage increase in the state of Florida equal to the wage increase for workers under businesses contracted to provide services for the county in Miami-Dade County and arguing that targeted wage subsidies would be a more effective means of reducing poverty than increasing the minimum wage in the state).

33. *Id.*

city or county government to regulate the wages paid by certain private employers and (2) suits by living wage ordinance proponents for the enforcement of the living wage ordinances that have been passed.³⁴

In Part II, this Note will contextualize the living wage movement as consistent with wage and hour movements throughout the century. In Part II.A, this Note will review state action in favor of a living wage prior to the FLSA. Part II.B will discuss the enactment struggles that the FLSA faced, and Part II.C will examine the functioning of the FLSA after its enactment and the contemporary living wage movements branching out from the national living wage movement that previously had given life to the FLSA. Having laid out the background for the contemporary living wage movement, the Note will turn to the struggles the living wage movement faces in enacting legislation. In Part III, the Note will assess the economic policy challenges the living wage movement faces when voters and municipal officials are considering legislation. The Note will review the arguments concerning the effects of living wage on poverty in Part III.A, on employment rates in Part III.B, and on employers in Part III.C. In Part IV, the Note will discuss the legal challenges that the movement faces once legislation has been implemented, highlighting state law preemption of municipal living wage ordinances, challenges to the validity of living wage ordinances, and suits to enforce living wage ordinances. This Note aims to highlight the frameworks for debate that the living wage movement faces both before and after living wage ordinances are enacted. Recognizing patterns in debates about living wages will prove an effective tool in determining what, if any, legislation is best for a given municipality.

II. A CONTINUATION OF TWENTIETH CENTURY WAGE MOVEMENTS

A. *Pre-FLSA Wage Regulation on the State Level*

At the turn of the Twentieth Century, the long work hours, the employment of children, and the high rate of industrial accidents that accompanied the Industrial Revolution led to demands for new labor

34. See *infra* Part IV.

standards legislation in both wage and non-wage areas.³⁵ However, advocates of new labor standards faced tough legal precedent in improving wages, hours, and working conditions. In 1905 the U.S. Supreme Court, in *Lochner v. New York*,³⁶ voided a New York law limiting bakers to a ten hour work day.³⁷ The Court found that the law was a violation of the freedom of contract, a right emanating from the Fifth Amendment right not to be deprived of liberty without due process of law.³⁸ Thus, any attempt to pass legislation imposing limitations on the terms employers could use in their contracts would meet strong opposition from the *Lochner* doctrine. However, three years later, in *Muller v. Oregon*,³⁹ the Court did show some willingness to allow some types of regulation of employment contracts under state police power. In *Muller*, the Brandeis Brief induced the Court to uphold an Oregon hours law for women as a valid exercise of state police power.⁴⁰

In the context of these decisions, states began to regulate the wages that employers paid. In 1912, Massachusetts passed the first minimum wage

35. WILLIS J. NORDLUND, *THE QUEST FOR A LIVING WAGE: THE HISTORY OF THE FEDERAL MINIMUM WAGE PROGRAM 1* (1997); see generally GEORGE E. PAULSEN, *A LIVING WAGE FOR THE FORGOTTEN MAN: THE QUEST FOR FAIR LABOR STANDARDS 1933-1941* 15-34 (1996). The movement for living wages actually preceded the push for living wages in the United States. *Id.* at 15. Christian fathers in Western Europe had advocated a just wage and income sufficient to support a worker and the worker's family. *Id.* They felt that a just wage was a natural right. *Id.* This right found its way into legislation when industrialization began in England and Parliament responded with protective measures. *Id.* The Catholic Church, labor groups, and women's organizations pushed for protection for workers, achieving protective legislation in Britain, Australia, New Zealand, and Western Europe. *Id.* at 16. The United States was slow to adopt similar legislation because of the limitation of federal power to powers enumerated in the U.S. Constitution. *Id.* Regulation of labor standards was considered to be a state police power. *Id.* In this context of lack of federal legislation and worsening labor standards coming more and more to the public's attention, states began to adopt protective legislation. *Id.* This state action in the face of federal inactivity resembles contemporary local living wage campaigns and legislation in the face of an eroded FLSA. See *infra* Part II.B.

36. 198 U.S. 45 (1905).

37. *Id.* at 64.

38. *Id.*

39. PAULSEN, *supra* note 35, at 18.

40. *Muller v. Oregon*, 208 U.S. 412, 422-23 (1908). The state of Oregon convicted the owner of a laundry of allowing a female employee to work longer than the maximum number of hours women were permitted to work under a state statute. *Id.* at 417. The laundry owner contended that the law restricting the employment hours for women violated the Fourteenth Amendment. *Id.* at 421. The U.S. Supreme Court, relying on the belief that women needed protective legislation upheld the Oregon law and the conviction. *Id.*

law, setting off a flood of public support for wage regulation.⁴¹ The Massachusetts law, which protected only women and children, required a wage sufficient to support the cost of living.⁴² However, the law was non-mandatory, as it was enforced through public opinion rather than through legal sanction.⁴³ The unenforceability of the Massachusetts law helped it withstand later legal challenges but made it largely ineffectual.⁴⁴ Despite the weakness of the Massachusetts statute, it set off a wave of similar, and often stronger, statutes in ten other states before the U.S. Supreme Court reviewed their validity.⁴⁵ The Oregon minimum wage law was the first to withstand legal challenge in *Stettler v. O'Hara* in 1917.⁴⁶ Six more states subsequently enacted wage regulations.⁴⁷ However, the U.S. Supreme Court halted the movement for wage regulation on the state level in 1923, when it decided in *Adkins v. Children's Hospital* that the minimum wage law in the District of Columbia unconstitutionally interfered with the freedom of contract.⁴⁸ Following the *Adkins* decision, states did not entirely abandon their programs because in many cases they were never challenged. However, states enacting new legislation had to find alternative ways to address the abuses that wage-regulating legislation was intended to address.⁴⁹ But, only three months after striking down the New York state minimum wage law, in *Morehead v. New York ex rel. Tipaldo* in 1937,⁵⁰ the U.S. Supreme Court reversed its previous decisions striking

41. NORDLUND, *supra* note 35, at 11.

42. *Id.*

43. *Id.*

44. *Id.* at 12.

45. PAULSEN, *supra* note 35, at 19.

46. *Id.*

47. *Id.*

48. *Adkins v. Children's Hosp.*, 6 U.S. 525, 525 (1923). The Court found that a state statute fixing a minimum wage for female employees in private employment interfered with the freedom of contract emanating from the Fifth Amendment of the U.S. Constitution because the minimum wage was not based on type of work or employee capacity and therefore did not allow bargaining for contractual terms. *Id.* at 559.

49. PAULSEN, *supra* note 35, at 25. States developed legislation prohibiting the payment of an oppressive wage to get around the *Adkins* decision and the similar decisions that followed. *Id.* The Court eventually denied this approach, holding that the state could only fix wages under its police powers in times of emergency. *Id.*

50. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 587 (1936). A New York statute setting a minimum wage for female employees was invalid for violation of the freedom of contract under the Fifth Amendment even though it added a requirement that the wage be commensurate with the employee's skill. *Id.* at 617-18.

down minimum wage laws when it upheld a Washington minimum wage law in *West Coast Hotel Co. v. Parrish*, thus setting the stage for broader wage regulation.⁵¹

B. *The Fair Labor Standards Act*

The favorable ruling in *West Coast Hotel Co.* sent a signal to the President and the U.S. Congress that national minimum wage legislation was a possibility, with this strong language in favor of living wages:

The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless 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. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met . . . 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.⁵²

The first legislative proposal for a federal wage and hour law emerged in the middle of 1937.⁵³ After over a year of debate and compromise, the FLSA was enacted.⁵⁴ The FLSA withstood constitutional challenge in *United States v. Darby*, in which the U.S. Supreme Court found congressional authority to enact the FLSA under the Commerce Clause

51. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937). The Court upheld the Washington state minimum wage law for female employees as valid under the Fourteenth Amendment and under state police powers. *Id.* at 398-400. The Court found a state interest in setting a minimum wage for women because of unequal bargaining power between female employees and employers. *Id.* at 394. Equal protection was not violated because legislation need not be all-encompassing to be valid. *Id.* at 400.

52. *Id.* at 399-400.

53. NORDLUND, *supra* note 35, at 48. The bills introduced in the House and the Senate provided more protection for workers than the final FLSA did. *Id.* It provided for a minimum wage of no more than \$0.80 an hour or \$1,200 a year, the general initiation of a minimum wage of \$0.40 per hour for a 40 hour work week, and the creation of a fair labor standards board to appoint advisory committees to investigate the conditions in industries and occupations before the establishment of wage standards. *Id.*

54. *Id.* at 48-51; see PAULSEN, *supra* note 35, at 68-130.

and ruled that the prohibition of the shipment of interstate commerce of goods produced under forbidden substandard labor conditions is within the constitutional authority of the U.S. Congress.⁵⁵

The compromised bill, promoted by President Roosevelt, provided a national minimum wage that fell short of the living wage sufficient to support a worker and his family.⁵⁶ It mandated a \$0.25 per hour minimum wage which would increase incrementally to \$0.40 per hour by 1945, and also limit the work week to forty hours.⁵⁷ The \$0.25 per hour minimum wage was still a poverty wage, falling far below wages won through collective bargaining in certain industries.⁵⁸ In addition, the FLSA failed to protect many workers, particularly women and African-American workers in the South.⁵⁹ These shortcomings reflect the shift in focus of the FLSA from protecting the health and morals of workers to increasing purchasing power in order to stimulate the economy.⁶⁰ Thus, the FLSA, rather than becoming an effective mechanism to guarantee a living wage, became a modest restraint on the invisible hand, a restraint which enabled the nation to humanize capitalism and to adjust to industrial change with the least possible restriction of free enterprise.⁶¹

C. Post-FLSA Commitment to a National Living Wage

Because of the shortcomings of the FLSA, the Roosevelt administration continued to push for a living wage.⁶² The National Resources Planning Board (NRPB) called for a new bill of rights, including a right to work and

55. *United States v. Darby*, 312 U.S. 100, 122 (1941). At issue in *Darby* was the constitutionality of the FLSA. *Id.* at 112. The Court had to determine whether the power to prohibit the shipment of lumber made by employees making below the minimum wage or working more than the maximum hours defined by the FLSA was within the Commerce Clause power of the U.S. Congress. *Id.* at 108. The Court also had to determine whether the U.S. Congress had the power to prohibit the employment of employees making below the minimum wage or working more than the maximum hours defined by the FLSA on the basis of its Commerce Clause power. *Id.* The Court found that the U.S. Congress had the authority under the commerce clause to prohibit shipment of goods not made in compliance with FLSA standards and that it could control intrastate activities to achieve that end. *Id.* at 122.

56. *NORDLUND*, *supra* note 35, at 51.

57. *Id.*

58. *Quigley*, *supra* note 1, at 910. For example, in 1937, the average wage set in the unionized automobile industry under collective bargaining agreements was \$0.88 per hour. *Id.*

59. *Id.* at 911.

60. *See PAULSEN*, *supra* note 35, at 68-97.

61. *Id.* at 155.

62. *Quigley*, *supra* note 1, at 911-12.

to fair pay.⁶³ President Roosevelt praised the FLSA after its enactment but publicly acknowledged that it was only a first step toward securing a living wage.⁶⁴ The public largely continued to support the call by Roosevelt for a right to work and a living wage.⁶⁵ In 1944, Roosevelt proposed a second bill of rights, including a right to work and a right to a living wage.⁶⁶ Since

63. *Id.* The New Bill of Rights included:

1. The right to work, usefully and creatively through the productive years.
2. The right to fair pay, adequate to command the necessities and amenities of life in exchange for works, ideas, thrift, and other socially valuable services.
3. The right to adequate food, clothing, shelter and medical care.
4. The right to security, with freedom from fear of old age, want, dependency, sickness, unemployment and accident.
5. The right to live in a system of free enterprise, free from compulsory labor, irresponsible private power, arbitrary public authority and unregulated monopolies.
6. The right to come and go, to speak and be silent, free from the spyings of secret political police.
7. The right to equality before the law with equal access to justice in fact.
8. The right to education, for work, for citizenship and for personal growth and happiness.
9. The right to rest, recreation and adventure, the opportunity to enjoy and take part in an advancing civilization.

The New Bill of Rights, N.Y. TIMES, Mar. 11, 1943, at 12.

64. PAULSEN, *supra* note 35, at 131.

65. *Id.*

66. *Id.* Roosevelt's second Bill of Rights included:

- The right to a useful and remunerative job in the industries or shops or farms or mines of the nation;
- The right to earn enough to provide adequate food and clothing and recreation;
- The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;
- The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;
- The right of every family to a decent home;
- The right to adequate medical care and the opportunity to achieve and enjoy good health;
- The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;
- The right to a good education.

President Roosevelt's Message to Congress Asking Enactment of a National Service Law, N.Y. TIMES, Jan. 12, 1944, at 12.

the enactment of the FLSA, the U.S. Congress has called for a living wage on a national level, though a living wage law has not emerged on that level.⁶⁷

Although no legislation guaranteeing a nationwide living wage has been enacted, the real value of the minimum wage has varied over time, as has the relationship of the minimum wage to the poverty threshold.⁶⁸ In the first two decades of the FLSA's existence, the U.S. Congress worked to give the Act teeth, making it more enforceable, giving it broader coverage, and using it to stabilize the economy and reduce the poverty level.⁶⁹ The U.S. Congress became even more focused on the goal of alleviating poverty in the 1960s.⁷⁰ The change in focus accompanied a period of dramatic economic growth in the United States between 1960 and 1969.⁷¹ Overall, average hours worked decreased as hourly wage increased.⁷² The federal government responded when the good economic conditions of the 1960s placed in stark relief a major problem in the U.S. economy: poverty.⁷³ By 1969, a living wage had become an explicit objective of the FLSA.⁷⁴ The U.S. Congress responded to the economic conditions giving rise to the concern with the elimination of poverty, using the FLSA with changes in the value of the minimum wage.⁷⁵ In the early

67. Quigley, *supra* note 1, at 914.

68. POLLIN & LUCE, *supra* note 5, at 30-32.

69. See NORDLUND, *supra* note 35, at 59-93.

70. *Id.* at 95-96.

71. *Id.*

72. *Id.*

73. *Id.* at 97.

74. NORDLUND, *supra* note 35, at 97.

75. See *id.* at 97-116. In the late 1950s, soon after a 1956 increase of the minimum wage to \$1.00 per hour, President Eisenhower began pushing for increased coverage under the FLSA, and members of the U.S. Congress scrambled to take credit for the 1956 increase in the minimum wage. *Id.* at 97-98. Both increased FLSA coverage and an increased minimum wage became major issues in the 1958 and 1960 elections, with the AFL-CIO, the Teamsters, and the National Consumer League all publicly supporting an increased minimum wage. *Id.* at 99. Meanwhile, a different movement was occurring in the U.S. Congress in which senators began to support state enforcement responsibilities when states had minimum wage standards with equal or greater protection as compared to the FLSA. *Id.* at 99-100. The U.S. Congress failed to pass any minimum wage legislation until after the 1960 election despite a Democratic majority in both the House and the Senate in part because there was not always consensus among different liberal groups in the U.S. Congress and because the President would not support the desired legislation. *Id.* at 104. Once President Kennedy was elected in 1960, the U.S. Congress began to move more decisively toward amending the FLSA. *Id.* In 1961, after a lowball proposal by a Republican senator and an economic recovery proposal by President Kennedy, a third proposal passed extending the FLSA to significantly more workers and raising the minimum wage to \$1.25 per hour over the course of four

1960s, the real value minimum wage began to rise, reaching its peak in 1968⁷⁶ as the commitment to use of the FLSA to alleviate poverty developed.⁷⁷

The real value of the minimum wage then began to decline, most sharply through the 1980s.⁷⁸ The 1970s saw large relative and absolute minimum wage gains to keep pace with inflation despite increasing opposition to increases in the minimum wage.⁷⁹ In the 1980s, the real value of the minimum wage plummeted in response to a period of high inflation and an increasing federal debt and deficit.⁸⁰ Currently, the real value of the minimum wage is thirty percent below its 1968 peak.⁸¹ Along with these changes in the real value of the minimum wage, the income of a full-time worker earning the minimum wage in relation to the poverty-threshold income has changed over time, with the income of a full-time worker

years. *Id.* at 105-08. President Kennedy signed the legislation saying that this was only a start in moving toward economic recovery. *Id.* at 107. In 1966, after considerable pressure for a higher minimum wage from the AFL-CIO, the U.S. Congress passed another increase in the minimum wage to \$1.60 per hour. *Id.* at 114-16. The political forces behind the passage of these wage increases from \$1.00 to \$1.60 over one decade are illustrative of the potential for congressional response to pushes for strengthening of the FLSA when economic conditions are favorable and the U.S. Congress and the President are labor-friendly. In the 1960s, the FLSA appeared to be an effective tool for ensuring economic justice, though the FLSA has not lived up to that potential.

76. POLLIN & LUCE, *supra* note 5, at 32.

77. NORDLUND, *supra* note 35, at 97.

78. POLLIN & LUCE, *supra* note 5, at 32; *see* NORDLUND, *supra* note 35, at 167-97. In the 1980s, not only were economic conditions unfavorable to strengthening or even maintaining the FLSA, political conditions were unfavorable, with political candidates who had come out in favor of raising the minimum wage losing elections in the beginning of the decade. *Id.* at 176. There was a push throughout the decade for a youth differential in the minimum wage for working youth in response to high youth unemployment. *Id.* at 176-77. The initiative failed, however, out of fear that such a differential would displace adult workers. *Id.* at 178-79. With the focus on a youth subminimum wage and an unwillingness to raise the minimum wage in the face of poor economic conditions, the U.S. Congress was characterized by stalemate with respect to changes in the FLSA in the 1980s. *See id.* at 175-86. This weakening of the FLSA will likely leave the FLSA an inadequate tool for ensuring fair wages and alleviating poverty until the U.S. Congress and the Presidency are dominated by officials committed to fair wages and alleviation of poverty.

79. *See* NORDLUND, *supra* note 35, at 123-64. In the 1970s, the focus of the national debate on the minimum wage shifted to focus on the impact and the effectiveness of the minimum wage rather than on elimination of poverty and economic justice. *Id.* at 143-44. The AFL-CIO, the NAACP, and the National Consumers League continued to press for a higher minimum wage. *Id.* at 125. Moderate minimum wage increases occurred in response to pressure. *See id.* at 123-43. However, empiricism in the face of worsening economic conditions ensued limiting any strengthening of the minimum wage. *Id.* 160-61.

80. POLLIN & LUCE, *supra* note 5, at 32.

81. *Id.*

earning the minimum wage decreasing in relation to the poverty-threshold income since 1968.⁸² Although a living wage provided through the FLSA has been a purported goal of the U.S. Congress ever since the FLSA was enacted,⁸³ the minimum wage is not sufficient to keep a worker with a family above the poverty threshold.⁸⁴

The living wage movement is both a response to the failure of the U.S. Congress to maintain the minimum wage at a living wage level and a response to the trend of outsourcing, in which local governments contract out service work to private firms.⁸⁵ City and county governments save money though outsourcing by contracting with private businesses that can perform services at a low cost, in part by paying their workers less and by providing fewer benefits than the city or county government would.⁸⁶ The concern of the living wage movement is that public money, coming from taxpayers, will be used to subsidize low-wage employment by the companies with the lowest bids, which are the companies that cut out as many labor costs as possible to maximize profits.⁸⁷ The living wage movement is an extension of the push for living wages that has existed since the beginning of the Twentieth Century and is a response to contemporary economic circumstances both on the national and local levels.

III. ECONOMIC POLICY ARGUMENTS

The economic policy arguments for and against living wage ordinances have been the major topic of debate for city and county governments and for voters in deciding whether to adopt living wage legislation. While some argue that living wage ordinances reduce poverty and promote urban development, others argue that living wage ordinances hurt employment rates, cost employers and taxpayers money, and discourage contractors from bidding for business in cities with ordinances. Research from proponents and opponents of living wage ordinances sometimes give

82. *Id.*

83. Quigley, *supra* note 1, at 914.

84. POLLIN & LUCE, *supra* note 5, at 32.

85. *Id.* at 14.

86. *Id.*

87. See, e.g., *Living Wage Laws: Answers to Frequently Asked Questions*, AFL-CIO Department of Public Policy 4 (2000), available at <http://www.afl-cio.org> (last visited Feb. 6, 2003).

different answers to the question of how a living wage ordinance will affect workers, employers, and the city or county as a whole. Regardless of these varying answers, an understanding of the basis of these arguments is important in considering whether to enact a living wage ordinance. An understanding of the potential effects of living wage ordinances can help cities or counties prioritize different aspects of efficiency and distribution in order to best suit their own needs.

A. *Living Wage Ordinances and Poverty*

One of the main goals of the living wage movement is to eliminate poverty among the working poor by raising wages paid by the county and the city as well as by the businesses contracted by the county and city.⁸⁸ In support of this argument, advocates of living wage ordinances typically compare the income of a minimum-wage worker working forty hours per week, fifty weeks per year to the poverty threshold income for families of two to four.⁸⁹

A second argument that has been made on behalf of living wage ordinances is that they are good strategies for urban development.⁹⁰ In their comprehensive study on living wage legislation, Robert Pollin and Stephanie Luce identify two ways in which living wage ordinances promote urban development.⁹¹ First, living wage ordinances address the disproportionate levels of poverty in urban areas and the downward pressure on wages that the abolition of welfare support will place on the low-wage labor markets by forcing more workers into that market as people losing government assistance look for jobs.⁹² Second, living wage ordinances address the failure of urban development strategies to alleviate

88. See, e.g., ACORN, *THE LIVING WAGE MOVEMENT: BUILDING POWER IN OUR WORKPLACE AND NEIGHBORHOODS*, available at <http://www.livingwagecampaign.org> (last visited Feb. 6, 2003).

89. See, e.g., POLLIN & LUCE, *supra* note 5, at 2. The current federal minimum wage is \$5.15 per hour. *Id.* A worker making the minimum wage would only make \$10,300 a year working full time for 50 weeks. *Id.* This falls well below the poverty threshold for a family of two. *Id.*

90. See, e.g., Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 *STAN. L. REV.* 399, 465-72 (2001) (arguing that promoting living wage movements is an effective means for community economic development lawyers to help alleviate poverty in cities); POLLIN & LUCE, *supra* note 5, at 54-86.

91. POLLIN & LUCE, *supra* note 5, at 54-55.

92. *Id.* at 55.

poverty.⁹³ Although cities have attracted private businesses with subsidies, among other incentives, this relocation of private businesses to urban areas has not reduced poverty or helped declining urban communities.⁹⁴ The theory behind providing such subsidies is that they will create a favorable business environment which will promote growth; however, studies have shown that growth actually slows and that distribution of wealth becomes concentrated among the privileged when governments try to create advantages by subsidizing and enticing businesses.⁹⁵ Studies find that subsidy programs do not redistribute jobs to areas of high unemployment but benefit businesses and the purchasers of government subsidized bonds.⁹⁶ In the face of these circumstances, requiring a minimum wage will ensure a fairer distribution of income and likely will not affect businesses' decisions to locate in cities.⁹⁷

Opponents of the living wage movement have posed challenges to the theory that living wage legislation will alleviate poverty or promote urban development. For example, in a study of the potential impact of a comprehensive living wage law in the state of Florida (if such a law were adopted), David Macpherson concluded that a living wage law in Florida would not reach working families as efficiently as targeted wage subsidies.⁹⁸ Macpherson found that a large percentage of the people who would be affected by a minimum wage increase in Florida would be young.⁹⁹ In addition, a worker affected by the increase in the minimum wage is less likely than the average Florida worker to be supporting a family.¹⁰⁰ Macpherson does find, however, that the family income of an affected worker is lower than that of the average Florida resident.¹⁰¹ Finally, the theoretical minimum wage would primarily benefit families

93. *Id.*

94. *Id.*

95. *Id.* at 58-59.

96. POLLIN & LUCE, *supra* note 5, at 58-59.

97. *Id.* at 80-81. A business decision to locate in a particular city is usually based upon other factors such as how close suppliers and markets are, the city's infrastructure, quality and education of the labor force, and overall quality of life. *Id.* at 81.

98. MACPHERSON, *supra* note 32 (assessing the impact of a wage mandate of \$8.81 to \$10.09 on all Florida employers, both public and private, on employment, distribution of income, and cost of contracts to the city and cost to employers).

99. *Id.* at 5. Of the workers who would be affected by a minimum wage increase in Florida, 30.1% to 32.8% are younger than 24 years old. *Id.* Twelve-and-a-half percent to 15.0% are between 15 and 19 years old and 17.6% to 17.8% are between 20 and 24 years old. *Id.*

100. *Id.*

101. *Id.* at 5-6.

with incomes above \$12,500, with roughly one-fifth of benefits accruing to families with incomes below the poverty level.¹⁰² Macpherson reasons that the problem with raising the minimum wage is that it will not affect the many low-income people who do not work.¹⁰³

In other impact studies, researchers have found that a living wage will positively impact urban development and alleviate poverty. For example, in a proposal for a living wage ordinance in New York City, the researchers at the Brennan Center for Justice found that “[w]orkers and their families who are covered by the law [would] gain . . . considerably, across almost all occupations and all family sizes.”¹⁰⁴ In a post-enactment study of the Baltimore living wage ordinance, the Economic Policy Institute found in two years of operation that the living wage had positive effects on a relatively small number of workers in Baltimore without significant financial cost to the city.¹⁰⁵

In many ways, analysis of the impact of a living wage and its effects parallel the analysis of increases in the minimum wage. In a study of the effects of an increase in the federal minimum wage, David Card and Alan B. Krueger found “that the minimum wage serves as a backstop for the wages of a significant fraction of *all* wage and salary workers, not just teenagers.”¹⁰⁶ The whole lower end of the income distribution was pushed up.¹⁰⁷ There was also a less direct impact as a result of an increase of the minimum wage on family earnings.¹⁰⁸ After the 1990 and 1991 minimum wage increases, more than thirty-five percent of the earnings gains generated went to families in the lowest ten percent of the family earnings

102. *Id.* at 6.

103. MACPHERSON, *supra* note 32.

104. BRENNAN CENTER FOR JUSTICE FISCAL POLICY INSTITUTE, NEW YORK CITY LIVING WAGE LAW 6 (2002). The proposed law would set living wages to be paid by homecare agencies operating under contract with the city, providers of services for children operating under contract with the city, and businesses benefiting from new city subsidies in excess of \$500,000 or of tax-exempt bond financing worth over \$10,000,000. *Id.* 3.

105. CHRISTOPHER NIEDT ET AL., THE EFFECTS OF THE LIVING WAGE IN BALTIMORE, ECONOMIC POLICY INSTITUTE WORKING PAPER 119 (1999). In 1994, the Baltimore ordinance set a minimum wage of \$6.10 per hour for workers under a city service contract. BALTIMORE, MD., ORDINANCE 442, 26 (1994). The wage was set to increase to \$6.60 per hour and was indexed to \$7.70 by 1999. *Id.*

106. DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE 308 (1995).

107. *Id.*

108. *Id.*

distribution.¹⁰⁹ The study found only a modest impact on poverty among the working poor, however.¹¹⁰ Card and Krueger, like Macpherson, found that “[t]he connection between minimum wages and poverty is even less direct, because most people who live in poverty are non-workers, and the minimum wage can affect only families with workers.”¹¹¹ Overall, however, Card and Krueger found that an increase in the minimum wage could have slightly beneficial effects for low-wage workers and could, to some extent, help even out income distribution.¹¹² Although setting a wage floor has only subtle effects on income distribution, family earnings, and poverty, those effects are generally beneficial.

Those opposed to living wage legislation generally propose the alternative of targeted wage subsidies.¹¹³ They argue that wage increases resulting from raising minimum wages go to the middle or upper part of the income distribution.¹¹⁴ Thus, they argue, targeted wage subsidies are more efficient.¹¹⁵ Wage subsidies usually come in the form of tax credits, either to employers or to families, and are typically determined on the basis of such factors as skill levels of workers hired or on family size in relation to family earnings.¹¹⁶ Thus, proponents of targeted wage subsidies argue that targeted wage subsidies are more efficient because (1) they specifically target workers in low income families and (2) they give the poor an incentive to enter the labor force, without subsequently causing job losses.¹¹⁷ In addition, proponents of targeted wage subsidies in lieu of living wages point out that living wage ordinances will increase the wages of families on government assistance programs, causing them to lose government assistance, and thus create disincentives for individuals in poor families to work.¹¹⁸ Wage subsidy proponents argue that a large part of wage increases due to living wage legislation could potentially be lost

109. *Id.* This did tend to vary across states. *Id.* The greatest improvement in family earnings occurred in states where the minimum wage had the greatest effect on wages. *Id.*

110. *Id.*

111. CARD & KRUEGER, *supra* note 106, at 308.

112. *Id.* at 308-09.

113. See, e.g., MACPHERSON, *supra* note 32; EMPLOYMENT POLICIES INSTITUTE, THE CASE FOR A TARGETED LIVING WAGE SUBSIDY, available at http://www.epionline.org/study_epi_living_wage_07-2001.html (last visited June 2001).

114. EMPLOYMENT POLICIES INSTITUTE, *supra* note 113, at 5.

115. *Id.*

116. MACPHERSON, *supra* note 32, at 8.

117. EMPLOYMENT POLICIES INSTITUTE, *supra* note 113, at 5.

118. *Id.* at 5-6.

through increased taxes and loss of benefits.¹¹⁹ For instance, a New Orleans living wage of \$6.15 per hour would increase earnings before taxes and benefits 12%, but after taxes and benefits, the increase would be only 2.9% to 4.4%.¹²⁰ However, working with a different set of wage increases, payroll taxes, and income tax credits, other studies have found greater increases after taxes and reduced benefits. For instance, Ed Lazare, of the Center for Budget and Policy Priorities, calculated that an increase in hourly wage from \$5.15 per hour to \$8.20 per hour would result in a net income increase from \$13,781 to \$18,720 after increased payroll taxes and reduced federal Earned Income Tax Credit (EITC) benefits resulting from the income increase are taken into account.¹²¹ Thus, there would be a thirty percent increase in income after taxing and reduced benefits under a different set of numbers.¹²² The net result of a wage increase will vary based upon the size of the increase as well as the taxes and benefits existing where the wage increase takes effect. The potential for a small net effect after a wage increase should not deter a legislator or voter from considering living wage legislation, however. The jurisdiction adopting the legislation could adopt targeted wage subsidies that coordinate with living wage legislation to both ensure that income increases reach families and the working poor and to ensure that as much of those increases as possible reach those groups through wage increases rather than benefit programs.

Increased wages are more favorable to workers than money received through such government benefits as income tax credits and food stamps because they provide workers with independence.¹²³ Workers become less dependent on the government assistance they received through food stamps, public health trusts, and the federal EITC. In an impact study of the potential effects of a living wage ordinance on Miami-Dade County, Bruce Nissen notes that across the political spectrum there seems to be agreement that poor people are better off if they are weaned from

119. *Id.* at 5.

120. ROBERT POLLIN ET AL., ECONOMIC ANALYSIS OF THE NEW ORLEANS MINIMUM WAGE PROPOSAL, RESEARCH REPORT NUMBER I 70-72 (1999), available at <http://www.umass.edu/peri/research.html> (last visited Feb. 6, 2003).

121. AFL-CIO DEP'T OF PUB. POL'Y, LIVING WAGE LAWS: ANSWERS TO FREQUENTLY ASKED QUESTIONS 4 (2000) (citing ED LAZARE, CENTER ON BUDGET AND POLICY PRIORITIES CALCULATION (2000)).

122. *Id.*

123. BRUCE NISSEN, THE IMPACT OF A LIVING WAGE ORDINANCE ON MIAMI-DADE COUNTY, CENTER FOR LABOR RESEARCH AND STUDIES, FLORIDA INTERNATIONAL UNIVERSITY (1998), available at http://www.fiu.edu/~clrs/index/liv_wage_full.html (last visited Oct. 2002).

dependence on government assistance. "They are better in all respects . . . if they earn their income from their own work efforts."¹²⁴ In addition to these effects, being weaned from government assistance affects workers' sense of dignity.¹²⁵ When employees receive higher wages they do a better job, as reflected in their improved morale, lower rate of absenteeism, lower turnover, and improvement in the quality of applicants.¹²⁶ With higher wages rather than government assistance, workers could use their money as they see fit, benefiting from higher spending power and better healthcare in addition to greater credit worthiness and ability to invest in education, homes, cars, etc.¹²⁷ Apart from their potential to increase net income in conjunction with tax and benefit programs, living wages have the potential to provide low-wage workers with a greater degree of independence and dignity than a pure system of targeted wage subsidies.

B. Living Wage Ordinances and Employment Rates

One of the main arguments against living wage ordinances is that ordinances would cause job losses, particularly among less skilled workers.¹²⁸ The rationale behind this claim is that as the bottom floor for wages increases, the difference in labor costs between lower-skilled and higher-skilled workers decreases, thus creating more of an incentive for employers to hire higher-skilled workers.¹²⁹ In addition, the cost differential between lower-skilled workers and capital equipment decreases, again causing employers to choose not to hire low wage workers.¹³⁰ Finally, opponents of living wage legislation reason that a living wage will cause businesses to raise prices and therefore lose customers and be forced to eliminate some jobs.¹³¹ For example, Macpherson estimates that if a wage increase to \$8.81 per hour for employees receiving healthcare and \$10.09 for employees receiving no

124. *Id.*

125. *Id.*

126. JARED BERNSTEIN, HIGHER WAGES LEAD TO MORE EFFICIENT SERVICE PROVISION: THE IMPACT OF LIVING WAGE ORDINANCES ON THE PUBLIC CONTRACTING PROCESS, ECONOMIC POLICY INSTITUTE (2000), available at <http://www.epinet.org/Issueguides/livingwage/alexlivwg.html> (last visited Mar. 15, 2003).

127. NISSEN, *supra* note 123.

128. See, e.g., MACPHERSON, *supra* note 32, at 3-4; EMPLOYMENT POLICIES INSTITUTE, *supra* note 113.

129. EMPLOYMENT POLICIES INSTITUTE, *supra* note 113, at 4.

130. *Id.*

131. *Id.*

healthcare were effected for all employers in Florida, 131,207 to 222,354 workers would lose their jobs because of increased labor costs, causing \$1.7 billion to \$3.2 billion in worker income losses.¹³² Macpherson found that losses would be distributed differently among different industries and different cities in Florida.¹³³ Thus, opponents of the living wage argue that living wage legislation does not fulfill its purpose because it eliminates the jobs of those people who should benefit.¹³⁴

Living wage proponents argue that living wage legislation will not cause unemployment because worker replacement costs are so high, higher wage workers are unlikely to quit their existing jobs, and any displaced workers will find jobs outside the scope of the ordinance.¹³⁵ Supporting living wage proponents' claims is a study of the experience of Baltimore, conducted by Economic Policy Institute over the two years after the enactment of a living wage ordinance showed that there was no job loss and that workers interviewed for the study reported no decrease in hours worked after the wage increase.¹³⁶

Because the living wage movement is relatively new and research is still not completely developed, Pollin analogizes living wage increases to union-mandated wage increases to show that mandated wage increases do not cause unemployment.¹³⁷ Pollin explains that when unions negotiate for a higher wage there is an incentive for employers to hire higher-skilled workers.¹³⁸ If employers acted on that incentive, then workers earning the higher wage would make the same amount of money they would make working non-union jobs.¹³⁹ However, workers in union firms still make twenty percent more than workers with the same skill levels in non-union firms.¹⁴⁰ Thus, organizing, not greater skills, accounts for the higher wage.¹⁴¹ Pollin postulates that workers whose wages are increased by living wage ordinances, like workers whose wages increase due to union

132. MACPHERSON, *supra* note 32, at 7.

133. *Id.*

134. *See id.*

135. POLLIN & LUCE, *supra* note 5, at 159-60.

136. NIEDT ET AL., *supra* note 105, at 27.

137. POLLIN & LUCE, *supra* note 5, at 160-61.

138. *Id.* at 160.

139. *Id.*

140. *Id.*

141. *Id.* at 160-61.

organizing, will not be displaced but will actually earn higher wages as intended by the statute.¹⁴²

Also analogous to the effect of implementing a living wage mandate on unemployment is the effect of increasing the minimum wage on unemployment. In their study of the effects of the 1990 and 1991 federal minimum wage increases on the restaurant and retail-trade sector, David Card and Alan B. Krueger concluded that the increase in the minimum wage caused wage gains but did not cause employment losses.¹⁴³ Similarly, in their research on the effects of the California minimum wage increase in 1988, they found that the increase in the state minimum wage had little or no negative effect on employment.¹⁴⁴ Thus, Card and Krueger conclude that, “[a]t the outset, it should be noted that many economists view the minimum wage as a highly inefficient transfer program, and, therefore, usually recommend its repeal. [Card and Krueger’s] findings suggest that the efficiency aspects of a modest rise in the minimum wage are overstated.”¹⁴⁵ Thus, they argue, the focus in debates about the minimum wage should shift away from inefficiency arguments and focus on the distributional effects such as how much the wage increase will help families and the working poor.¹⁴⁶

While some labor economists say that minimum wage mandates are inefficient and will cause job displacement because of the labor costs of an increased minimum wage and the reduced wage differential between higher-skilled and lower-skilled workers,¹⁴⁷ studies of actual wage mandates in the settings of union-mandated wages, minimum wage mandates, and living wage mandates have shown that wage increases raise wages and do not cause unemployment.¹⁴⁸ Therefore, economic efficiency arguments claiming that wage mandates will cause unemployment should not automatically deter legislators and voters from adopting living wage ordinances. Instead, they should focus mainly on the distributional effects of living wage legislation.

142. POLLIN & LUCE, *supra* note 5, at 161.

143. CARD & KRUEGER, *supra* note 106, at 149.

144. *Id.* at 109-10.

145. *Id.* at 393.

146. *Id.*

147. *See, e.g.*, MACPHERSON, *supra* note 32; EMPLOYMENT POLICIES INSTITUTE, *supra* note 113.

148. *See, e.g.* CARD & KRUEGER, *supra* note 106, at 308-09; NIEDT ET AL., *supra* note 105; POLLIN & LUCE, *supra* note 5, at 159-61.

C. *The Cost of Living Wage Ordinances to Employers and Municipal Economies*

Some labor economists also fear that a living wage mandate could cost employers money and therefore would put a city or county that had adopted a living wage ordinance at a comparative disadvantage with cities and counties that do not have a living wage ordinance, in terms of attracting businesses and employers to the city or county to stimulate development.¹⁴⁹ In his study on the potential effects of an increased minimum wage in Florida, Macpherson estimated that the net labor cost to employers of the increased wage, after accounting for wages eliminated due to layoffs, would be \$4.9 to \$8.8 billion statewide.¹⁵⁰ This figure can be considered in context by determining the cost per affected firm. In a study of three hypothetical living wage ordinance proposals, Pollin and Luce determined that, spread out across all firms affected by the living wage ordinance, the overall costs of the living wage are small as compared to total production costs.¹⁵¹ Pollin and Luce found that, for most, these costs were spread out unevenly among different types of firms depending upon the number of low-wage workers they employed.¹⁵²

What is most important for legislators and voters to consider in adopting living wage legislation is the effect that increased labor costs for employers will have on the municipality as a whole. In low impact firms, where the cost of labor increases is only a small fraction of total production costs, Pollin and Luce find that the employers can absorb the costs of the wage increase, considering both the competitive strategies and the organizational structure of the affected firms.¹⁵³ When a living wage ordinance is based upon privity with the city, firms affected only slightly by the wage mandate will try to maintain contract prices to keep their contract with the city.¹⁵⁴ Profit share for firms would decrease only slightly for firms affected by the ordinance.¹⁵⁵ In high-impact firms, where wage increases account for ten percent or more of production costs, there are high productivity increases but not high enough to offset the impact of the

149. See, e.g., MACPHERSON, *supra* note 32.

150. *Id.* at 7.

151. See POLLIN & LUCE, *supra* note 5, at 112-35.

152. *Id.* at 118-21.

153. *Id.* at 122.

154. *Id.* at 122-23.

155. *Id.* at 125-26.

wage mandate.¹⁵⁶ Thus, the price of the wage mandate may be passed on in the price of contracts to the municipality, but the stable contract costs for the vast majority of firms affected, together with the city's ability to phase in a living wage or to eliminate contracts with prices that increase dramatically, can offset the price of a living wage to the municipality.¹⁵⁷ Thus, overall, the cost of living wage ordinances to taxpayers is small. In Baltimore, for example, the living wage ordinance had only a small financial impact on the city.¹⁵⁸ In the report by Nissen on the probable effects of a living wage ordinance implemented in Miami-Dade County, Nissen estimated that the living wage legislation would probably cost the county \$4.3 million for the first year, which is equal to between 0.1% and 0.2% of the yearly operating budget of the county.¹⁵⁹ In subsequent years, the living wage ordinance would probably cost \$360,000, which is equal to between 0.01% and 0.02% of the operating budget of the county.¹⁶⁰ In addition, Nissen noted that the cost of living wage legislation would be offset by reducing the hidden subsidy paid by taxpayers to assist low-paid workers through state and federal programs.¹⁶¹ Empirically, the cost of living wage legislation to municipalities relative to the entire budget of municipalities is fairly low.

D. *Economic Policy Conclusions*

The experience of Miami-Dade in its cost-benefit analysis of living wage legislation is illustrative of the experience of any city, county, or state deciding whether to implement living wage legislation. Nissen concludes as follows in his pre-enactment impact study of the Miami-Dade County living wage ordinance:

Whether the benefits are worth the most likely \$5 million dollar price tag over a three year period is a political question which the county commissioners will have to decide. Given the large benefits and the rather small price tag, the ordinance appears to have a great deal of merit.¹⁶²

156. POLLIN & LUCE, *supra* note 5, at 126-27.

157. *Id.*

158. See NEIDT ET AL., *supra* note 105.

159. NISSEN, *supra* note 123.

160. *Id.*

161. *Id.*

162. *Id.*

In deciding what kind of living wage legislation to implement, efficiency arguments will not be decisive for legislators and voters. The costs of living wage legislation will vary depending on the number of workers affected in relation to total production costs. Whatever the cost of the legislation, the voters or legislators considering legislation must weigh the distributional effects of the ordinance against its overall costs. Despite arguments that wage mandates are inefficient, minimum wages are popular nationwide.¹⁶³ Card and Krueger note, depending on how the question is phrased and when it is asked, sixty-five to ninety percent of the general public favors an increase in the minimum wage.¹⁶⁴ Setting a floor below which wages cannot fall is appealing because it demonstrates a commitment to developing economic justice.

IV. LEGAL CHALLENGES

Living wage legislation has met the most resistance in economic policy debates which are ultimately decided at the polls or in city council meetings. Increasingly, the living wage movement has faced challenges in county and state courts. Some states have responded to the passage of municipal living wage ordinances with measures such as state minimum wages and limitations on municipal authority to pass living wage ordinances in order to provide grounds for challenges to the validity of municipal living wage ordinances.¹⁶⁵ Meanwhile, opponents of living wages have, both successfully and unsuccessfully, challenged the validity of municipal living wage ordinances on the basis of violation of state law.¹⁶⁶ Even when the validity of the living wage legislation is not in question, municipalities have, in some cases, failed to enforce living wage legislation. Advocates of living wages have recently brought suit in Buffalo because the city government has failed to enforce recently implemented living wage legislation.¹⁶⁷ As more cities and counties implement living wage legislation and as more states react to this implementation with restrictive legislation, the living wage movement is sure to face more and more legal challenges.

163. CARD & KRUEGER, *supra* note 106, at 392.

164. *Id.*

165. Quigley, *supra* note 1, at 937-39.

166. *See infra* Part IV.B.

167. *See infra* Part IV.C.

A. State Law Preemption of Municipal Living Wage Laws

Opponents of living wage legislation often lobby at the state level to preempt local living wage laws.¹⁶⁸ As a result, some states have passed laws banning local governments from enacting living wage laws that set a higher minimum wage than the state minimum wage.¹⁶⁹ This has become the most successful tactic to challenge living wage ordinances for opponents.¹⁷⁰ For example, in February 2001, Utah passed a law banning local governments from setting minimum wages higher than the state minimum wage.¹⁷¹ Likewise, Louisiana passed a state minimum wage preempting more protective local minimum wage laws just as a ballot initiative to set a higher minimum wage was occurring in Louisiana.¹⁷² Most recently, on August 15, 2001, the governor of Oregon signed a bill permitting local governments to pass a minimum wage higher than the state minimum only when the business upon which the living wage mandate is being imposed has a contract with the local government or has more than ten employees and receives a local subsidy or tax abatement.¹⁷³ Otherwise, local governments cannot impose a wage mandate higher than the state minimum wage on employers (i.e. private businesses with no connection to the local government).¹⁷⁴ Arizona, Kansas, and Michigan have considered similar legislation.¹⁷⁵

B. Challenges to the Scope of Living Wage Ordinances

As living wage ordinances have emerged, state legislators have, in some cases, responded with preemptory legislation. In addition, some opponents to living wage laws have attempted to challenge living wage legislation on the basis of preexisting state law.

168. Quigley, *supra* note 1, at 937.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 938.

173. LIVINGWAGELAWS.ORG, OREGON PROHIBITS LIVING WAGE LAWS APPLYING TO NON-CONTRACTORS AS SANTA MONICA BATTLES OVER SAME ISSUE (2001), available at <http://www.livingwagelaws.org> (last visited Apr. 8, 2003); OREGON HOUSE BILL 2744, 71ST OREGON LEGISLATIVE ASSEMBLY (2001).

174. LIVINGWAGELAWS.ORG, *supra* note 173; OREGON HOUSE BILL 2744, 71ST OREGON LEGISLATIVE ASSEMBLY (2001).

175. LA. REV. STAT. ANN. § 23:642 (West 2003).

For example, in August 1997, the Louisiana state legislature passed a law prohibiting local governments from establishing a minimum wage for private employers.¹⁷⁶ In September 2001, the New Orleans City Council passed Ordinance No. 20376, which placed a proposal on the ballot to raise the minimum wage in New Orleans to \$6.15 per hour, or \$1.00 over the federal minimum wage.¹⁷⁷ The voters adopted the proposal in February 2002.¹⁷⁸ The New Orleans Campaign for a Living Wage then brought suit against New Orleans, its mayor, and the state in a proceeding seeking declaration of the validity of the New Orleans living wage law.¹⁷⁹ The Louisiana Supreme Court found that the Louisiana statute prohibiting the establishment of a local minimum wage was a legitimate exercise of the police power of the state in that it sought to promote economic stability and growth by setting a consistent statewide wage floor.¹⁸⁰ Thus, the Louisiana Supreme Court concluded that because the ordinance abridged state police power, it violated article VI, 9(B) of the Louisiana Constitution, which mandates that the state police power never be abridged.¹⁸¹ Concurring Judge Weimer believed it was unnecessary to decide whether the police power of Louisiana overrides that of New Orleans, instead finding that the New Orleans ordinance violated article VI, 9(A) of the Louisiana Constitution, which prohibits local governments from enacting legislation governing private or civil relationships unless they have received an express grant of authority from the state legislature.¹⁸² Dissenting, Judge Johnson found that in order for the Louisiana statute to be a valid exercise of police power the state must show empirical evidence that the statute was necessary to protect the vital interests of the state.¹⁸³

The New Orleans experience is illustrative of the challenges living wage advocates will face in court as state legislatures respond to local ordinances and as businesses bring suit challenging the authority of the local government to pass living wage legislation. The majority opinion

176. *Id.*

177. NEW ORLEANS, LA. ORDINANCE NO. 20376 (2002).

178. *New Orleans Campaign for a Living Wage v. City of New Orleans*, (No. 02-CA-0991) 2002 La. LEXIS 2453 (La. 2002), at 4.

179. *Id.* at 4.

180. *Id.* at 25.

181. *Id.*

182. *Id.* at 27 (Weimer, J., concurring); *accord id.* at 57-77 (Calogero, J., dissenting).

183. *New Orleans Campaign for a Living Wage*, 2002 La. LEXIS 2453, at 77-88 (Johnson, J., dissenting).

indicates the potential strength of state legislation in preempting local ordinances.¹⁸⁴ The concurrence of Judge Weimer, on the other hand, demonstrates the potential availability of arguments based upon challenges to the authority of local government to pass legislation.¹⁸⁵ The dissenting opinion of Judge Johnson demonstrates the possibility that some courts may be willing to hear policy arguments and require empirical evidence in order to rule that state legislation preempting local living wage legislation is a valid exercise of state police power.¹⁸⁶ If courts were to require such policy arguments and empirical evidence, it would be necessary for state legislatures to establish findings justifying legislation on the basis of some empirical evidence rather than simply stating a reason with no empirical support. The suit of the New Orleans Living Wage Campaign, though unsuccessful in securing a living wage in New Orleans, provides potential frameworks for anticipating and drafting arguments in cases challenging local living wage ordinances on the basis of state preemption.

A similar challenge has played out in Berkeley, California in *Rui One Corp. v. City of Berkeley*.¹⁸⁷ In 2000, Berkeley adopted a living wage ordinance, applying to the desirable city-owned Marina district, requiring employers that lease property from the city or have large contracts with the city to pay a living wage of \$9.75 per hour plus health benefits.¹⁸⁸ A restaurant in the Marina district filed suit against the city in federal court to prevent enforcement of the law.¹⁸⁹ The restaurant argued (1) that because the ordinance was written into preexisting leases, including the lease of the restaurant, the city had invalidly exercised its police powers and (2) that by affecting the preexisting lease and contracts with at-will employees, the city had invalidly exercised police powers.¹⁹⁰ The federal court found that the ordinance was valid,¹⁹¹ and reasoned that the restaurant had not showed any interference with specific provisions in the lease.¹⁹² Furthermore, the federal court reasoned that there was no

184. *See id.* at 1-26.

185. *See id.* at 26-57 (Weimer, J., concurring); *accord id.* at 57-77 (Calogero, J., dissenting).

186. *See id.* at 77-88 (Johnson, J., dissenting).

187. Jason Hoppin, *Eatery Gags on Berkeley's Living Wages*, RECORDER, Mar. 4, 2002, at 1 (citing *RUI One Corp. v. City of Berkeley*, No. 00-3878 (N.D. Cal. 2002)).

188. *Id.*

189. *Id.*

190. Jason Hoppin, *Berkeley's Living Wage Law Upheld*, RECORDER, Apr. 1, 2002, at 1.

191. *Id.*

192. *Id.*

interference with the contracts of at-will employees because those contracts are continually re-created every time the employer offers additional compensation.¹⁹³ Thus, the mandated wage increase would create a new contract without violating a preexisting one.¹⁹⁴ Finally, the federal court ruled that even if there was interference with specific terms of the businesses' contracts with the city or with employees, the interference would not be sufficient to void the ordinance.¹⁹⁵ It found that since wages are already highly regulated, the restaurant should have had a reasonable expectation of more regulation.¹⁹⁶

Rui One Corp. hints at the willingness of some courts to uphold wage-regulating ordinances in the absence of state preemption. The failure of a challenge on the basis of interference with contract is evident both in the unwillingness of the federal court to find an interference with contract or to assign any weight to interference even if it existed. The experience of Berkeley in court provides a framework for argument in cases in which interference with contract by a living wage ordinance is alleged. Challenges to living wage ordinances, like those in New Orleans and Berkeley, will continue to face the living wage movement as it extends to more and more municipalities throughout the nation.¹⁹⁷

C. Government Failure to Enforce: The Buffalo Ordinance

Even where living wage ordinances have been enacted and have not been challenged, living wage advocates face the challenge of ensuring that living wage ordinances are enforced. Certain cities have faced inadequate implementation of living wage legislation after enactment of ordinances. In Buffalo, for example, after enacting a living wage law requiring that

193. *Id.*

194. *Id.*

195. Hoppin, *supra* note 190, at 1.

196. *Id.*

197. For example, in *Missouri Hotel & Motel Association v. St. Louis Living Wage Campaign*, the Missouri Supreme Court dismissed a challenge to the St. Louis living wage ordinance enacted in August 2000 after a vote in which 77% of St. Louis residents approved the enactment of the ordinance. St. Louis Free to Move Forward with New Living Wage Law; Missouri Supreme Court Dismisses Appeal from Low-Wage Employers, Brennan Center for Justice (2002), available at <http://www.brennancenter.org> (last visited Feb. 10, 2003). The trial court had invalidated the ordinance on the basis of technical defects, but when employers appealed to the Missouri Supreme Court in order to get a broader ruling that would prevent cities in Missouri from enacting living wage legislation, their case was dismissed. *Id.* St. Louis was therefore able to remedy the technical defects in its living wage law and implement it. *Id.*

employers with service contracts with the city pay a minimum wage of \$7.15 per hour with health benefits or \$8.15 per hour without health benefits, the city failed to enforce the law.¹⁹⁸ The Coalition for Economic Justice brought suit against the city on July 11, 2001.¹⁹⁹ More than a year after the legislation was supposed to take effect, the city had not reviewed contracts or notified outside vendors of the legislation.²⁰⁰ The city claimed that it lacked the staff to implement the ordinance.²⁰¹ In the year following the filing of the lawsuit, the city still failed to enforce the legislation.²⁰² The city revised the ordinance, dropping the requirement that the city monitor employers as well as the requirement that employers notify employees of the rules.²⁰³ Individual employees are left to sue non-complying companies on their own.²⁰⁴

It is critical for advocates of a living wage to ensure that implementation and enforcement measures are included in any legislation and to track the adequacy of the enforcement measures implemented by a municipality after legislation has been enacted. Suits for enforcement, like the suit in Buffalo, will prove an important aspect of the movement to support living wages.

V. CONCLUSION

Economic and legal arguments about the impact or validity of living wage ordinances do not give legislators and voters a definitive answer as to whether or not they should pass living wage legislation. They merely act as tools with which legislators and voters can ensure that their visions for society are reflected both in the law and in the law's impressions upon the people it governs. For instance, economic policy research may indicate that living wage ordinances will raise the costs of contracts to the city from firms highly impacted by an ordinance and, at the same time, may indicate

198. Press Release, Brennan Center for Justice, *City of Buffalo Sued for Failure to Enforce Living Wage Law* (2001), available at <http://www.brennancenter.org> (last visited Feb. 10, 2003).

199. *Id.*

200. Brian Meyer, *City Sued for Neglecting Living Wage Ordinance*, BUFF. NEWS, July 12, 2001, at B3.

201. *Id.*

202. Brian Meyer, *On City Hall Steps, A Call for Living Wage Now*, BUFF. NEWS, July 11, 2002, at B4.

203. *Id.*

204. *Id.*

that the ordinance will ensure that low-wage workers with families will earn incomes sufficient to support themselves as a result of the legislation. Legislators and voters are then left to choose whether to enact the legislation or not on the basis of their own ideals.

The living wage movement appeals to the ideal of promoting the development of a truly just society, in which full-time workers and their families need not rely on public assistance to support themselves. It appeals to the recognition that the inherent value of living in a just society outweighs the efficiency losses that may occur as a result of the fair distribution of income and alleviation of poverty. This value, espoused by living wage advocates, is consistent with the ideals of the United States as a nation.²⁰⁵

The contemporary living wage movement has the ideal of working toward a just society on its side. Now it faces four main challenges: (1) developing laws that balance the needs of a municipality for maximum efficiency, fair distribution, and alleviation of poverty; (2) enacting those laws in the face of self-interested opposition; (3) ensuring that the laws are not rendered invalid by subsequent legislation at the state level; and (4) ensuring that valid laws are enforced by municipal governments. In facing these challenges, it is important for living wage advocates to carefully consider the context in which they are pressing for living wage legislation and to remain vigilant, even after legislation has been passed.

The living wage movement will continue to respond to the inadequacy of federal minimum wage legislation in ensuring the just result of a living wage for all full-time workers. Cities, counties, and states will continue to pass legislation in order to achieve justice and eliminate poverty and dependency among the lowest-wage workers. The economic policy and legal arguments facing the contemporary living wage movement mirror the arguments that have faced living wage proponents since the Industrial Revolution. Just as living wage proponents pushed for national minimum wage protection for workers in the 1930s and the 1960s, living wage proponents will continue to press at the local level for national change.

205. See MaryBeth Lipp, *Legislators Obligation to Support a Living Wage: A Comparative Constitutional Vision of Justice*, 75 S. CAL. L. REV. 475 (2002) (arguing that legislators have an obligation to support living wage legislation on the basis of a substantive vision of justice under the U.S. Constitution that creates a duty for legislators to pursue the founding values of liberty, justice, and equality found in the Declaration of Independence).

