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Mandating the Supersize Option: The Legality of Government Intervention in the Fast Food Industry to Address Insufficient Wages and Close the Public Assistance Gap

Joshua A. Berman*

Several prominent studies have recently highlighted how the federal government tacitly subsidizes insufficient wages paid in certain industries—notably, major corporations within the fast-food sector. Historically, the government addressed insufficient wages by implementing a minimum standard-of-living wage. Since the New Deal inception of this remedy, the Judiciary has regularly upheld the minimum wage in the face of challenges to its constitutionality. Given the recent passage of a substantial increase in the minimum wage and the toxic political cloud hovering over the United States Congress, President Obama likely will have a difficult time in passing another increase, as he has promised since his first campaign. Even if passed, the constitutionality of such a hike will likely face a more rigorous test by a conservative Supreme Court that features five Justices appointed by Republican Presidents. This Comment seeks to understand the kind of test that the Court might use, and to analyze the constitutionality of a wage increase through the lens of potential tests.

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INTRODUCTION

Suppose that Liam, an unmarried 29-year-old employee at McDonald's, earns the minimum wage while working a traditional forty-hour week. The \$15,080 annual pay¹ he receives would represent a figure roughly twenty-six percent higher than the federally established poverty threshold,² which is a dollar amount that somewhat reflect a family's

¹ The total, \$15,080, is borne by calculating \$7.25 per hour times forty hours per week times fifty-two weeks per year. This figure reflects the full enactment of the Fair Minimum Wage Act of 2007, a supplemental appropriations bill that raised the minimum wage established by the Fair Labor Standards Act of 1938 from \$5.25 per hour. Fair Minimum Wage Act, 29 U.S.C. § 206 (2007).

² The poverty threshold in 2012 was \$11,945 for a one-person household. The calculation is wages earned less poverty line, quantity divided by the poverty line. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2012, 51 (Sept. 2013). The U.S. government measures poverty with two different standards, poverty thresholds and poverty guidelines. Poverty thresholds were first published by the Social Security Administration in January 1965 and are updated annually by the Census Bureau for statistical purposes. Poverty guidelines are issued annually by the Department of Health

most basic needs to determine poverty status.³ Liam, cast in a different light, would be counted among the three-quarters of Americans who live paycheck-to-paycheck.⁴ Modify the hypothetical such that Liam is instead the sole earner for a family of four, and Liam's income is only sixty-five percent of the federal poverty guideline.⁵

Liam's choice of theoretical plights represents the unfortunate realities facing many Americans today. In the United States, more than forty-five million individuals live below the poverty line,⁶ and "[f]ewer than one in four Americans have enough money in their savings account to cover at least six months of expenses, enough to help cushion the blow of a job loss, medical emergency or some other unexpected event."⁷

The federal government provides a buffer by way of welfare for most of these individuals against their falling into abject poverty. In 2012, the federal government was projected to combat poverty by spending \$668 billion on at least 126 different programs,⁸ including food stamps and Medicaid.⁹ State and local governments were projected to supplement federal welfare spending with an additional \$284 billion, totaling government spending at all levels at roughly \$952 billion.¹⁰ As of Labor Day 2013, "welfare currently pays more than a minimum-wage job in 35

and Human Services in the Federal Register and are used for administrative purposes. Report from Gordon M. Fisher, United States Census Bureau, titled *The Development of the Orshansky Poverty Thresholds and Their Subsequent History as the U.S. Poverty Measure* (last revised September 1997) (on file with the United States Census Bureau, 202-690-6143). This Comment will take both definitions into account, but will mostly rely on poverty guidelines in its discussion of welfare benefits.

³ U.S. CENSUS BUREAU, How the Census Bureau Measures Poverty, <http://www.census.gov/hhes/www/poverty/about/overview/measure.html> (last visited Oct. 14, 2014); see also Danielle Kurtzleben, *50 Years Later, a War Over the Poverty Rate*, U.S. NEWS (Jan. 6, 2014, 3:16 PM), <http://www.usnews.com/news/articles/2014/01/06/50-years-later-a-war-over-the-poverty-rate>.

⁴ Angela Johnson, *76% of Americans Are Living Paycheck-to-Paycheck*, CNN (June 24, 2013, 2:53 PM), <http://money.cnn.com/2013/06/24/pf/emergency-savings/> (citing BANKRATE, June 2013 Financial Security Index Charts, <http://www.bankrate.com/finance/consumer-index/financial-security-charts-0613.aspx> (last visited Oct. 14, 2014)).

⁵ CTR. FOR POVERTY RESEARCH, *What Are the Annual Earnings for a Full-Time Minimum Wage Earner?*, U.C. DAVIS, <http://poverty.ucdavis.edu/faq/what-are-annual-earnings-full-time-minimum-wage-worker> (last visited Sept. 28, 2014).

⁶ DENAVAS-WALT, *supra* note 2, at 12.

⁷ Johnson, *supra* note 4.

⁸ Michael Tanner, *The American Welfare State: How We Spend Nearly \$1 Trillion a Year Fighting Poverty—And Fail*, CATO INST., Policy Analysis No. 694, 2012, at 1.

⁹ *Id.* at 2-3.

¹⁰ *Id.* at 1.

states, even after accounting for the Earned Income Tax Credit,”¹¹ “which offers extra subsidies to low-income workers who take work.”¹²

Those who do take minimum wage jobs often find themselves scrambling to make ends meet to pay for their homes, meals, healthcare, and other basic expenses.¹³ Many times, minimum wage earners generate bills that must be paid, in part, by means-tested government welfare programs.¹⁴ Twenty-five percent of the workforce as a whole, which includes workers in nearly every sector of the economy,¹⁵ receives public assistance.¹⁶

No industry had a greater share of workers enrolled in public programs than the fast food industry, which counted fifty-two percent of its workers as welfare recipients.¹⁷ The biggest culprit of the industry: McDonald’s, whose employees are estimated to receive \$1.2 billion annually from the government.¹⁸ According to a data brief issued by the National Employment Law Project, “low wages and lack of benefits at the [ten] largest fast-food companies¹⁹ in the United States cost taxpayers an estimated \$3.8 billion each year.”²⁰ Meanwhile, the seven corporations of these ten that are publically traded combined for a profit of \$7.44 billion and distributed \$7.7 billion in shareholder benefits.²¹

¹¹ MICHAEL TANNER & CHARLES HUGHES, *THE WORK VERSUS WELFARE TRADE-OFF*: 2013, CATO INST., 1 (2013).

¹² Avik Roy, *On Labor Day 2013, Welfare Pays More Than Minimum-Wage Work in 35 States*, FORBES (Sept. 2, 2013, 11:50 AM), <http://www.forbes.com/sites/theapothecary/2013/09/02/on-labor-day-2013-welfare-pays-more-than-minimum-wage-work-in-35-states/>.

¹³ See generally Alan Feuer, *Life on \$7.25 an Hour*, N.Y. TIMES, Dec. 1, 2013, at MB.1.

¹⁴ See generally Tanner, *supra* note 8.

¹⁵ SYLVIA ALLEGRETTO ET AL., *FAST FOOD, POVERTY WAGES: THE PUBLIC COST OF LOW-WAGE JOBS IN THE FAST FOOD INDUSTRY* 7 (October 15, 2013). The report includes calculations of workers enrolled in public programs who are employed in the following industries: restaurant and food services; agriculture, forestry, and fisheries; other services; other leisure and hospitality; retail trade; construction; health and social services; transportation and utilities; manufacturing; professional and business services; wholesale trade; mining; educational services; information; financial activities; and public administration.

¹⁶ *Id.* at 1.

¹⁷ *Id.*

¹⁸ NAT’L EMP’T LAW PROJECT, *SUPER-SIZING PUBLIC COSTS: HOW LOW WAGES AT TOP FAST-FOOD CHAINS LEAVE TAXPAYERS FOOTING THE BILL* 2 (October 2013) (citing ALLEGRETTO, *supra* note 15).

¹⁹ The ten largest fast-food companies ranked by size of U.S.-based restaurant workforce are McDonald’s, Yum Brands (which includes Pizza Hut, Taco Bell, and KFC), Subway, Burger King, Wendy’s, Dunkin’ Donuts, Dairy Queen, Little Caesars, Sonic, and Domino’s. *Id.*

²⁰ *Id.*

²¹ *Id.* at 3.

Liam is, both in his imaginary bachelorhood and in his theoretical family life, a strong representation of the majority of fast-food workers in the modern era. The fast food industry, once dominated by acne-pocked teenagers, is now populated by workers with an average age of 29, many of whom attempted college and more than a quarter of whom are parents raising children.²² Many fast-food workers must work multiple jobs to make ends meet for their families.²³ The president of the International Franchise Association asserted that the fast-food industry's wages, like all minimum wages, were "never meant to be a living wage,"²⁴ and our imaginary friend Liam would most certainly agree. With traditionally limited occupational mobility and low median wages, the fast food industry's likelihood of identifying and correcting the public assistance gap is small.²⁵

This Comment contends that the duty to protect an individual's basic standard of living and prudently invest taxpayers' dollars falls squarely on the shoulders of the federal government. Recent data strongly indicates that many companies—specifically those in the fast-food industry—are functionally using federal money as a subsidy to supplement workers' insufficient wages. Such a knowing reliance on taxpayers to augment industry wages is, at a minimum, questionable behavior. This Comment argues that such behavior constitutes a negative externality tacitly—and wrongfully—paid by a Congress that turns a blind eye towards the practice. Accordingly, Congress ought to pass new legislation that adjusts the industry's minimum-wage floor upwards to better reflect a calibrated poverty threshold and account for business externalities in the form of public assistance to minimum-wage earners.

This Comment proceeds as follows. Part I revisits the original legal justifications for a minimum wage and updates those rationales to apply to the modern-day workforce. Part II examines the efficacy of the current minimum wage in light of both the poverty threshold and poverty guidelines, with particular attention given to the fast-food industry. Part III analyzes the possible legal implications of a company's cognizant reliance on taxpayers to bridge the gap between earned wages and the basic threshold for living expenses. Part IV discusses possible remedies. Part V concludes by arguing that the federal government has a duty to regulate the cost of the public assistance gap so as to more prudently appropriate taxpayer dollars.

²² Feuer, *supra* note 13, at MB.1.

²³ *See generally id.*

²⁴ Feuer, *supra* note 13, at MB.1.

²⁵ *See generally* NAT'L EMP'T LAW PROJECT, GOING NOWHERE FAST: LIMITED OCCUPATIONAL MOBILITY IN THE FAST FOOD INDUSTRY (2013).

II. JUSTIFYING THE MINIMUM WAGE IN THE TWENTY-FIRST CENTURY

The federal minimum wage was signed into law during the New Deal Era as part of the Fair Labor Standards Act of 1938. Legend has it that “when he felt the time was ripe, [President Roosevelt] asked [Secretary of Labor] Perkins, ‘[w]hat happened to that nice unconstitutional bill you had tucked away?’”²⁶ The Act set the minimum hourly wage at twenty-five cents, in addition to banning oppressive child labor and capping the workweek at forty-four hours.²⁷

American economists touted the idea of establishing a minimum wage since the early 1900s,²⁸ while other nations²⁹ implemented similar standards of compulsory arbitration.³⁰ The minimum wage was floated as a means to help the factory system better compete “in its struggle against small workshops and home work.”³¹ However, given that Americans generally assumed that such a measure would prove unconstitutional as a violation of the freedom of contract, economists did not fully engage in discourse revolving the economic validity of a minimum wage.³²

A. *Legal Theories for Establishing a Federal Minimum Wage Policy*

One of the early legal theories was that “[t]here is no constitutional objection to the limitation of the freedom of contract, provided that the limitation is not accomplished without due process of law.”³³ The theory, advanced by A.N. Holcombe, is predicated on the notion that the

²⁶ Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101 MONTHLY LAB. REV., June 1978, at 22, 24.

²⁷ Fair Labor Standards Act, 29 U.S.C. § 201 (1938); see also Victor M. Valarde, *On the Construction of Section 203(O) of the FLSA: Exclusion Without Exemption*, 21 U. Miami Bus. L. Rev. 253, 255 (2013) (“Congress enacted the FLSA in a period of widespread unemployment in order to eliminate labor conditions that were ‘detrimental to the maintenance of the minimum standard of living . . . without substantially curtailing employment.’”).

²⁸ See generally H.B. Lees Smith, *Economic Theory and Proposals for a Legal Minimum Wage*, 17 ECON. J. 504, (1907); A.N. Holcombe, *The Legal Minimum Wage in the United States*, 2 AM. ECON. REV. 21, (1912).

²⁹ Holcombe, *supra* note 28, at 21.

³⁰ Smith, *supra* note 28, at 508 (“When every industry in which wages are below a certain minimum is brought within operation of a wages board . . . the minimum wage gradually becomes university. Similarly, a system of compulsory arbitration . . . has the same effect, if the workers in the ill-paid trade appeal for arbitration, and the court in each case fixes the lowest wages at a certain minimum.”).

³¹ *Id.* at 512.

³² See generally Holcombe, *supra* note 28, at 21.

³³ *Id.* at 27.

limitation must be justified by the “social necessity for the maintenance of the family”³⁴ and presupposes that the oppressive employment of women and minors threatens that family structure.³⁵ Holcombe asserts that the limitation may be accomplished through the exercise of the ordinary police power, under which the federal government has the ability to regulate interstate commerce.³⁶

Having established that a limitation to the freedom of contract may be constitutional and, further, that the United States government has a mechanism available at its disposal to enact such a control, Holcombe continues by assessing the reasonableness of federal action. So long as the *public perception* is that the federal wage is reasonable—“the American public should be convinced that some action for the protection of the American standard of living is necessary, and that the proposed remedy is appropriate”³⁷—there ought to be no difference between the regulation of work hours and of wages.³⁸

With the logical framework in place establishing the constitutionality of the laws, Holcombe arrives at what he signals is the proper definition for minimum standard-of-living wage laws, as defined by legislation pending (at the time) in Wisconsin:

[To protect] the public against the evil results of employment at less than standard-of-living wages . . . [define] the minimum wage as such compensation for labor performed under reasonable conditions as should enable employees to secure for themselves and those who are, or may be, reasonably dependent upon them, the necessary comforts of life.³⁹

³⁴ *Id.* at 27.

³⁵ *Id.* at 26-27. Holcombe notes that the constitutional freedom of contract may be exercised solely by men, which allows the “industrial exploitation” of woman and minors. Minimum wage advocates attempted to secure legislation that would protect those two classes of people, but Holcombe argues that as women have a familial interest against wage exploitation, men do, too, in their joint capacity as heads of the household. As such, Holcombe advances the theory that a minimum standard-of-living wage should be universal in application.

³⁶ *Id.* at 27. This logic would therefore hold that state regulation of wages, while not inherently unconstitutional, might be violative of the Constitution insofar as those regulations apply to persons whose activities are intertwined with interstate commerce.

³⁷ *Id.* at 29.

³⁸ Holcombe, *supra* note 28, at 29. Holcombe refers here to the Illinois Supreme Court’s reversal of a previous decision that the regulations of hours of labor of women was unconstitutional to show that “social reformers who can prove their case for the minimum wage may expect equally favorable consideration from the courts.” *See also* W.C. Ritchie & Co. et al. v. Wayman et al., 244 Ill. 509 (Ill. 1910).

³⁹ *Id.* at 30-31.

The bill, however, failed to define the phrase “the necessary comforts of life,” which had also been used in seven⁴⁰ state constitutions without further clarification.

B. *Supreme Court Rulings on Minimum Wage Law*

Holcombe’s argument for the constitutionality of a minimum wage law appeared incorrect, however, in 1923 when the Supreme Court nullified a District of Columbia law establishing a minimum wage for women.⁴¹ Had this case come before the Supreme Court a mere six years earlier, the minimum wage ordinance would very likely have been held constitutional.⁴²

By 1936, the Court’s composition had yet to shift in favor of minimum wage laws. In *Morehead v. Tipaldo*,⁴³ the Supreme Court voted 5-4 against a New York-legislated minimum wage law that established a minimum weekly wage for women, on the grounds that the law violated the employer’s liberty of contract.⁴⁴ The decision was met

⁴⁰ *Id.* at 31. Seven states used the phrase “necessary comforts of life” in their state constitutions: Indiana, Minnesota, Montana, Nevada, North Dakota, South Dakota, and Wisconsin. The phrase was generally used “in connection with the grant to their respective legislatures of the power to enact debtors’ exemption laws.”

⁴¹ *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923).

⁴² Thomas Reed Powell, *The Judiciality of Minimum-Wage Legislation*, 37 HARV. L. REV. 545, 546 (1924). Powell relates the story of a case originating out of Oregon on the matter of minimum wage to demonstrate how:

The law of constitutional due process . . . upon the composition of the court of last resort at the particular time when the issue comes before it

The question [on the constitutionality of minimum-wage legislation] first came before the Oregon court in 1914, and in two decisions seven judges declared themselves in favor of the legislation and none was opposed. The Oregon case went to the Supreme Court of the United States, and in 1917 the decree of the state court was sustained by a vote of four to four. Mr. Justice Brandeis, having been of counsel, did not sit. His general outlook on what is called social legislation is so well known that there can be no doubt that, had he not been of counsel, he would have voted in favor of the law. In that event, the consequent five-to-four vote almost certainly would have established the constitutionality of such legislation against subsequent attack in the federal courts. Though conceivably a favorable decision might later have been overruled by a differently composed Supreme Court, the experience is that police issues of this general character are finally settled by such favorable decision.

Id. In the six-year period between the four-four decision in the two Oregon cases and the five-three decision in *Adkins*, four changes in the Supreme Court would take place. *Id.* at 547.

⁴³ *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

⁴⁴ *Id.* at 611.

with widespread hostility and labor standards became a central tenet of President Roosevelt's re-election campaign.⁴⁵ It was during this time that President Roosevelt famously advocated his court-packing scheme.⁴⁶

Roosevelt's blustering realized its intended impact when Justice Owen Roberts sided with the Court's liberal contingency to uphold minimum wage legislation⁴⁷ in *West Coast Hotel Company v. Parrish*.⁴⁸ This decision empowered liberals to push for labor legislation that offered further protection for workers.⁴⁹ In 1938, that work was realized in the passage of the Fair Labor Standards Act (FLSA).⁵⁰ The FLSA was ruled constitutional as a matter of interstate commerce in *U.S. v. Darby Lumber Company*, and with it, the federal minimum wage was upheld.⁵¹

C. *The Economic Components of the Minimum Wage Debate*

By the end of World War II, the public was declaring that the "minimum wage provisions of the Fair Labor Standards Act of 1938 have been repealed by inflation" and was advocating a higher wage floor.⁵² Dr. George Stigler, the 1982 Nobel Prize for Economics recipient and long-time University of Chicago Economics professor,⁵³ countered the public's opinion and contended that minimum wage legislation did not diminish poverty.⁵⁴ Stigler argued that "unless the minimum wage varies with the amount of employment [in a family], number of earners, non-wage income, family size, and many other factors, it will be an inept device for combatting poverty even for those who succeed in retaining employment."⁵⁵ Other economists have corroborated Stigler's theoretical point that "the link between low wages and low family incomes is imperfect."⁵⁶

In contrast, Dr. Arin Dube, Associate Professor of Economics at the University of Massachusetts–Amherst, finds in a recent empirical study that "[t]he totality of evidence from the 12 published studies for which I

⁴⁵ Grossman, *supra* note 26, at 23.

⁴⁶ *Id.* at 23.

⁴⁷ *Id.* at 23-24.

⁴⁸ *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

⁴⁹ Grossman, *supra* note 26, at 24.

⁵⁰ Fair Labor Standards Act, 29 U.S.C. § 202 (1938).

⁵¹ *United States v. Darby*, 312 U.S. 100 (1941).

⁵² George J. Stigler, *The Economics of Minimum Wage Legislation*, 36 AM. ECON. REV. 358, 358 (1946).

⁵³ *George J. Stigler*, THE CONCISE ENCYCLOPEDIA OF ECON., available at <http://www.econlib.org/library/Enc/bios/Stigler.html>.

⁵⁴ Stigler, *supra* note 53, at 358.

⁵⁵ *Id.* at 363.

⁵⁶ Arindrajit Dube, Minimum Wages and the Distribution of Family Incomes 32 (Dec. 30, 2013) (unpublished manuscript) (on file with author).

could obtain or construct minimum wage elasticities point towards some poverty reduction from minimum wage increases.”⁵⁷ Dube acknowledges Stigler’s findings that there is not a \$1-to-\$1 relationship of dollars the minimum wage is raised to dollars less in poverty a family finds itself, but he argues that raising the minimum wage is a big part of the equation.⁵⁸ If the minimum wage were to increase from \$7.25 per hour to \$10.10 per hour,⁵⁹ families with an income in the bottom ten percent of America would realize an increased income of about twelve percent, which is the annual equivalent of roughly \$1,700.⁶⁰

Stigler and Dube are not, however, in contradiction as they might appear facially. Stigler analyzes the minimum wage efficacy in a theoretical vacuum with (relative to today) little available data, concluding that the minimum wage is not an effective means to fight poverty; Dube incorporated twelve other studies on minimum wage into his own, including some that initially concluded against minimum wage, and he found that the minimum wage plays an important role in poverty reduction. Dube agrees with Stigler, however, in that he states “the minimum wage is a blunt tool when it comes to fighting poverty”⁶¹ and prefers “more targeted policies like cash transfers, food stamps, and programs that raise the employment rate for highly disadvantaged groups.”⁶²

D. *Applying the Legal Theory of Minimum Wages to Present-Day*

Dube echoes past studies that advance justifications for establishing minimum wages that go beyond poverty reduction.⁶³ While it is clear that alternate reasons for minimum wage policy—raising the earnings of low and moderate earning families,⁶⁴ concerns for fairness of wages,⁶⁵ and

⁵⁷ Dube, *supra* note 56, at 30.

⁵⁸ *Id.* at 33-34.

⁵⁹ Dube’s analysis stems from a legislative proposal in the 113th Congress to raise the minimum wage to \$10.10 per hour. Minimum Wage Fairness Act, S. 1737, 113th Congress (2013).

⁶⁰ *Id.* at 34.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Dube, *supra* note 56, at 34 (suggesting that “concerns of fairness [should] seek to limit the extent of wage inequality”) (citing David A. Green & Kathryn Harrison, *Minimum Wage Setting and Standards of Fairness* (Inst. for Fiscal Stud., Working Paper W10/09, 2010)).

interest in curtailing an employer's market power⁶⁶—do exist, the overarching rationale for such laws is to combat poverty.⁶⁷ While the Supreme Court has allowed for the introduction of minimum wage laws, several opponents of a hike argue that such a policy shift would demonstrate an unconstitutional overabundance of government intervention.⁶⁸

Should the Supreme Court rely on historical precedent, however, to determine the constitutionality of a second modern era⁶⁹ increase in the minimum wage, it will look to social sciences data to determine whether government intervention would be justified.⁷⁰ The question of justification will turn on the basis of whether the government has an appropriate regulatory concern, and not on whether the financial hardship imposed on minimum wage earners provides recourse under the law.⁷¹

In the period since *Darby Lumber* was decided, which entrenched minimum standard-of-living wage policy as constitutional, the federal

⁶⁶ *Id.* at 34 (citing Ernst Fehr & Urs Fischbacher, *Third-party Punishment and Social Norms*, 25 *EVOLUTION AND HUMAN BEHAV.* 63 (2004); Daniel Kahneman et al., *Fairness as a Constraint on Profit-Seeking: Entitlements in the Market*, 76 *AM. ECON. R.* 728 (1986)).

⁶⁷ Stigler, *supra* note 53, at 358.

⁶⁸ See generally Jeff Scully, *Repeal Minimum Wage Laws, Restore Employment*, FREEDOMWORKS (Feb. 6, 2012), <http://www.freedomworks.org/blog/jbscully/repeal-minimum-wage-laws-restore-employment> (“Government intervention includes . . . simply setting minimum wages for hourly wage earners. All of these policies do the exact opposite of what they are intended to do.”); Jonathan Karl, *Alaska’s Joe Miller Wants to Abolish Federal Minimum Wage*, ABC NEWS, Oct. 4, 2010, <http://abcnews.go.com/Politics/alaskas-joe-miller-abolish-federal-minimum-wage/story?id=11790828&page=1> (“There should not be [a federally-established minimum wage],” Miller answered. “That is not within the scope of the powers that are given to the federal government.”); Stephen Dinan, *Raese Won’t Hide Conservative Views*, THE WASHINGTON TIMES (Oct. 13, 2010), <http://www.washingtontimes.com/news/2010/oct/13/raese-wont-hide-conservative-views/?page=all> (“Mr. Raese . . . has taken fire for saying he would abolish the minimum wage. But he has refused to back down, saying it’s not only bad policy, but it’s not constitutional. ‘I don’t think it is. And the reason I don’t think it is, is the same reason the [National Recovery Administration] was not constitutional in 1936,’ [Raese] said. ‘It was declared unconstitutional because it was government micromanaging an intervention into the private sector. Well, what are price controls, or what are wage controls? They’re the same thing.’”)

⁶⁹ Note that the Fair Minimum Wage Act of 2007 already increased the minimum wage from \$5.25 an hour in 2006 to \$5.85 an hour in 2007, \$6.55 an hour in 2008, and finally, \$7.25 an hour in 2009. Fair Minimum Wage Act, 29 U.S.C. § 206(a)(1) (2006).

⁷⁰ See generally ROSEMARY J. ERICKSON & RITA JAMES SIMON, *THE USE OF SOCIAL SCIENCE DATA IN SUPREME COURT DECISIONS* (1997) (describing the Supreme Court’s use of social science research in its decision-making capacity).

⁷¹ See *Maybrick v. SSA*, No. 2:13-CV-508, 2013 WL 6571819 at *3 (D. Utah Dec. 13, 2013) (District Court found that a plaintiff did not plead the “deprivation of a federal right” in alleging that “the income he receives is inadequate because it falls below the poverty level and below what a worker could take home earning minimum wage”).

government has established a working definition for poverty.⁷² This development is of the utmost importance: whereas the Supreme Court approved minimum wage laws to combat gender discrimination in the workplace⁷³ and affirmed use of the policy in the context of interstate commerce,⁷⁴ today's advocates seek to identify the minimum wage as a tool to regulate a compelling government interest, poverty.⁷⁵ Without poverty metrics, advocates would have a tough time of gaining Justices' support for a data-driven policy.

III. MEASURING THE EFFICACY OF THE MINIMUM WAGE IN PROVIDING ACCESS TO NECESSITIES

The important question, therefore is whether the data on poverty accurately represents the plight facing many Americans today. This Comment contends that, inherently, a minimum standard-of-living wage ought to be sufficient for a family of three or more with a sole wage earner to exceed any reasonably-calculated⁷⁶ poverty metric. As such, the Comment agrees in large part with Stigler's assessment of why fighting poverty is a worthwhile goal:

We seek to abolish poverty in good part because it leads to undernourishment. In this connection, dietary appraisals show that in any income class, no matter how low, a portion of the families secure adequate diets, and in any income class, as high as the studies go, a portion do not. The proportion of ill-fed, to be sure, declines substantially as income rises, but it does not disappear.⁷⁷

It is on this basis that Mollie Orshansky of the Social Security Administration published the first poverty thresholds in 1965.⁷⁸ By calculating

poverty thresholds for families of three or more by taking the dollar costs of the economy food plan for families of those sizes and multiplying the costs by a

⁷² See Fisher, *supra* note 2, at 7.

⁷³ West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

⁷⁴ United States v. Darby, 312 U.S. 100 (1941).

⁷⁵ See Dube, *supra* note 56, at 34.

⁷⁶ That is to say, poverty metrics should be calculated regularly to accurately reflect the basic needs of individuals and updated to reflect any inflationary considerations that have arisen since those metrics were first introduced.

⁷⁷ Stigler, *supra* note 53, at 365.

⁷⁸ Fisher, *supra* note 2, at 6.

factor of three . . . she [effectively] took a hypothetical average family spending one third of its income on food, and assumed that it had to cut back on its expenditures sharply.⁷⁹

This calculation is roughly identical to that which is used to calculate expenses for purposes of poverty determinations today.

A. *The Impact of Poverty Considerations on the Minimum Wage*

For that reason, the American poverty threshold is in dire need of a recalibration. Whereas Americans may have spent a third of their budgets on food in 1965, the Gates Foundation estimated that “Americans now spend only [six] percent of their money on food.”⁸⁰ As a result of the flawed federal poverty calculation, “[t]here’s almost a universal acknowledgement that the number we use now doesn’t make a whole lot of sense.”⁸¹ According to the National Academy of Sciences, which uses experimental measures of poverty, the poverty threshold may be understating the issue by 1.9 percent—excluding 5.9 million impoverished Americans from the statistics.⁸²

Poverty guidelines, which are used for administrative purposes in determining the financial eligibility for certain programs, are updated from the weighted average poverty thresholds using the urban consumer price index (CPI-U).⁸³ As a result, this Comment argues that many Americans, who might otherwise qualify for certain programs of welfare assistance, may currently be wrongfully excluded from such a designation. Adjusting the poverty threshold to include such impoverished Americans would remedy this issue.

The problems facing many Americans hovering around the poverty threshold is compounded by their employment in minimum wage earning jobs. Adjusting for inflation, the minimum wage introduced in 1938 would be worth \$4.07 per hour today.⁸⁴ Four years after President

⁷⁹ *Id.*

⁸⁰ Kurtzleben, *supra* note 3 (citing BILL GATES, GATES FOUNDATION, Annual Letter 2012 (2012), available at <http://www.gatesfoundation.org/who-we-are/resources-and-media/annual-letters-list/annual-letter-2012>).

⁸¹ *Id.* (internal quotation marks omitted).

⁸² *Id.*

⁸³ 42 U.S.C. § 9902 (2013).

⁸⁴ CPI Inflation Calculator, BUREAU OF LABOR STAT., http://www.bls.gov/data/inflation_calculator.htm (set \$ to “0.25”; then select “1938” from the first “in” drop-down menu; then select “2013” from the second “in” drop-down menu; then follow the “Calculate” hyperlink); see also Annalyn Kurtz, *A History of the Minimum Wage Since*

Lyndon B. Johnson declared a “War on Poverty,”⁸⁵ the adjusted value of minimum wage was \$10.56 per hour.⁸⁶ Today, minimum wage is \$7.25 per hour⁸⁷; “[i]n terms of purchasing power, its value is 30 percent lower today than it was in 1968.”⁸⁸ As demonstrated through the discussion of poverty metrics, what might have been sufficient in 1938, before the average family’s housing and medical costs grew, is simply insufficient today. The aforementioned reduction in the minimum wage’s buying power has priced many families back into the dark abyss of poverty.

B. *Analyzing Whether Government Intervention is Appropriate*

The rationale behind the government intervention necessary to establish a minimum standard-of-living wage is often steeped in poverty considerations and fairness concerns regarding the relative strength of many employers’ market power to exploit workers.⁸⁹ For these reasons, studies that examine the impact of a rise in minimum wage serve this Comment well in examining whether such a rise would lift an individual out of poverty without proverbially ending modern capitalism.

While campaigning for the presidency in 2008, candidate Barack Obama promised that a central tenet of his agenda would be to raise the minimum wage to \$9.50 an hour by 2011⁹⁰ and adjust it annually for inflation.⁹¹ Obama addressed the minimum wage again in his 2013 State of the Union address, pushing for an incremental increase of the wage floor to \$9 an hour in 2015, and indexing the minimum wage to adjust for inflation annually.⁹² President Obama reaffirmed his commitment to

1938, CNN MONEY, Feb. 14, 2013, 10:24 AM, <http://economy.money.cnn.com/2013/02/14/minimum-wage-history/>.

⁸⁵ President Lyndon Baines Johnson, State of the Union Address (Jan. 8, 1964).

⁸⁶ CPI Inflation Calculator, *supra* note 84 (set \$ to “1.60”; then select “1968” from the first “in” drop-down menu; then select “2013” from the second “in” drop-down menu; then follow the “Calculate” hyperlink); *see also* Kurtz, *supra* note 84.

⁸⁷ Fair Minimum Wage Act, 29 U.S.C. § 206(a)(1) (2006).

⁸⁸ NAT’L EMP’T LAW PROJECT, BIG BUSINESS, CORPORATE PROFITS, AND THE MINIMUM WAGE 1 (2012).

⁸⁹ *See* Dube, *supra* note 56, at 34.

⁹⁰ *See* *Agenda–Poverty*, THE OBAMA-BIDEN TRANSITION TEAM, change.gov/agenda/poverty_agenda/ (last visited on Jan. 13, 2014); *see also* David G. Taylor, *Increase the Minimum Wage to \$9.50 an Hour*, POLIFACT, Aug. 29, 2011, 2:47 PM, <http://www.politifact.com/truth-o-meter/promises/obameter/promise/316/increase-the-minimum-wage-to-950-an-hour/>; Paul R. La Monica, *Behind the Minimum Wage Debate*, CNN MONEY, Sept. 5, 2008, 11:22 AM, <http://money.cnn.com/2008/09/05/markets/thebuzz/>.

⁹¹ E.g., Barack Obama, Remarks at the Iowa Jefferson-Jackson Dinner in Des Moines (Nov. 10, 2007), <http://www.presidency.ucsb.edu/ws/index.php?pid=77021>.

⁹² President Barack Obama, State of the Union Address (Feb. 12, 2013).

raising the minimum wage in the 2014 iteration of the State of the Union address by announcing “an executive order raising the minimum wage to \$10.10 an hour for future federal contract workers.”⁹³ Such a plan has been met with resistance, despite arguments that “raising the minimum wage would help boost the economy by putting more money in to the hands of lower-income Americans, who are likely to spend it,”⁹⁴ as it would preclude future legislatures from needing to periodically adjust the minimum wage and effectively end debate on the policy.

Obama’s calls to action have spurred criticism. Worker advocates contended that the annual income of a \$9-minimum-wage earner would bring home an annual pay less than the poverty level for a family of four,⁹⁵ while employer groups point to studies projecting jobs losses totaling roughly 467,500 jobs.⁹⁶ One Forbes contributor pointed out that minimum wages enacted by foreign governments have most perversely affected youth employment opportunities.⁹⁷ In New Zealand, for example, unemployment jumped from an expected fourteen percent to twenty percent when the special youth minimum wage—a lower minimum wage than that imposed for adult workers—was abolished.⁹⁸ Companies are more inclined to hire and provide training for young employees when doing so is cheaper than hiring more experienced workers.

Other studies, still, evaluate minimum wage as an industry-specific issue. One analysis of restaurant financials found that if the minimum wage in the fast-food industry were raised to \$15, it would drive fast-food prices twenty-five percent higher, adding \$1 to the cost of a Big

⁹³ President Barack Obama, State of the Union Address (Jan. 28, 2014).

⁹⁴ Tami Luhby, *The Impact of a \$9 Minimum Wage*, CNN MONEY (Feb. 13, 2013, 9:57 AM), <http://money.cnn.com/2013/02/12/news/economy/obama-minimum-wage> (citing MICHAEL SALTSMAN, EMPLOYMENT POLICIES INSTITUTE, *THE IMPACT OF A \$9.80 FEDERAL MINIMUM WAGE 3* (2012)).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Tim Worstall, *Youth Unemployment Shows the Effects of a Minimum Wage That is Too High*, FORBES (Mar. 2, 2014, 9:11 AM), <http://www.forbes.com/sites/timworstall/2014/03/02/youth-unemployment-shows-the-effects-of-a-minimum-wage-that-is-too-high/>.

⁹⁸ *Id.* When the special, lower minimum wage for youths was abolished in New Zealand,

The unemployment rate for 16 and 17 year olds, which had always tracked a fairly predictable but noisy path above the adult unemployment rate, instead took a jump. Where we might have expected a youth unemployment rate around 14%, it instead touched 20%. Two quarters later, when adult unemployment rates hit 4.5%, and we would have expected youth unemployment rates around 16%, the youth unemployment rate instead hit 27%. *Id.*

Mac.⁹⁹ This Comment cautions against such studies, however, because of the same fairness concerns that guide minimum wage policy in the first instance: why should Liam, our hypothetical McDonald's worker, earn more for his minimum wage position than he would otherwise earn sweeping the floors at the Pet Supermarket next door? While it is true and demonstrated herein¹⁰⁰ that corporations in the fast-food industry are prone to allow their workers to rely on public assistance, such an argument for different standards of minimum wages are considered by this Comment to be insufficient solutions to resolving the issue at hand.

On the determination of whether government intervention is appropriate, this Comment would be remiss, however, if it were to omit the political obstacles that any minimum wage hikes would face. In the first, John Boehner—whose expansive powers as Speaker of the House of Representatives give him wide latitude over government policy—has been quoted as saying, “I’ll commit suicide before I vote on a clean minimum-wage bill.”¹⁰¹ Rather than follow through on the rather morbid and surely hyperbolic threat, Speaker Boehner has voted no on all but one bill aimed to raise the minimum wage since 1996.¹⁰² The Speaker’s voting history likely reduces the likelihood of his caving and allowing a vote on the minimum wage this year.¹⁰³

For that reason, President Obama is taking a different tact to try to raise the minimum wage: he is appealing to Democratic governors to

⁹⁹ Vanessa Wong, *This is What Would Happen If Fast-Food Workers Got Raises*, Bloomberg BusinessWeek (Aug. 2, 2013), <http://www.businessweek.com/articles/2013-08-02/this-is-what-would-happen-if-fast-food-workers-got-raises>.

¹⁰⁰ See Part I.

¹⁰¹ Fred Barnes, *Maximum Meltdown*, 1 THE WEEKLY STANDARD (Apr. 29, 1996), available at <http://www.weeklystandard.com/Content/Protected/Articles/000/000/007/621qdhht.asp?page=2>.

¹⁰² JOHN A. BOEHNER’S POLITICAL SUMMARY, available at <http://votesmart.org/candidate/27015/john-boehner?categoryId=3&type=V#>. VD8LHildXOY. Four months after the interview in which Speaker Boehner issued his threat, President Clinton signed a minimum wage hike into law that lifted the wage by ninety cents. When Democrats took over the House in 2007, Boehner again voted against raising the minimum wage. The only instance in which Boehner voted in support of a minimum wage hike was in 2006, when he strategically voted with the hope that passing an increase in the minimum wage would preclude Democrats from being able to campaign with the intent of taking over the House. Molly K. Hooper & Bob Cusack, *Boehner: Suicide Over Minimum Wage Hike*, THE HILL (Feb. 21, 2014), <http://thehill.com/homenews/house/198856-boehner-id-rather-kill-myself-than-raise-the-minimum-wage>.

¹⁰³ Hooper, *supra* note 102. There has been some suggestion that Boehner might be forced to cave as a result of political pressure, as happened in 2006 when the Democrats last threatened to take over the House of Representatives.

support his initiative at the state level.¹⁰⁴ Four governors in particular—Dannel Malloy of Connecticut, Deval Patrick of Massachusetts, Peter Shumlin of Vermont, and Lincoln Chafee of Nebraska—have joined the President in pushing for a higher minimum wage, and six states¹⁰⁵ have enacted higher minimum wages since Obama’s 2013 State of the Union address.¹⁰⁶

The Democrats’ push finds support in reports that an increase in minimum wage would likely augment consumer spending,¹⁰⁷ which has been a chief concern of the Federal Reserve during the economic recovery.¹⁰⁸ Such a raise would most benefit the Democrats’ base given that

a raise would help lower-income earners contend with a decrease in government assistance such as the food-stamp program and the increase in the payroll tax that have hurt household purchases, which account for over 70 percent of the economy.¹⁰⁹

As a result of an increased borrowing power from a higher wage earnings, “a \$1 increase in minimum pay leads to \$250 in extra income per quarter for households with adult minimum-wage earners, spurring \$700 in quarterly spending in the year following the escalation.”¹¹⁰

¹⁰⁴ Dave Boyer, *New England Governors, Obama to Push Minimum Wage*, WASHINGTON TIMES, Mar. 2, 2014, <http://www.nydailynews.com/news/politics/obama-push-minimum-wage-wednesday-governors-conference-article-1.1708078>.

¹⁰⁵ These states are California, Connecticut, Delaware, New York, New Jersey, and Rhode Island. Labor Code, CAL. STAT., § 1182.12 (2013); CONN. STAT., § 31-58 (2014); DEL. STAT. tit. 19, § 902(a) (2014); N.Y. STAT., § 652 (2014); N.J. STAT., § 12:56-3.1 (2013); R.I. STAT., § 28-12-3 (2014).

¹⁰⁶ *Obama to Push Minimum Wage Increase Wednesday at Governors’ Conference*, New York Daily News, Mar. 2, 2014, 1:20 PM, <http://nydn.us/1eR0aO7>.

¹⁰⁷ President Barack Obama, State of the Union Address (Jan. 28, 2014).

¹⁰⁸ LaVaughn Henry, *Consumer Spending Reflects New Priorities after the Recession*, FED. RESERVE BANK OF CLEVELAND ECONOMIC TRENDS, Feb. 5, 2014, at 7, 7-9.

¹⁰⁹ Jeanna Smialek, *Minimum Wage Increase in U.S. Will Probably Promote Spending*, BLOOMBERG PERSONAL FIN. (Feb. 27, 2014, 4:32 PM), <http://www.bloomberg.com/news/2014-02-27/minimum-wage-increase-in-u-s-will-probably-promote-spending.html> (citing DANIEL AARONSON & ERIC FRENCH, THE FEDERAL RESERVE BANK OF CHICAGO, HOW DOES A FEDERAL MINIMUM WAGE HIKE AFFECT AGGREGATE HOUSEHOLD SPENDING? (2013)).

¹¹⁰ *Id.* (citing AARONSON, *supra* note 109, at 3) (“real spending in households with adult minimum wage workers rises, on average, by approximately \$700 per quarter during the first few quarters following a \$1 hike in the hourly minimum wage. This additional spending, which exceeds the immediate income gain of \$250 per quarter, is primarily on durable goods, particularly new vehicles (financed with credit)”).

The fact that the presented social science data is conflicting should not have any bearing on the ultimate issue of constitutionality of a minimum wage hike; rather, any dispute in data merely points to whether such an intervention would be good or bad public policy to combat poverty. There exist additional justifications for raising the minimum wage, and, this Comment argues, chief among them is regulating the negative externalities produced by industries.

IV. ANALYZING THE LEGAL RAMIFICATIONS OF WIDESPREAD INDUSTRY EXTERNALITIES

The federal government is no stranger to regulating industries in order to protect the public from paying the costs generated by negative externalities. In its landmark decision upholding the constitutionality of the Affordable Care Act, the Supreme Court held that an Act of Congress that mandates the purchase of a particular product—health insurance—is not constitutional under the Commerce Clause,¹¹¹ but that the levying of a tax on individuals who did not purchase healthcare insurance is constitutional under the government's Tax Power.¹¹² While the fact pattern between the argument for healthcare insurance and a higher minimum wage is largely similar—a big part of the reason for the healthcare legislation was to account for the large share of taxpayer dollars that went towards uncompensated care covered by Medicaid,¹¹³ which is simply a narrower version of using taxpayer dollars covering a broader array of expenses with public assistance money—this Comment contends that it would be inefficient to resolve the public assistance gap through a tax on employers.

Whereas the question of whom and how to tax for healthcare purposes is simple—does an individual have healthcare insurance and, if given a negative answer, including a tax on the individual—the same question in a minimum wage context offers the unpleasant remedy of taxing businesses per minimum wage employee. Aside from being political suicide, such a tax connotes a punishment for hiring someone at the minimum legally sanctioned going-rate. It is important to note that using a tax rationale similar to that of the Affordable Care Act for the purposes of justifying a higher minimum wage amounts to nothing more

¹¹¹ Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2591 (2012).

¹¹² *Id.* at 2600.

¹¹³ JANUARY ANGELES, CENTER ON BUDGET AND POLICY PRIORITIES, HOW HEALTH REFORM'S MEDICAID EXPANSION WILL IMPACT STATE BUDGETS: FEDERAL GOVERNMENT WILL PICK UP NEARLY ALL COSTS, EVEN AS EXPANSION PROVIDES COVERAGE TO MILLIONS OF LOW-INCOME UNINSURED AMERICANS I (2012).

than a mental exercise, given that *Darby Lumber* held the minimum wage to be within the constraints of the Commerce Clause.

The appropriate government regulation, therefore, is mandating a higher minimum wage. There are two strong precedents for action to regulate an actor's behavior through mandated action. The first pertains to environmental regulations on factories that, in their current form, serve to protect the public health and, in proposed forms, quantify the external costs of production and charge the factories that rate. The second pertains to regulations on motorcycles that are structured to reduce the taxpayer's burden of paying for injuries to helmetless riders who get into accidents and endure severe head trauma.

A. *Environmental Regulations*

Environmental regulations are the classic example of a negative externality. Take, for example, a consumer's purchase of power from the electric grid:

When I buy power from my electric company, a generator somewhere in Victoria's Latrobe valley works a little bit harder and makes some extra greenhouse gases. I pay for the electricity and that money compensates the electricity retailer, distributor, transmission company and the generator. But people who are adversely affected by the pollution receive no compensation. They suffer a 'negative externality.'¹¹⁴

The United States regulates against environmental harms at the national, state, and local levels.¹¹⁵

Congress derives its authority to regulate the environment from the Commerce Clause.¹¹⁶ However, "[w]hich school of Commerce Clause jurisprudence controls a challenge to federal environmental law is critically important"¹¹⁷ as there are two theories: (a) *Raich*, under which the Court held that Congress had to apply a rational basis test to conclude whether the aggregate effects of the regulation affected interstate

¹¹⁴ Stephen King, *Global Warming, Externalities and Government Failures*, ECON. STUDENT SOC'Y OF AUSTL (June 24, 2013), <http://economicstudents.com/2013/06/global-warming-externalities-and-government-failure/>.

¹¹⁵ *E.g.*, United States Environmental Protection Agency; Florida Environmental Regulations Commission; Miami-Dade County Environmental Ordinances.

¹¹⁶ James R. May, *The Intersection of Constitutional Law and Environmental Litigation*, in ENVIRONMENTAL LITIGATION: LAW AND STRATEGY 359, 370 (Cary R. Perlman ed., 2009).

¹¹⁷ *Id.* at 372.

commerce¹¹⁸; and (b) *Lopez*, which limits congressional regulation to certain types of activity,¹¹⁹ and *Morrison*, which establishes guidelines for Congress to follow in conducting such regulation.¹²⁰ *Raich* is considered the easier theory under which a negative externality may be regulated.¹²¹

For nearly the same reasons as have been established to allow Congress to regulate the environment, government may act to regulate the wage market under the authority of the Commerce Clause. The guidelines under *Raich* and *Lopez* are satisfied by the same factors under which *Darby Lumber* was legitimized, and the wealth of information that has been collected about minimum wage would certainly satisfy the *Morrison* guidelines for control. Still, the remedies offered by issues that arise in environmental regulation—which are mainly punitive in nature¹²²—fail to satisfy the craving for a more preemptive solution to justify a minimum wage hike under the Commerce Clause.

B. *Motorcycle Regulations*

While of a slightly different nature, motorcycle helmet laws seem to satisfy this craving. While there is no federally established motorcycle helmet mandate, only three states in the country have not passed at least a partial helmet law.¹²³ On their face, motorcycle helmet laws are incredibly similar to minimum wage laws in that they both force an actor

¹¹⁸ *Gonzalez v. Raich*, 545 U.S. 1, 22 (2005); *see also* May, *supra* note 116, at 371 (“the majority in [*Gonzalez v.*] *Raich* simply asked whether Congress had a ‘rational basis’ for concluding that the ‘aggregate effects’ of those regulated activities collectively significantly affect interstate commerce”).

¹¹⁹ *U.S. v. Lopez*, 514 U.S. 549, 557 (1995); *see also* May, *supra* note 116, at 370 (“In *United States v. Lopez* (involving the Gun-Free School Zones Act), the Court explained that the Commerce Clause only allows Congress to regulate (i) channels of, (ii) instrumentalities of, and (iii) activities that ‘substantially affect’ interstate commerce”).

¹²⁰ *U.S. v. Morrison*, 529 U.S. 598, 617-618 (2000); *see also* May, *supra* note 116, at 370-371 (“In *United States v. Morrison*, (involving the Violence Against Women Act), the Court elaborated on the third of these, explaining that activities that ‘substantially affect’ interstate commerce are those in which (1) the underlying activity is ‘inherently economic,’ (2) Congress has made specific findings about the regulated activity’s effect on interstate commerce, (3) the law contains a jurisdictional element establishing that the cause of action is pursuant to Congress’s Commerce Clause power, and (4) the overall effects of the activity actually are substantial”).

¹²¹ May, *supra* note 116, at 372.

¹²² *See* Jonathan M. Karpoff et al., *Environmental Violations, Legal Penalties, and Reputation Costs* 7 (Univ. of Chi. Law Sch., Working Paper No. 71, 1999).

¹²³ The three states without such laws are Illinois, Iowa, and New Hampshire. CDC, *Save Lives, Save Money – How Does Your State Measure Up?*, http://www.cdc.gov/Motorvehiclesafety/mc/states/index.html?s_cid=fb_tbi529 (last visited Sept. 30, 2014).

to act preemptively by imposing costs on an actor to protect a societal interest.¹²⁴

Motorcycle helmet laws have been ruled constitutional by the highest courts in more than twenty-five states as a means to protect society from incurring the costs borne to society by helmetless riders who consume taxpayer dollars after an accident. The Supreme Court held this reasoning to be sound in *Simon v. Governor of the Commonwealth of Massachusetts*:

From the moment of the injury, society picks the person up off the highway; delivers him to a municipal hospital and municipal doctors; provides him with unemployment compensation if, after recovery, he cannot replace his lost job, and, if the injury causes permanent disability, may assume the responsibility for his and his family's continued subsistence. We do not understand a state of mind that permits plaintiff to think that only he himself is concerned.¹²⁵

In affirming the helmet law, the *Simon* Court specifically cites the various costs to society that show the impact of a decision to not wear a helmet extends beyond the individual.

Similarly, the public assistance costs to society, arising out of an employment contract that engages an individual in a traditional workweek for less than is necessary to sustain a family of three, extend beyond the parties to that contract. To use the framework of the *Simon* analysis, from the moment of the contract, society assists the individual and his dependents with the funds necessary to make up the public assistance gap; protects his family during times of unemployment as minimum wage earners generally lack savings¹²⁶; provide him with the potential of vocational training, if he qualifies; and, if he gets sick, pays for his healthcare with Medicaid. The reasoning in motorcycle helmet laws is parallel to that which may be put forth to lend credence to minimum wage as a regulatory tool.

C. *Minimum Wage As a Regulatory Tool*

The minimum wage has long been thought of more of a redistributive tool than anything else. Economists have noted that

¹²⁴ See *Common Myths About Motorcycle Helmets and Motorcycle Helmet Laws*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., <http://www.nhtsa.gov/people/injury/pedbimot/motorcycle/safebike/myths.html> (last visited Feb. 4, 2014).

¹²⁵ *Id.* (quoting *Simon v. Sargent*, 409 U.S. 1020 (1972)).

¹²⁶ See *Johnson*, *supra* note 4.

“[t]he goal of a minimum wage is not, of course, to reduce employment, but to redistribute earnings to low-paid workers.”¹²⁷ While Barack Obama gave a 2001 interview that suggested that the judicial system might be the best medium through which an economic redistribution could transpire,¹²⁸ the courts have not ruled on this Robin Hood theory.¹²⁹ More than likely, any potential assessment of minimum wage legislation will be borne out of its potential as a regulatory tool and handled as such.

The reasoning behind motorcycle helmet laws is parallel to that which may be put forth to lend credence to minimum wage as a regulatory tool; after all, what is the minimum standard-of-living wage if not a helmet to protect workers from poverty? Defining minimum wage as a regulatory tool is important to its constitutionality because, having once been established as a means against workplace gender and age discrimination and later affirmed as a matter of interstate commerce, the initial reasons for establishing the floor are not necessarily sufficient to protect against an argument that raising the minimum wage constitutes overregulation. Having established that the minimum wage is functionally equivalent of a wage market motorcycle helmet law, this Comment deems its status as a regulatory tool is sufficient to protect the constitutionality of an increase.

V. REMEDYING THE TAXPAYERS' SUPERSIZED BURDEN

The reality of raising the minimum wage is that the floor is legislatively set, and there is a partisan impasse in Congress that has precluded deserving legislation from reaching the White House for approval. Without legislative passage, there can be no true remedy to remedy the taxpayers' supersized burden.

¹²⁷ Richard B. Freeman, *The Minimum Wage as a Redistributive Tool*, 106 THE ECON. J. 639, 639 (1996).

¹²⁸ Audio Tape: Interview with Barack Obama, WBEZ CHI. 91.5 FM (2001), available at <https://www.youtube.com/watch?v=OkpdNfTgQNM#t=11>.

¹²⁹ The Robin Hood theory concerns the notion of redistributing wealth from the rich to the poor; alas, such redistribution here is not orchestrated by arrow-wielding outcasts clad in tights, but instead by the courts. In *Edgewood v. Kirby*, the Supreme Court of Texas did adjudicate a dispute of the Robin Hood theory in which education money was collected by counties and redistributed to the school districts, declaring that the system was unconstitutional where funds were funneled from wealthier to poorer school districts. *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989). When that court held Robin Hood redistribution to be an unconstitutional method of raising and allocating education money, the legislature sought to enact an amendment to the state constitution to ratify the plan. Kathy J. Hayes & Daniel J. Slottje, *RETHINKING ROBIN HOOD* (1993).

This Comment contends that the President does, however, have soft power tools at his disposal to effectuate a higher minimum wage, or to put pressure on Congress to actualize that result. For example, the President may urge a blue-ribbon study on poverty to determine whether the poverty thresholds and guidelines are accurate, or whether they need to be updated. That study, which would be completed after the Obama administration has been term-limited, would almost certainly reflect the conclusions reached in Part I of this Comment: the poverty threshold is an outdated metric based on an anachronistic calculation.

The result of such a study would be a reconfiguration of the terminology that would house more people under a “poverty” designation, without burdening this President or the next with the politically damaging brand of “causing” a higher poverty rate. This reclassification would also serve to allow families that are wrongly considered above the poverty line to qualify for needed aid under a more encompassing poverty guidelines.

More traditional means are also available for the President to enact change on minimum wage legislation. One such example would be taking advantage of the Presidential bully pulpit to showcase a personable Chief Executive who wowed people with his eloquence and feel for the needs of the middle class during his two campaign cycles. The President may prioritize a higher minimum wage in speeches such as his State of the Union address and when campaigning around the country for Democratic candidates for the House and Senate during the 2014 election cycle. Placing populist pressure on Republican candidates may serve to shift their campaign rhetoric towards the President on this issue or perhaps result in the election of Democratic candidate to traditionally Republican seats.

VI. CONCLUSION

The minimum wage must be raised to mitigate the societal costs of public assistance due to insufficient hourly pay to low-income workers. As minimum wage is sufficiently similar to a motorcycle helmet law that preemptively imposes a cost on an actor to protect a societal interest, it follows that the minimum wage may function as an effective regulatory tool against corporations that are inclined to externalize their business costs as a burden of the general public.

Given that Congress seems unwilling, or unable, to pass legislation at the moment, the President may act on his authority as the Chief Executive to use soft law as a means to protect workers from employers’ relatively strength in determining the wage market. Ultimately, the

minimum wage must be raised as part of an overall strategy to combat poverty. That increase will be held constitutional in this nation's highest court.