CERTAIN FACTORS WHICH HAVE RETARDED MINIMUM WAGE LEGISLATION FOR WOMEN IN THE UNITED STATES

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A Thesis

Presented to the Faculty of the Graduate School
of the
University of Oregon
in partial fulfillment of the requirements
for the degree of
Master of arts

August, 1931.

Introduction

Certain factors or forces impinge upon every type of social change which tend either to hasten or retard that change. One phase of social change which has been occuring in this country during the past two decades is an increase in the amount of governmental control over certain phases of interaction, especially in the field of economic behavior. This legislation is termed "social legislation." One of the types of this legislation is that designed to establish a minimum wage for women. There have been certain factors which have retarded it and a description of them and of their development is the purpose of this study.

Either of two methods might have been used to determine what these obstacles have been. First, there was the possibility of comparing the social forms related to this type of legislation, of a group whose culture had undergone the change to minimum wage legislation more rapidly than the United States (1), with the social forms found in this country. From such a comparison

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(1) New Zealand created a form of minimum wage legislation in 1894; in Australia the Province of Victoria in 1896, Queensland in 1900, New South Wales in 1901, West Australia in 1900, and the Commonwealth of Australia in 1904. Great Britain created a form in 1909. The first minimum wage legislation in the United States was established in Massachusetts in 1913, to be followed the same year by eight other states. At present these acts have been practically nullified by a decision of the Federal Supreme Court - Adkins v. Children's Hospital, 261 U.S., 525.

there could be isolated those factors related to minimum wage legislation which existed in the United States which did not exist in the compared group, and so the retarding factors determined. The second method was to study the history of minimum wage legislation and determine from the experience of this program in legislatures and courts just what the cultural forms were which opposed it. The first of these methods proved impossible simply because a thorough study of the cultural forms relevant to minimum wage legislation in some other group was beyond the means at hand. So the method used to determine what these factors are which have served as retarding factors was to study the history of minimum wage legislation and to examine the literature relevant to the subject, especially literature published by certain representative groups, such as: the publications and minutes of proceedings of the National Association of Manufacturers, which represents the employer group; the publication and minutes of the proceedings of the American Federation of Labor, which represents the employee group; and the court opinions of both state and federal supreme courts which represent in the main a cross section of American opinion.

The method obviously allows for a good deal of subjective interpretation since a detection of these factors

in operation is done entirely by an uncontolled observer. This weakness is unavoidable because of the size of the problem but is believed not sufficient by any means to invalidate the study. Then too, certain of the more subtle yet perhaps more potent factors in the retardation process may have been overlooked by the observer. This study does not pretend, however, to present all of the factors which come to play upon this type of change, - factors which might range in type from the disposition of a particular judge the morning of a decision to factors that tend to retard all change whatsoever.

By an examination of the data four factors were selected as retarding minimum wage legislation. The first two of these are traditional attitudes, namely: the tradition that there is an individual right to a liberty of conduct, and the tradition that governmental interference in the workings of natural law is dangerous. These two factors are discussed in the first and second chapters. The second two factors are discussed in the third chapter and arise from certain structural features of the political organization in the United States: first, the federated form of government, and second, the judicial power to review legislation.

This study is an attempt to present the evidence of the existence of these factors in the culture of the

United States and to show theoretically how the very existence of them is a barrier to the effective application of minimum wage control. Where possible, however, the existence of these factors is presented in quotations which are related specifically to minimum wage legislation for women.

Classical Economic Theory

In the literature of employer groups, in certain court opinions, and in the publications of professorial economists there is continuously expressed the idea that the relationships in the field of economic behavior are controlled by definite natural laws which must not be tampered with by governmental enactments lest the delicate mechanisms of nature be thrown out of adjustment. Minimum wage legislation for women involves the interference of government to determine the terms of certain contracts, a practice which involves a theory directly opposed to this classical economic theory of laissez faire in all contractual relationships. The following chapter will present the evidence of the existence of this traditional theory and show how it is applied to minimum wage legislation.

One of these natural laws or fundamental principles of economics which is brought in opposition to social legislation regulatory of the contract between labor and capital is the wages fund theory. The principle founded upon this theory is that since wages are paid from a fixed fund derived from the sale of produce any slack in production will decrease the wages fund, and so wages.

Early objections in this country to regulation of the hours of work either by legislative action or by collective bargaining were founded to a large extent upon this principle. It seemed inevitable that since the share of labor depended upon the amount produced by labor, any reduction in the productive time could be nothing but folly resulting in either reduced wages or a reduced income to capital, and a lessening of the national wealth. As early as 1865 it was argued that

"it is enough to condemn the scheme of this eight hour labor league to say that, if executed, it would diminish production, for eight hours of work cannot produce as much as ten hours, which is now called a day's work. To diminish capital, also, by taking for the laborer, a portion of it that belongs by natural law, and therefore justly, to capitalist: - - -." (1)

While others less willing to believe capital would give up what was "justly" its share argued that

"the effect of shorter hours on the general wages of labor depends entirely on their effect on production. If they lessen production, generally, they will lower wages generally." (2)

Even if a few did gain shorter hours, their gain in advantage would be at the expense of other laborers who worked the regular ten or twelve hours a day.

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(1) "The Eight Hour Movement," Nation, 1, (1865), p. 517.

(2) The data presented in this and the subsequent quotations throughout the thesis are obviously opinion and may be expressed by members of interest groups for merely tactical reasons. This does not invalidate the quotation but indicates that these tactics are continued because of a recognition of the effectiveness of their appeal to the general public.

In more recent times this same principle has been used by the employer associations in their fight against social legislation. The National Association of Manufacturers in 1919 alarmed somewhat by the prevalent belief that reduction in hours of labor was socially beneficial, passed a resolution calling attention to the fact that

" to restrict production consciously or unconsciously, is to increase the cost of living, to impede progress, and to diminish the wage fund and stop accumulation of new wealth out of which to provide for the improvement of social life." (3)

Another employer stresses the argument by showing the only way to advancement:

" Stripped of abstract theories and reduced to a practical problem, the following concrete results of curtailment of labor seem to be clearly established: increased scarcity of labor, decreased production, increased cost of production, higher cost of living. It is only by performing additional work beyond the standard work day or in other words by increased efforts that the labor can gain an economicadvantage over the higher cost of living. Common welfare is not promoted nor can the economic condition of the individual laborer be permanently improved by reduced effort or by requiring two to accomplish the work of one. An artifically created economic condition which stimulates the demand for labor by curtailing and restricting individual effort violates the most vital social and economic principles, for the human family can progress to a higher level only by maximum and not by minimum exertion." (4)

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(2) Charles Beardsley, "Effect of an Eight Hour Day," Quarterly Journal of Economics, IX, (1895), p. 242.
(3) Quoted in A.G.Taylor, op. cit., p. 55.
(4) S. Mendelsohn, Labor's Crisis, New York, MacMillan, 1920. pp. 68-9.

A slight variation of this first principle insists that since wages are paid from a fixed sum any forced raise to a few by governmental enactment will necessarily result in a decrease in the wages of other laborers, because the "total sum which goes to labor is fixed." (5)

Another part of this economic law regulating the affairs of men is that the indivdual laborers are paid according to their productive power, and so since

" the hysterical agitation for a minimum wage (today urged chiefly for women) has in it no conception of relation between wages and producing power" (6)

if a minimum wage is created by law it

"will maintain a barrier against the possible employment of all labor whose efficiency is below the standard of those entitled to the fixed wage," (7)

and any plan for the setting of a minimum wage must be based upon a statistical estimate of the number of those who under the regulation would be forced to receive state support because their production power was not great enough for them to demand the minimum wage. (8)

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(5) J.L. Laughlin, The Elements of Political Economy, New York, American Book Co., 1909, pp. 215-219. See also Brief and Arguments for Plaintiffs in Error, Supreme Court of the United States, October Term 1914. No. 507. Stetler v. O'Hara, and Simpson v. O'Hara, p.11.

(6) J.L. Laughlin, Labor and Wages, pamphlet number 4, Washington, Roberts, 1920, p. 15.

(7) Brief and Argument for Plaintiff in Error, Stetler v. O'Hara, op. cit. p. 55.

(8) A. Marshall, Principles of Economics, London, MacMillan, 1922, p. 715.

Still another feature of this law insists that labor and capital derive their just share from the sale of produced goods, a factor regulated by the law of supply and demand on the market. So the inevitable conclusion on the basis of this principle is that the economic fallacy of minimum wage legislation

"is so obvious to thinking men that I need not presume to demonstrate its error, - - - and that in any event, political agitation and legislation can do little. The forces governing the demand and supply of labor are beyond the control of legislation."(9)

The only hope for the poorly paid man or woman is in the increase in the efficiency of production, in its methods and machines, (10)

This same attitude is expressed in the N.A.M. convention in 1923, where it was stated

"that the worker is subject to the inevitable operations of the unrepealed and unrepealable law of demand and supply, and the employer discharges fully his economic obligation with the payment of the wage so determined." (11)

A further application of economic law demonstrating the futility of governmental intervention is found in the argument that

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(9) J.L. Laughlin, Labor and Wages, Pamphlet number 3, p. 9.
(10) Ibid., Number 2, p. 10.
(11) Quoted in A.G. Taylor, op. cit., p. 45.

"due to the inevitable working of natural economic laws - - the general enforcement of a minimum wage in any industry would necessarily result in increase in the price of the product or wares in the market. Such rise in prices would increase the necessary cost of living, which cost is to be the basis at which minimum wage is maintained."(12)

Wage-explanation Theories

The professorial theory upon which these adherences to economic law are based and the development of these theories are also a concern of this study.

During the 18th century when from the back ground of the Newtonian concept of natural law in the physical sciences there arose the concept of fundamental human rights as natural rights in agreement with natural laws, there also arose in the field of economic or political economy as it was then known a similiar group of natural laws which were statements of relationships in the field of economic activity. Such a theory of natural law insisted upon a general attitude of laissez-faire with regard to all phases of economic activity, lest interference by political power should disrupt the natural course of events. As stated above, this objection applied especially to any attempt to regulate the condition of the contract between employer and employee, namely, the number of hours of work and the amount of the wages.

(12) Brief and Argument for Plaintiff in Error, Stetler v. O'Hara, op. cit., p. 54.

The natural laws violated by such legislation were laws of wage explanation.

For a considerable period of time the reputable explanation of wage determination was the "subsistence theory", based on the Malthusian views in regard to the growth of population. If wages rose above the natural wage of bare subsistence, the new rate increased the supply of laborers and reduced wages to the subsistence level. If wages fell below the natural level, there resulted a postponement of marriage and a falling off in the birth rate, so that with the thus diminished labor supply, wages were again forced up.

But as a factor in determining wage rates by regulation of the supply, the subsistence theory came to be regarded as working too slowly, and there was an obvious need of a theory of wages which would explain wages during a shorter period of time, immediate, "market wages", as distinct from the "natural wages" toward which rates tended vaguely throughout a long period of time, and which emphasized the element of demand rather than that of supply. So there was formulated the wages-fund theory for the explanation of present market wages, considering

primarily the factor of demand, supply being for the time constant. According to this theory, wages are paid from a fund set aside by capital for the purpose, and the wage of each man is the equivalent of the total wages-fund of capital divided by the number of laborers.

Such a combination as these two laws, then, explained wages as dependent upon supply, showing how the supply may rise and fall over long periods of time, as dependent upon demand as the demand fluctuates during shorter periods, according to the amount laid by for wage payment. But they did not take into consideration variation within the wage scale at any given time. (13)

This explanation was left to a new theory, the discounted marginal productivity theory of wages, most of whose adherents take over the wages-fund theory and add to it the explanation needed by saying that the individual's wage is

"approximately the equivalent of the amount which he can subtract from the product of the group by withdrawing him self from it." (14)

This one change is made in the wages fund theory also: the wages-fund is considered to be derived from the laborers share of the sale of produce, this income continously replenishing the wage source. Capital and labor are regarded as receiving from this sale produce specifically in

(13) G.A. Kleene, Profit and Wages, MacMillan, New York, 1915 and W. Hamilton and L. May, The Control of Wages, New York, Doran 1923, for an explanation of these laws.
(14) T.N. Carver, The Distribution of Wealth, New York, MacMillan, 1904, p. 157.

proportion as they produce. The guarantee to both that each is receiving the deserved share is the free competition of the employers for labor, and the laborers for jobs. If a laborer is paid less than he produces, his employer pockets an unearned surplus; this causes other employers to compete in the field and bid for the services of the laborers, this continues until the surplus is taken up; and conversely if the laborer is paid more than he produces, his employer finds it unprofitable to keep him, and the laborer is forced to accept a wage corresponding to his productivity, as an alternative to discharge. So wages are determined: a productivity wage because the wage earner is paid according to what he produces; a marginal wage because the amount he produces is calculated theoretically by the margin of produce he adds by working or the margin he subtracts by not working; a discounted wage because the capitalist is regarded as possessing the right to subtract from the marginal productive wage the interest on the amount of that wage from the time of the wage payment until the wage-fund is replenished by the sale of the goods produced for this wage.

The manner in which such theories of wages represent a factor in the retardation of legislation in earlier

times is easily seen, In the days of close adherence to Malthus' subsistence theory of wages under which misery vice, and famine were considered to be checking the powerful force tending to cause a growth in population, social legislation was frowned upon because it would allow early marriage and the survival of the children and would finally produce even greater pressure upon the means of a subsistence and a greater supply of labor to lower even further the wage amount. (15)

When this theory was supplemented by the wages fund, in the minds of many there was a clear conviction that labor legislation was futile. The only possible way to raise wages seemed to be that of increasing the wages fund, and if the wages of the poor were raised, they would be so at the expense of the other laborers, J.S. Mill was real doleful about it:

"Since therefore, the rate of wages which results from competition distributes the whole wages-fund among the whole laboring population, if the law or opinion succeeds in fixing wages above this rate some laborers are kept out of employment." (16)

Which simply means that if wages were set by political enactment the fund would be divided among the few fortunate and the excess group would be left with no wage at all.

(15) T. Malthus, An Essay on the Principle of Population, Vol.1. Bk.1,pp. 15-16.

(16) J.S. Mill, Political Economy, Bk.2,ch.12, Sec.1,p.219. Peoples Edition, Quoted by Richard T. Ely, Proceedings of the first annual meeting of the American Association for Labor Legislation. Madison, Wisconsin, 1907. "Economic Theory and Labor Legislation," pp. 6-17.

Ricardo also advocated the let alone policy:

"Like all other contracts, wages should be left to the fair and free competition of the market and should never be controlled by interference of the legislature." (17)

Such was the heritage then of economists of the present century, and as presented in the data at the first of this chapter it has quite effectually pervaded the thinking of contemporary groups.

The strength of the appeals to the inevitability of natural law in the future is impossible to predict with accuracy. Wages are sometimes explained by other theories than the productivity and wages-fund. That these theories have been of tremedous importance in the past however cannot be doubted, especially by those who have sought remedial legislation for social ills, and who have seen reflections of it in legislative halls and on judicial benches. (18) Justice Earle in the New York tenement house case warned that:

"Such governmental interference disturb the normal adjustments of social fabric, and usually derange the delicate and complicated machinery of industry and cause a score of ills while attempting the removal of one." (19)

(17) David Ricardo, The Principles of Political Economy, London, 1926, p. 61.
(18) Richard T. Ely, op. cit., p. 24
(19) Ex parte Jacobs, 98 N.Y., 98. (1885)

How many justices in the future will be trained with such economic beliefs as that of Justice Earle is purely a speculative proposition but that many judges and legislators, as well as many of their constituents, will be sincere believers in these "dismal" theories may be safely assumed from a glance at the economic texts in use in Universities today. By far the great majority adhere to the productivity theory. (20)

In summarizing the influence of economic theories, this further observation is perhaps in order. Professorial theories themselves represent no effectual barrier in the traditions of the great body of people,

(20) T.N. Carver, The Distribution of Wealth, New York, MacMillan, 1904. pp. 157-181.
H.L. Moore, Law of Wages, MacMillan, New York, 1911, p.44.
J.B. Clark and F.H. Giddings, The Modern Distribution Process, Boston, Ginn, 1888, pp. 59-65.
John Bates Clark, The Distribution of Wealth, New York, MacMillan, 1899, pp. 2-3.
A. Marshall, Principles of Economics, London, MacMillan, 1922, pp. 538-541.
F.W. Tausig, Wages and Capital, New York, Appleton, 1896, p. 118.
H.R. Seager, Introduction to Economics, New York, Holt, 1908, p. 243.
F.A. Fetter, The Principles of Economics, New York, Century, 1907, p. 213.
G.A. Kleene, Profit and Wages, New York, MacMillan, 1915, p. 154.
J.L. Laughlin, The Elements of Political Economy, New York, American Book Co., 1909.

to social legislation. They are adhered to, aside from those of academic inclinations such as students of economics and justices of the courts, only by those who have a vested interest in the maintenance of the economic status quo. When used as arguments (though no doubt used in all sincerity), these theories are in the nature of rationalizations, their effectiveness upon the untrained legislator depending primarily not upon such value as he is able to detect in the theories, but rather upon the fact that they remove the focus of attention from the humane question of whether actual conditions demand remedial legislation, to the "eternally moot" point of whether labor is deriving its just share from capital.

The Tradition of Individualism

Throughout the publications of employer, employee, and court groups in discussion of social legislation of every type there is a continuous insistence upon individual rights as opposed to societal rights. This is the tradition of individualism. Social legislation embodies a recognition of a right of political control over many details of social interaction and a sense of social responsibility for social maladjustments, a point of view in complete opposition to that tradition of individualism which insists upon extreme individual politico-economic rights and which regards the individual as capable of self-direction. In more explicit terms this tradition might be expressed somewhat as follows: there are certain fundamental rights arising from the nature of things. One of these natural rights is the liberty of the individual to conduct himself and his affairs in such manner as he personally desires as long as he does not infringe upon the rights of other individuals to the same manner of conduct. These rights exist in the very nature of things and have been guarranteed to the individual by the constitution. Since every individual is possessed

of equal rights under this constitutional guarantee, all have equal opportunity to succeed in the competitive economic struggle and any failure to succeed under these conditions of equal opportunity is attributable only to the individual's failure to capitalize on his opportunities, for his affairs are entirely a matter within his own control, his success depending merely upon the exercise of his own powers of free will under these conditions of equal right and opportunity.

The following chapter will present the evidence of the existence of this tradition in the culture of our group and show how this is applied to social legislation and so far as possible to minimum wage legislation for women. Many of the following quotations have no specific reference to minimum wage legislation but refer in a general way to social legislation or just to individual rights, but as pointed out above minimum wage legislation involves a principle of governmental restriction of individual rights directly opposed to the traditional freedom and any evidence of the existence of the tradition is evidence of a factor opposing minimum wage control.

An analysis of the tradition of individualism as it is found in the data reveals three separate elements or constituent assumptions fundamental to it. These elements

and their relation of each to social legislation in the literature being analysed are: (a) there exists a natural right to an individual liberty of conduct so far as that conduct does not impinge upon the right of others, and social legislation or minimum wage legislation violates this right: (b) there is resident within the individual the free power of choice or self-determination which would be destroyed by such legislation: and (c) under these conditions of equal right and free choice there is an equal opportunity for freedom of action, making unnecessary the enactment of such legislation. The data has been grouped according to these three elements.

The Natural Right to Individual Liberty

First of all there has been an insistence upon the part of employers, employees, and justices that there is a natural right to liberty of conduct and that social legislation is an unjust violation of this right. In legal terminology this right is termed a right to freedom of contract. Representative of this attitude of the employer groups many references in the minutes of the proceedings of the annual meetings of the National Association of Manufacturers.

As early as 1903, soon after the organization of the association, it was declared in their principles that

"employers must be free to employ their work people at wages mutually satisfactory, without interference or dictation on the part of individuals or organizations not directly party to such contracts." (1)

The right to do this was regarded as one of the most sacred and fundamental of American liberty. (2)

" The Declaration of Independence and the Constitution of this country are constructed on one fundamental or foundation principle, which is that the individual has the right to live his own life, to manage his own affairs and follow the dictates of his own judgement and conscience without the interference either by others individual or by government so long as he does not trespass on the same rights of others." (3)

The year of greatest activity in minimum wage legislation (1913) brought forth a similiar insistence upon the belief that

"The sanctity of property must not be invaded. The inherent nobility of the right to labor must never be impaired.
The fundamental privilege of a citizen to follow a lawful calling, without molestation, must never be abandoned." (4)

President Mason in his annual address in 1921 expressed full faith in these rights.

(1) A.G. Taylor, Labor Policies of the National Manufacturers Association, Urbana, University of Illinois, 1928, p.38. Proceedings of the National Association of Manufacturers, New York, 1906, p. 14. (to be cited as N.A.M. hereafter)
(2) Taylor, OP. cit., p. 36.
(3) N.A.M., 1905, p. 45.

"Fundamentally, those declarations have constantly blazed the path for every sturdy and righteous proponent of the inherent human right of each individual American citizen lawfully to do business or earn a livelihood without let or hindrance by any other citizen or organization. Indeed, the course of national events and the trend of economic balance, during and since the recent war, have again and again evidenced the true worth and fairness of these principles, in advocacy of which we have never wavered and which we never will cease to steadfastly to uphold. It is timely, therefore, that on this occasion we should as good Americans, once again re-indorse and freshly dedicate to these principles all our energies and resources." (5)

This spirit has characterized the fight of the National Association of Manufacturers against practically every type of legislation which embodies a recognition of the right of governmental control.

In the American Federation of Labor a large group of which Samuel Gompers was the chief representative has taken a similiar stand in relation to governmental intervention. An analysis of the proceedings of their annual conventions, and of the publications, especially those of Mr. Gompers reveals but one difference in their attitude toward governmental intervention in economic relationships. This difference is an insistence that the laboring groups be guaranteed the right to organize for their

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(5) N.A.M., 1921, p. 106.

own protection and that there be enacted beneficial legislation for those groups whose peculiarity of position makes self-protection impossible. Gompers wrote in 1919

"labor seeks legislation from the hands of government for such purposes only as the individual or groups of workers can not effect for themselves, and for the freedom and right to exercise their normal activities in the industrial and social struggle for the protection and promotion of their rights and interests and for the accomplishment of their highest and best ideals." (6)

Except with respect to legislation of this type the attitude of the majority group as expressed in the proceedings of their meetings has been a negative one where such legislation would limit the "natural rights" of citizens.

They, rather, prefer economic action

"by which they can strengthen their economic position until it will control the political field, and thereby place labor in full possession of its inherent rights." (7)

And so they insist as has the National Association of Manufacturers upon a strict adherence to the natural and inherent rights of men.

(6) Samuel Gompers, Labor and the Common Welfare, New York, Dutton, 1919, p. 55.
(7) Proceedings of the Annual Convention of the American Federation of Labor, 1902, p. 178. (to be cited as A.F. of L. hereafter.)

" There must in justice be no law, formulated by judge or lawmaker which can deprive a wage worker of his own exclusive ownership, of himself, or in other words, of those rights over his own labor-power which is guaranteed by the constitution and the concepts of liberty implied in the fundamental principles of our Republic." (8)

But it is to the courts especially that the attention must be turned for expressions of this concept that social legislation violates a fundamental natural right. It was upon the traditional belief that there was such a right over and above the law, a natural, inalienable one, that Marshall founded his decision in Marbury v. Madison (9) a decision which marked the beginning of a long line of precedents for court annulment of legislative acts. Reviving this natural rights concept in his dissent from the Slaughter House case (10), Justice Field on the Supreme Court bench set the model for many decisions in the next fifty years adverse to social legislation on the ground that it contravened the natural rights of men.

This attitude of Justice Field toward certain regulatory legislation is best expressed in a later case (1883) in which his opinion had become a concurring one rather than a dissent.

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(8) Gompers, op. cit., p. 60.
(9) 1 Cranch, 137. (1803) This case concerned the power of the Secretary of State of the United States to issue a mandamus.
(10) 16 Wallace, 36. This case was concerned with the power of a city to grant a monoply, (1872).

"As in our intercourse with our fellow-men certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: - - - - . Among these inalienable rights as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others which may increase their prosperity or develop their faculties so as to give to them their highest enjoyment." (11)

He then quotes Adam Smith

"The property which every man has in his own labor as it is the original foundation of all other property so it is the most sacred and inviolate. The patrimony of the poor man lies in the strength and dexterity of his hands, and to hinder him from employing this strength and dexterity in what manner he thinks proper without injury to his neighbors, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman, and those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper. To judge whether he is fit to be employed, may surely be trusted to the discretion of the employers whose interest it so much concerns. The affected anxiety of the law-giver lest they should employ an improper person, is evidently as impertinent as it is oppressive." (12)

Two years later (1885) this same traditional concept of a <u>natural right</u> is found in the opinion of Justice Earle in the tenement house labor case, the first decision of importance related to labor legislation. Judge Earle characterizes this type of legislation as

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(11) 3 U.S., 756.
(12) Adam Smith, <u>An Inquiry into the Nature and Causes of Wealth of Nations</u>, Vol.1., Oxford, 1880, p. 128.

"infringements upon mans' fundamental right of liberty."(13)

The term freedom of contract had not yet been expressed but was found in a case the following year (1886). The decision in the case declared an act of the Pennsylvania legislature, which attempted to regulate the methods of wage payment in iron mills,

"unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what, in this country, cannot be done; that is, prevent persons who are sui juris from making their own contracts. The act is an infringement alike of the rights of the employer and the employee. More than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States, he may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional priveleges, and consequently vicious and void." (14)

In 1904 another case concerning the regulation of methods of wage payments in another state reflected the same belief that every man has a "natural inalienable right of acquiring, possessing and protecting property." (15)

Attempted regulations of the number of hours of work at first met with this same barrier that all men have

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(13) In re Jacobs, 98 N.Y., 98, 106. (1885) This case was concerned with the power of the legislature to regulate the manufacture of tobacco products in tenement houses. The law aimed to stop sweat shop labor.

(14) Godcharles v. Wigeman, 6 Atl. 354,356. (1886) This case concerned the power of the Pennsylvania State legislature to regulate the method of wage payment in the coal industry.

certain inherent and inalienable rights. (16)

"The right to make contracts is an inherent and inalienable one." (17)

And this enactment attempting to regulate hours of work was

" a purely arbitrary restriction upon the fundamental rights of the citizen." (18)

This concept has persisted, though slowly modified in spirit and strength, to the present time. Assuming the reality of this natural right, Justice Pitney said in 1915

"Included in the right of personal liberty and the right of private property partaking of the nature of each - is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial im-pairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money." (19)

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(15) State v. Missouri Tie and Timber Co., 80 S.W., 933,940. (1904)
(16) Ritchie v. People, 40 N.E., 454,457. (1895)
(17) Ibid.
(18) Ibid, See also: Lochner v. New York, 168 U.S., 45, 57 (1905); In re Morgan, 26 Col., 415 (1899)
(19) Coppage v. Kansas, 236 U.S., 1, 14. (1915)

One of the most recent manifestations of this spirit in the courts has been the minimum wage case of Washington D.C. This act was declared unconstitutional as a violation of the guarantee of the rights of liberty guaranteed by the 5th amendment to the constitution. Not only is it conceived that the power of the state to limit these natural rights to "freedom of action" greatly limited, but the state

" Is in nothing more essentially interested than, in the protection of every individual's private rights, - - -." (20)

The above references show unmistakably the existence of a belief in certain natural rights which are contravened by a program of social legislation.

The Power of Self-determination

The second element in the tradition of individualism, namely, that there exists not only the individual right to a freedom of action but also the individual power to direct that action, power expressed in such terms as free will, self-direction, self-reliance, etc, is equally manifest in the writings of those organizations

(20) Adkins v. Children's Hospital, 261 U.S., 525, 546. (1923) This is a quotation from Blackstone, See W.D. Lewis, Blackstone's Commentaries, Vol. 1, Philadelphia, 1898, p. 139.

whose beliefs are cited above. The citations are, however, not so numerous. The evidence of the existence of this element of the tradition consists of the assumptions of those whose writings are the data for this study that with the right to perform a certain act goes the freedom or opportunity to perform that act. Such freedom or opportunity of performance necessarily entails not only this right but also an individual power to act under this right. The inference is unavoidable, then that if the individual assumes that with the right goes freedom of action, he also assumes the power of absolute individual control.

There are some explicit statements of this second element of the tradition found in the literature of the National Association of Manufacturers. President Edgerton of that organization in 1925 said:

"All men are equally endowed by their Creator with free wills and with the abstract right and power of choice."(21)

This identical spirit pervades the utterances of the speakers before the asscoiation. They regard the effects of the enactment of regulatory legislation very much in the same way it was regarded editorially by the North American Review in 1866:

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(21) Taylor, op. cit., p. 44.

"It would not comport with our notions of liberty, nor should we deem it wise, or even expedient, for any government to interfere with the pshere of individual effort or duty, and deprive men of the needful discipline of self control or self-direction, by prescribing the terms or conditions upon which they may dispose of their own labor; - - - ." (22)

Or as it is expressed by a representative of an employer groups more recently:

"Over legislation dulls the spirit of independence, destroys that self-reliance without which slef-respect languishes, dies." (23)

Mr. Emery of the N.A.M. in 1920 expressed the belief that

"The undue and improper interference of government breaks down the very thing that a free society hopes to establish and stimulate- self-reliance, initiative, independente of though and action. Strong men make a strong state. The quality of the individual makes the quality of the republic. To create a sense of dependence and reliance upon the government saps the foundation of individual independence and initiative, tends toward the creation of that condition of crumbling society displayed in the German empire - a body of men developed by the state, and not a state developed by its men." (24)

This spirit is one very similiar to one found in the

(22) "Hours of Labor," North American Review, see 11. January 1866, p. 198.
(23) Resolved that the Proposed Twentieth Amendment to the Constitution of the United States Should be Ratified. A Debate: affirmative, O.R.Lovejoy; negative, C.S.Thomas. Reprinted from the Proceedings of the National Conference of Social Work for the National Child Labor Committee, New York, 1925. 43.
(24) N.A.M., 1920, p. 272.

organization in 1906

"I have said that it is the innate characteristics to do and to excell. With us self responsibility is enforced and individual initiative is encouraged to the uttermost. There is no despotism-no rule of force controlling the activities of the individual. Neither is there any enervating paternalism stealing from the worthy and rewarding the unworthy." (25)

The evidence of the existence of a belief in this power of self-direction in the literature of the American Federation of Labor is as pointed out above by inference from their assumption that with the right to perform an act goes the equal opportunity or freedom to perform that act. This equal opportunity they do not believe exists except under organization of those with like interests. This attitude will be taken up later under the discussion of the traditional belief in equal opportunity.

For the most part the evidence in the court opinions of a belief in the power of self-direction is by similiar inference. There are one or two expressions of the tradition, however, which can be presented here. Otherwise the evidence of the existence of this second element will be presented under the section devoted to the traditional belief in equality of opportunity.

This belief in free will is expressed plainly in

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(25) N.A.M., 1906, p. 13.

Coppage v. Kansas in which the court looks upon a man discharged for belonging to a union as "an employee at will and a man of full age and understanding." (26)

In Godcharles v. Wigeman the court declares the act not only a violation of right but

"More than this it is an insulting attempt to put the laborers under a legislative tutelage, which is degrading to his manhood." (27)

Equal Opportunity for Economic Success

The literature used as data provides numerous references to illustrate the existence of a belief in equal opportunity or freedom of action arising from the natural right and the individual power to act. In the language of the ordinary citizen the concept of men as possessing equal freedom of action is expressed by the term equal opportunity. The legal concept is one of freedom as arising from the coordinated right and power to the act. There is sometimes added the idea that potentially equal abilities are made practically equal by

"free and universal education, that the door of opportunity and the ladder to leadership should be free for every generation, to every boy and girl." (28)

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(26) 236 U.S., 1, 15. (1915)
(27) 6 Atl., 354, 356. (1886)
(28) Address of President Hoover on the Occasion of the Celebration of the One Hundred and Fiftieth Anniversary of the Battle of King's Mountain, October 7, 1930. Washington, Government Printing Office, 1930, p. 2-3.

President Edgerton of the N.A.M. in the national convention in 1925 referred to the bibical parable of the talents and by analogy likened the equal opportunities to those in this country. (29)

From the very beginning there has been this insistence that freedom or equality of opportunity was a reality. A committee reporting to the Massachusetts legislature in 1845 on the advisability of the control of hours of work reflects the traditional belief in equal opportunity as it was applied to social legislation and which helped delay effectual enactments of this sort for half a century. The report read in part:

"Labor in Massachusetts is a very different commodity from what it is in foreign countries. Here labor is on an equality with capital, and indeed controls it, and so it ever will be while free education and free constitutions exist. - - - Labor is intelligent enough to make its own bargains, and look out for its own interests without interference from us; and your committee want no better proof to convince them that Massachusetts men and Massachusetts women who appeared in support of this petition, before this committee." (30)

Coming down to the present President Hoover in an address in the fall of 1930 expressed the element of the tradition of individualism which insists upon the

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(29) Taylor, op. cit., 43.
(30) John R. Commons, Documentary History of American Industrial Society, Vol. VIII, Cleveland, A.H. Clark Co., 1910.

the superfluity of social legislation:

"We hold that all men are created equal, that they are equal before the law, and that they should be safe guarded in liberty and, as we express it latterly, in equality of opportunity to every individual that he may achieve for himself and for the community the best to which his character, his ability, and his ambition entitles him."

"In the large sense we have maintained open the channels of opportunity, constantly refreshing the leadership of the nation by men of lowly beginnings. We have no class or caste or aristocracy whose privilege limits the hopes and opportunities of our people. Science and education have been spread until they are the universal tools of the common man." (31)

The A.F. of L. group represented by Mr. Gompers believes that this freedom or equality of opportunity can exist under the present economic system if labor is guaranteed the right to organize, while the N.A.M. believes that equal opportunity for all can exist only under the conditions of 'open shop'. (32) This is not our concern here, the fact of interest is that they make the point and act upon it that under one condition or the other equality of opportunity does exist and hence governmental legislation besides being a violation of natural rights and a legislative tutelage subservient of manhood, is entirely unrequired, superfluous.

The A.F. of L. puts it as follows:

"Organization gives the workers freedom, choice, individuality. Organization enables them to protect themselves, to solve their own difficulties and to order their own lives." (33)

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(31) Address of President Hoover, op. cit.
(32) N.A.M., 1920, p. 113.
(33) A.F.of L. report of the Executive Council, 1914, p. 16.

There are many references in court opinions illustrating the existence of a belief in freedom of action, implying besides the right the power to act. The court in the case of the Missouri Tie and Timber Company, which concerned the regulation of the method of wage payment, refused to recognize an inequality of bargaining power between the two parties concerned, employer and employee. (34)

In a case regarding the right to keep a company store the opinion stated that

"Theoretically there is no inferior class other than that of those degraded by crime or other vicious indulgences of the passions, among our citizens. Those who are entitled to exercise the elective franchise are deemed equals before the law, and it is not admissable to arbitrarily brand, by statute, one class of them, without reference to and wholly unrespective of their actual good or bad behavior, as too unscrupulous and the other class as too imbecile or timid and weak, to exercise that freedom in contracting which is allowed to all other." (35)

In the earlier cases regarding the regulation of hours of work the court held that "all men are free and independent." (36) And bakers were assumed to be as other men

"able to assert their rights and care for themselves with out the protecting arm of the state, interfering with their independence of judgement and action." (37)

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(34) 80 S.W., 933. (1904)
(35) Frorer v. People, 31 N.E., 395, 399. (1892)
(36) Ritchie v. People, 40 N.E., 454, 457. (1895)
(37) Lochner v. New York, 168 U.S., 45, 57. (1905)

In Coppage v. Kansas the court considered a case which concerned a state act making it a misdemeanor to require a person to be or not to be a member of a union found nothing to show that the one so discriminated against was

"subject to the least pressure or influence or that he was not a free agent in all respects competent, and at liberty to choose what was best from the standpoint of his own interests.

He may select not only his employer but also his associates, he is at liberty to refuse to continue to serve one who has in his employe a person or an association of persons, objectionable to him." (38)

In one of the more recent cases the assumption that there was absolute freedom and equality of opportunity has been somewhat modified but the substance amounts to the same conclusion as far as it effects social legislation:

"There is of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless the general rule and restraint the exception, and the exercise of legislative authority to abridge it can be justified only by the existance of exceptional circumstance- whether these circumstances exist in the present case constitutes the question to be answered. (39)

In summary, the individualistic tradition as it is found expressed in the literature of these three representatives groups referred to above is as follows: (a) There is a natural right to liberty of conduct and (b) the individual is possessed of the power of choice and self determination;

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(38) 236 U.S., 1, 8. (1915)
(39) Adkins v. Children's Hospital, 261 U.S., 525,546. (1923)

(c) under this right and possessed of this power there is an equal opportunity given to every individual for economic success. Social legislation is a violation of this natural right and tends to be destructive of the initiative and manhood of those for whose benefit it is enacted, merely encouraging their lack of exercise of power and will given to them as to all others.

The Development of the Individualistic Tradition

In tracing the development of the tradition of individualism it will prove expeditious to trace the development and addition of each of the several elements of the tradition. Before doing so, however, one of these elements must be broken down into two parts. The first element, that there is natural human right to an individual liberty of conduct really embodies two parts which when considered historically must be studied apart. Historically this tradition was first an assumption of a fundamental human right to a liberty of conduct, unrationalized and unexplained as to origin. Later there was added to it the natural concept, under which this right was conceived of as being a natural right, i. e., arising from the nature of things. The four elements of the tradition, then, are: (a) there is a fundamental

human right to liberty of conduct; (b) this is a natural right; (c) the individual is possessed of a power of free will or self-determination; and (d) under these conditions of natural right and self direction there is equal opportunity for success in the economic struggle.

In an attempt to describe the origin and development of this tradition of individualism so clearly a part of our national pattern of ideas and to show the addition of its several elements it will be well to follow Cooley's dictum that

"to assume that there was a beginning to this individualism is fallacious. There is no beginning. - - - There is always continuity with the past." (40)

and his further advice regarding the development that

"we cannot describe the development by a special chain of causes, specifically; but rather, if explanations are essential we must explain outcomes as the growth of a reciprocating whole of processes, of which this special train of causes is a more incident." (41)

Several of the more outstanding links in this special chain of causes are given by Pound in his description of this tradition which he calls the "Spirit of the Common Law." Among these causes are: (a) An original substratum of Germanic tradition; (b) Puritanism; (c) The contest between the courts and the crown in the seventeenth century; (d) the eighteenth century political ideas; and (e) the conditions of the American frontier communities.(42)

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(40) C.H. Cooley, Social Process, New York, Scribner and Sons, 1918, p. 48.
(41) Ibid, p. 49.
(42) Roscoe Pound, The Spirit of the Common Law, Jones, Boston, 1921, pp. 14-15. The Greater portion of this last section of Chapter II is taken from this book.

The Substratum of Germanic Tradition

Underlying this individualistic tradition is the old Germanic tribal concept that there were certain fundamental rights to a liberty of conduct. This right was not given a rational explanation as to origin such as we find later in the natural law concepts of the 18th century but was simply a right of liberty traditionally maintained and unquestioned. Under this concept the law was looked upon as having as its purpose only the maintenance of peace and of the assurance that agreements were carried out. Above and beyond this insistence the law had no concern, and the individual of mature age had to take care of himself and his interests. If the individual made a bad bargain, was cheated, it was his due. He had no one but himself to blame and the law insisted that he carry out the agreement of such bargains to the letter.

"If he could not guard his own interests he must not ask the courts which were only keeping peace to do so for him - - . When he acted he was held to have acted at his own risk with his eyes open, and he must abide the appointed consequences. (43)

In fact, any attempt on the part of sovereign authority to exceed this limit of the maintenance of peace was

(43) Ibid., p. 19.

regarded as a violation of this fundamental right to liberty of conduct, a right which arose above any will of the sovereign.

Puritanism

This individualistic tradition which insisted upon the control as lying fundamentally in custom and not in civil power chafed under the arbitrary authority of the Roman church in political and religious affairs, both in Germany and England, previous to the Reformation. Finally there was a revolt. The renewed spirit of individual right found expression especially in that body of thought and custom known as Puritanism, and it was this renewal of individualism which emphasized the second element of the tradition as we know it today: the belief in the individual as a free moral agent.

This same element was found somewhat in the Germanic tradition (as certainly none of these elements can be separated as to development in a completely distinct fashion from the others), for it was the customary argument of this strict German tradition that the individual must suffer his own penalty as the "situation was produced by the parties own folly and he must abide it." But it was in the Puritanical thought that this concept of the individual having complete control over himself and his affairs reached its highest expression. Under this concept the

the individual conscience and the individual power of choice and judgement were raised to the highest possible plane. The assumption of a fundamental right to a liberty of conduct varied not at all from the early Germanic tradition, but the new emphasis insisted that all consequences arising from any act depended upon the exertion of the will. Under this concept the individual has the power to make his own bargains but he must accept the responsibility attending thereto, and the liability consequent upon his free choice. This is termed the "willing covenant of conscious faith."

The Courts and the Crown

The third factor in this train of development did not contributea new element of the individualistic tradition but it did much to strengthen certain features of the early Germanic tradition, especially with regard to the right of the sovereign will to supersede the fundamental rights of men. This factor is the struggle between the English courts and the crown during the 17th century.

Simultaneously with the decline of the papal jurisdiction in political and religious matters arose monarchial power as sovereign. Such arbitrary powers as had

exercised by the Roman chruch were attempted at times by these monarchs. In England the attempts at such power were met with stubborn resistance from the courts, which insisted that the fundamental law set limits to such authority and that any acts outside these traditional boundaries could not be countenanced. It was one of the chief functions of the courts of this period to see to it that these traditional rights were not impinged upon.

Eighteenth Century Political Ideas

As mentioned above, this concept of a fundamental right which could not be disregarded by the sovereign, coming down to the English culture from the Teutonic tribes, was not given a rational basis, the rights being traditionally regarded as simply unquestionable. During the 18th century, however, these rights were given an explanation as to origin which yielded considerable in the way of solidarity to the tradition of individualism. This explanation was that these fundamental rights were natural rights. This constitutes the third element of the tradition of individualism as it exists today.

Under the influence of the Newtonian concept of the existence of a certain relationship between the substances of a material world which could be stated as natural laws,

there arose in the writings of Locke, Grotius, and many of their contemporaries the explanation of social phenomena by a similiar process. (44) The traditional political rights were looked upon in a new light, as rights arising from certain inherent moral qualities in every individual which could be discovered by the exercise of reason. Any action by the government in violation of these rights inherent in the nature of man was regarded as an interference with natural forces, pure folly, and was furthermore the violation of individual natural rights.

The American Development of Individualism

Such was the tradition of individualism during the period when the 13 colonies were drifting toward liberty from England. A Traditional right was given the explanation of natural very much as royal rights had earlier been given the explanation of divine and in the exercise of this individual right the person was regarded as having full control of his capabilities and had to answer for any missteps or failures. A similiar tradition existed in certain parts of Europe, but it was accepted in this country probably with even greater enthusiasm than anywhere else.

(44) Hugo Gratius, The Rights of War and Peace, translated by A.C. Campbell, Washington and London, M.W. Dunne, 1901.
John Locke, Of Civil Government and Toleration, Cassell and Co., London, 1905.

"The social and economic conditions of the Western world were in the first place more favorable than in Europe for its acceptance. - - - America was the land of the pioneer, who had to rely for most of his success upon his strong right arm. (45)

These frontier conditions disappearing steadily in the East and existing continuously in a "farther West" to the close of the 19th century furnished fertile ground for the development of an exaggerated individualism. It was a country where men tended to be a law unto themselves and where very existence depended upon the individual's ability to work out his own survival. There was little or no formal control. The tone of it all was individual reliance.

Under these pioneer conditions in America there developed the fourth element of emphasis in the indivdualistic tradition, namely, that there is equal opportunity to all men for economic success. The country was devoid of those traditions of special privilegs and nobility which permanently stratified society in Europe. So the "natural rights of English-men" became in America not only natural but also <u>equal</u> rights before the law. The entire emphasis became upon <u>equality</u>. To guarantee that the potential equal abilities of the individuals should become

(45) Goodnow, F.J., "The American Conception of Liberty." <u>The Colver Lectures</u>, pp. 7-33, 1916, Providence RI.

actual equalities, public education was developed, free to all. And so the economic struggle, being greatly emphasized by the industrial growth of the period, was entered upon, according to this belief, with equal opportunity for success the heritage of every citizen. There was an equal right before the law to liberty of conduct; there was within the individual the power of self-direction; and by a system of free schools the potential abilities of each were made practically equal.

But this phenomenal development under frontier conditions of an individualistic tradition came to an end, the frontier was pushed further away to final disappearance and American society became more industrial. This industrialization of the United States following closely upon that of England brought with it conditions harmful to human health and safety. In the earlier years of the industrial history those who found themselves in depressing economic situations and who possessed strength of character sufficient to demand a change for the better could move to the frontier and homestead on their land, - their own masters. But as the frontier was pushed farther west and fewer and fewer were able to do this,

there arose a demand for governmental intervention for the protection of the less powerful from the rampant individualism of the financially strong. Such intervention today touches all the major fields of social relationships. From the very first these attempts to control the relations of men by legislative action has met with the objection that such legislation is a violation of the tradition of individual liberty and moral responsibility. The existence of this tradition in the culture pattern of the United States is unmistakably shown by the data presented above. The tradition that there is a natural right to liberty of conduct gives rise to the point of view that minimum wage legislation for women is a violation of the inherent rights of men. The beleif that there is a power of free-will in the individual results in an insistence that such legislation is destructive of strength of character. And the tradition of equal opportunity supports the contention that such legislation is not essential for the guarrantee of success in economic life.

The Structure of the Government

Two factors stand out as retarding elements in the legislative history of minimum wage legislation for women. They arise from certain structural features of the political organization of the United States. The two features of this structure which have tended to retard social legislation of any sort are: (a) the existence of 49 separate jurisdictions, all of which have been granted the exclusive power to legislate in such matters but none of which have the power to create tariff walls to maintain the standard set up by such legislation; (1) and (b) the system of check and balance of power by which courts are enabled to nulify the enactments of legislators.

The Federated Form of Government

The first of these structural characteristics of the political institution, the existence of 49 separate jurisdictions, represents to the legislator a consideration of major importance.

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(1) Article X of the Federal Constitution: "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively or to the people."

Article 1, Sec. 10: "No State shall, without the consent of the Congress lay any Imports or Duties or Exports - - - ."

By the tenth amendment to the constitution those rights not specifically assigned to congress are reserved to the various states. Among such rights belonging to the states are those of complete jurisdiction in purely internal matters (that is matters not concerned with interstate traffic). Beonging in this class are those legislative enactments termed social legislation. While, however, to the States is guaranteed the power to enact such legislation, the states may not create tariff walls to protect financially the raised standard of social welfare. (2)

Because there is no tariff protection it is feared that those states enacting social legislation, be it hour legislation, minimum wage or pension establishment, will at once place their industries at a disadvantage in interstate competition. As early as 1847 there appeared an indictment of the attempted regulation of hours of work on this score.

(2) The correctness of the theory that such protection of standards is essential for their maintenance is not a concern here, but that the theory exists is assumed.

"Again it should be considered that the manufacturing establishments in this state must run as many hours as similiar establishments in other states, or they cannot run at all without loss to their stock holders. If a mill in Dover runs but ten hours, while in the adjoining town of South Berwick, or in Lowell, or Saco, a similiar mill runs twelve hours, it is evident that the latter is reaping an advantage which must be ruinous to the former. (3)

And a meeting of Pennsylvania manufacturers in 1848 concerned with the effects of a ten hour day in that state resolved:

"that the extensive and enterprising competition in the various states of the Union, in producing coarse cotton goods, has reduced the business to an estimated and small profit, and that, whilst other manufacturing communities, both in the free and slave states, are untrameled in the hours of their labor, would have a most destructive tendency on a great growing and important branch of industry, conducive alike to the comfort and prosperity of our commonwealth. (4)

In 1920 cotton manufacturers opposed hours of labor legislation because

"they could not compete with the states which ran 54 to 60 hours, and in some places even 66 hours a week." (5)

(3) Quoted in J.R. COmmons, Documentary History of American Industrial Society, Vol. VIII, from the New York Weekly Tribune for October 16, 1847, which had quoted in turn from the Dover Enquirer for September 28, 1847.
(4) J.R. Commons, op. cit., p. 2.
(5) Quoted in Practical Experience with the Work Week of forty-eight hours or Less, Report #32 National Industrial Conference Board, New York, 1920.

The same argument is used against legislation for the protection of child labor. (6) Social insurance plans meet with this opposition somewhat as follows:

" that compulsory social insurance once inaugurated, will cost vast sums needs no argument. Will New York obligate itself to such expenditure, if Pennsylvania does not; shall Texas stand aloof, while California assumes the burden? In short if the nation be spotted by obstinate states what about the disadvantages to the citizen in compulsory social insurance states in competition with the states that go on doing business without it. - - (7)

This argument is particularly potent as it is applied to minimum wage legislation. It was the first advanced in the plea before the U.S. Supreme Court in the Oregon minimum wage case:

"An artificial discrimination would be created as to any particular occupation or industry against the localities with higher wages and in favor of those with a lower one.(8)

Not only would such a wage enactment penalize the already existing industries, but it would also result in the exclusion of new industries, resulting in less taxable property and less employment. (9)

(6) S.M. Lindsey, "Unequal Laws an Impediment to Child Labor Legislation," Annual of the American Academy of Political Science, vol. XXXV, p. 13.
Neal L. Anderson,"Child Legislation in the South," Annals of the American Academy of Political Science, Vol. XXV, p. 491.
(7) J.E. Johnson, Social Insurance, New York, 1922, p. 8.
Report of Commission on "Old Age Pensions, Annuities and Insurance." The Commonwealth of Mass., Jan. 1910.p.300
(8) "Brief and Arguments for Plaintiffs in Error," Stetler v. O'Hara, op. cit., p. 57.
(9) D.D. Dayton,"Discussion." Proceedings of the Minnesota Academy of Social Sciences, Vol, VI, pp. 123-130.1912.

The result is then that there are those legislators who sincerely feel that if these certain social policies which recognize the obligation of society to intervene in contractual relations should be followed, those states having such a sense of social responsibility would be penalized in an economic sense for their sympathetic procedure. To many American business men the evils of this attack upon the economis stability of their own states, are of too serious proportions to justify legislation on mere humanitarian grounds.

With whatever sincerity the above argument may be proposed as a rationalization, as selfish defense reaction, or as a sincere fear of state economic deflation the fact remains that it does represent a basis for serious consideration on the part of state legislators. Obviously the remedy for such a situation is to be found in uniformity of enactment by the federal government. But the obvious is not the simple solution.

The very bigness of this federated political organization, with its lack of a well developed social consciousness, and its variety of conditions and needs, represents one of the most powerful barriers to social legislation. And when these have been overcome there is

the reserve force in opposition, an insistence upon states rights, in legislative halls and judicial chambers.

The United States as a social organization has grown far past the dimensions characterizing the primary face-to-face groups of primative society. These factors in the training and daily associations of members of these small groups, which developed a sense of social responsibility and group consciousness, are lacking in modern society. (10) Contracts between individuals rather than being intimate and tending toward the development of a feeling of mutual responsibility are for the most part superficial, more or less transitory, with the result that the individual, rather than having the group interests uppermost in his mind has tended to lose interest in the welfare of the organization. He has lost that feeling that the group lossess are his losses, their gains his gains, and their misfortunes and maladjustments his concern.

This attitude of irresponsibility of the individual member of our political organization is of course of major importance as a cause of the unresponsiveness and unadaptiveness of our political organization to the demands for social legislation of a changing industrial society,

(10) F.A. Bushee, Social Organization, New York, Holt, 1930, C.H.Cooley, Social Organization.

but an equally potent cause of delay is the lack of free operation of those mediums of communication which tend to mold social consciousness and result in a greater flexibility of organization.

In the first place, those who are faced with the task of molding public sentiment throughout the whole country in the interests of certain supposedly needed reforms of social conditions are faced with the tupendous expense and problem of organization. It is with comparative ease that an interested group can arouse public sentiment against an obvious violation of human considerations in industry in one state, but when Federal legislation is demanded, immediately a task 48 times as great from the standpoint of cost and coordination is faced. Such organization as this demands the highest type of executive action and almost illimitable funds.

Even if these are available, a second barrier presents itself. Those mediums of communication which must be depended upon for developing a sense of social responsibility, the newspaper, the radio, etc., are controlled by a great extent by those financial interests which are vitally concerned with the maintenance of the present social order, to assure them of continued economic superiority.

Though propoganda should be made effective and a social consciousness developed, federal legislation runs against a new snag in the insistence upon

States rights. Minimum wage legislation has never been attempted on a federal scale but a good illustration of what such an attmmpt would meet with is found in the child labor legislation attempted for many years. Continously in congress during the days of debate there was an insistence upon States rights. By the tenth amendment to the constitution those rights not specifcally assigned to congress are reserved to the various states. and all through American political history there has been an insistence upon the part of some that this legislation or that is in the sphere of the states and that any usurpation of these powere by the Federal Government is a dangerous tendency toward autocratic centralization.

After each of the Child Labor Laws have been passed, the first forbidding the shipment in interstate traffic and the second taxing goods produced by child labor, the Supreme Court declared them void because they contravened this states rights clause in the constitution.

In 1918 the opinion insisted upon these rights as follows:

"in interpreting the constituion it must never be forgotten that the Nation is made up on states to which are entrusted the powers of local government - - -. To sustain this statute would not be in our judgement a recognition of the lawful exertion of congressional authority over inter state commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress conferring the power to regulate commerce among the States.(11)

(11) Hammer v. Daggenhart, 247 U.S., 251. (1918)

In 1921, chief Justice Taft wrote the opinion:

"grant the validity of this law, and all that Congress would need to do, hereafter in seeking to take over to its control any one of the great number of subjects of public interest jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so called tax upon departures from it. To give such magic to the word "Tax" would be to break down all constitutional limitations of the powers of Congress and completely wipe out the sovereignity of the States. (12)

In attempts at state enactment, then, social legislation meets the objection of a resulting economic disadvantage and in attempts to equalize this condition by federal enactment there is an insistence upon state rights of jurisdiction. But even if legislative enactments is accomplished, either in the state or federal legislatures, it runs afoul many times of another feature of government peculiar to the United States and useful as an explanatory principle when contrasting the amount of social legislation in Europe and in the United States. This feature is the power of the state and federal supreme courts to declare acts of the legislature void.

The Power of the Courts

It is assumed in this study that in reality the courts

(12) 259 U.S., Child Labor Tax case.

in declaring acts of legislative bodies invalid are reflecting the tradition of those groups from which the personnel of the courts came.(13) Still as there exist in the courts the tendency to follow precedents of previous decisions and since the justices as a rule represent the older traditions of a group, there inheres in the courts for a changing society, separate and distinct from the force of the traditions which are crystallized in their adverse opinions. The power to declare acts unconstitutional is in itself a factor delaying the final effectiveness of social legislation and especially of minimum wage legislation. The opinion of the court may change to a favorable one during a period of years as has occured with respect to enactments designed to regulate the hours of work. (14)

(13) F.M. Cooley, Constitutional Limitations, Boston, Little, Brown 1903. 509.
E. Freund, Standards of American Legislation, University of Chicago, Chicago 1917. 185,207.
Noble State Bank v. Haskell, 219 U.S., 104,111.(1911)
J.R. Commons, J.B. Andrews, Principles of Labor Legislation, New York, 1920, 25. This is illustrated by the data from court opinions in Chapter two above.

(14) This change has occured in the Illinois courts which in Ritchie v. People, 155 Ill., 98,(1895), was unfavorable to an eight hour day law for women. This decision was reversed after 15 years in Ritchie v. Wayman, 244, Ill., 509, (1910). This change also occured in the New York Courts which in People v. Williams, 189 N.Y., 131 was unfavorable to the regulation of night work. This decision was reversed eight years later in People v. Charles Scheinler Press, 214 N.Y., 395. There are many other examples of this change.

The log in change between the legislative body and the court reviewing the acts of that doby is the direct index of the reality of this factor of court power as a force in the retardation of wage legislation.

Minimum wage legislation was at first declared to be a valid enactment by the decision of the Oregon Court (15) and by a divided decision of the Federal Court (16). Other state decisions were equally favorable (17), but in 1923 the District of Columbia minimum wage law was declared unconstitutional by a 5-3 vote. (18) This attitude of the federal court today represents a barrier to minimum wage legislation which only a changed personnel with consequent new backgrounds of tradition and belief as to what constitutes the public health safety and morals, can remedy.

These two features of the political organization of the United States, the federated form of government and the power of judicial review, have obviously retarded minimum wage legislation for women. The appeal to the

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(15) Stetler v. O'Hara, 69 Ore., 519, Pac. 143 (1914) and Simpson v. O'Hara, 70 Ore., 261 141 Pac., 158 (1914)
(16) Stetler v. O'Hara, 243 U.S., 629 (vote 4-4, Brandeis not sitting.) (1917)
(17) Williams v. Evans 139 Minnesota, 32, 165 N.W., 495, (vote 6-0) (1917)
(18) Adkins v. Children's Hospital, 261 U.S., 525. (1923)

economic security of the state is always a powerful one; and the decision of the federal supreme court in the District of Columbia minimum wage case illustrates most strongly the effectiveness of this factor in the attempt to control wages for women.

Conclusion

There are certain factors which have retarded the enactment and application of minimum wage legislation for women. By an analysis of literature related to the program of minimum wage legislation there were determined four factors which exist in the culture of the United States as barriers to this type of legislation. Those factors which stand out as important in the data analysed are: (a) The classical economic tradition that relationships in the field of economic behavior are determined by immutable natural laws which must not be tampered with by legislative programs; (b) the individualistic tradition that there is a natural right to liberty of conduct, that every individual has the power of self-determination to act under this right, and finally that given this right and this power all have equal freedom and opportunity in the economic struggle; (c) the existence of 49 separate jurisdictions each having the power to establish a higher wage standard but not possessing the power to protect that standard by tariff regulations; and (d) the power of state and federal supreme courts to declare acts of the legislatures invalid and so cause continued reference to traditions which in the body of the group might be losing effectiveness.

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