Federalism, Gender, & the Fair Labor Standards Act of 1938*

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The constitutional revolution of the New Deal produced the Fair Labor Standards Act of 1938, the first national labor standards law in the United States. Yet, as this article shows, several occupational categories of women workers who needed the coverage were excluded from the legislation, creating a gender division in a seemingly gender-neutral law. Thus, while men were guaranteed new economic rights by the national government, many women remained under the often parochial and paternalistic authority of state governments. The result, the author concludes, was a new version of federalism that treated men and women workers as citizens of two distinct realms of government.

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The New Deal has been widely heralded, by proponents and critics alike, as the decisive turning point in the emergence of a centralized state in American political development. The Supreme Court allowed a "Constitutional Revolution" by affirming a new definition of the commerce clause, thus permitting the national government to regulate economic and social conditions as never before. Scholars have described the consequences variously as the irrefutable end of "dual federalism," the triumph of "cooperative federalism," and the demise of "belated feudalism."[1] For the first time, the national government extended rights of

*The author thanks Judith Baer, Eileen Boris, Donald Brand, James MacGregor Burns, Wayne Grove, Mary Fainsod Katzenstein, Isaac Kramnick, Theodore Lowi, Elizabeth Sanders, and Martin Shefter for their help in the preparation of this article.

1. Edward S. Corwin, "The Passing of Dual Federalism," *Virginia Law Review,* 36 (February 1965): 1-24; Morton Grodzins, *The American System: A New View of Government in the United States* (Chicago: Rand McNally & Co., 1966), pp. 41-57; Karen Orren, *Belated Feudalism: Labor, Law, and Liberal Development in the United States* (New York: Cambridge, 1991), pp. 1-30, 209-30.

social citizenship to Americans, such as the right of labor to organize and bargain collectively, the right of workers to a minimum wage and a limited work week, and the right of employed persons to social insurance to protect against the calamities of old age and unemployment.[2]

While riveted by the transformative elements of the New Deal, however, political scientists have neglected to examine sufficiently the limits of incorporation of citizens within the broadened domain of national government and the significance of the enduring powers of the individual states, which remained securely intact beyond the reach of national intervention.[3] While the New Deal state consolidated its power by bringing mostly white, male wage-earners within its jurisdiction, political settlements were established by leaving substantial authority to the individual states, which retained authority over the social and economic dimensions of citizenship for most women and black men. Consequently, a broader view of the New Deal reveals the persistence of two sovereignties in the United States, national and federal, but with a reconstituted division of governance along the lines of gender and race.

The Fair Labor Standards Act of 1938 (FLSA), America's first and enduring national law mandating a floor beneath wages and a ceiling on hours for employees in covered occupations, epitomizes the revised boundaries of national and state government authority that separated men and women into different jurisdictions.[4] This article examines the role of federalism in the formation of the FLSA to show how the New Deal state constructed separate forms of citizenship according to gender.[5] It will show how the altered constitutional meaning of "interstate commerce" in the FLSA, converted from a narrow interpretation pertaining

2. On "social citizenship," see T. H. Marshall, "Citizenship and Social Class," in *Class, Citizenship, and Social Development* (New York: Doubleday, 1964), pp. 65-122.

3. See Russell L. Hanson, "Federal Statebuilding During the New Deal: The Transition from Mothers' Aid to Aid to Dependent Children," in *Changes in the State,* ed. Edward S. Greenberg and Thomas F. Mayer (Newbury Park: Sage, 1990), pp. 93-114.

4. I am grateful to Eileen Boris for bringing to my attention Vivien Hart's work on the FLSA, specifically Vivien Hart, "Minimum Wage Policy and Constitutional Inequality: The Paradox of the Fair Labor Standards Act of 1938," *Journal of Policy History,* 1 (1989): 319-43. See also Eileen Boris, "(En)gendering the New Deal Order: Labor Standards' Alternative Stream" (paper presented at the Thirteenth Annual North American Labor History Conference, Wayne State University, October 17-19, 1992); Eileen Boris, "The Quest for Labor Standards in the Era of Eleanor Roosevelt: The Case of Industrial Homework," *Wisconsin Women's Law Journal,* 2 (Spring 1986): 53-74.

5. For a fuller treatment of the relationship between gender and citizenship in the New Deal, see Suzanne B. Mettler, "Divided Citizens: State Building, Federalism and Gender in the New Deal" (Ph.D. diss., Cornell University, 1994).

only to the literal "flow" of goods across state lines to a broader inclusion of those industries "affecting commerce," meant the extension of labor standards as rights guaranteed by the national government to mostly male workers. The female work force desperately needed measures like the minimum wage because most occupations employing women paid notoriously low wages and because the underrepresentation of women in labor unions meant that few would benefit from collective bargaining as sanctioned by the National Labor Relations Act of 1935. The reinterpreted commerce clause still evaded, however, the terrain where most women's occupations were located, leaving them under the provincial, uneven, and generally paternalistic rule of state legislatures.

To explain the transformation of federalism illustrated by the FLSA and its limitations, the analysis begins with a brief review of gender politics in the context of the "dual federalism" that predated the New Deal. Then it examines the formation of the FLSA in the Roosevelt Administration and Congress. The gender divide in the new law cannot be explained primarily as a function of constitutional precepts; a full explanation must emphasize the institutional and political factors that influenced the particular delineation made between "interstate" and "intrastate" commerce.[6]

I. Dual Federalism and Gender Politics

Since before the turn of the century, social reformers in various industrializing nations had sought to alleviate the horrors of sweat-shop working conditions by establishing a floor under wages, thus guaranteeing a minimum standard of living for employees and eliminating the competition caused by employers willing to pay miserly wages. New Zealand enacted a minimum wage law in 1894, Australia followed in 1896, and Great Britain legislated its first such measures in 1909 and added more comprehensive coverage nine years later. But as other Western European nations followed suit, the United States lagged behind and pursued a different, gender-specific course for reasons rooted in the constraints of "dual federalism."[7]

6. Though there is a good deal of overlap between Vivien Hart's approach to the FLSA and mine, she ultimately stresses the "straitjacket of constitutional definitions" while I treat institutional structures as animated by politics. See "Minimum Wage Policy and Constitutional Inequality," p. 338.

7. Alexander Feller and Jacob E. Hurwitz, *How to Operate Under the Wage-Hour Law* (New York: Alexander, 1938), p. 3; Theda Skocpol and Gretchen Ritter, "Gender and the Origins of Modern Social Politics in Britain and the United States," *Studies in American Political Development,* 5 (Spring 1991): 36-93.

Throughout the nineteenth century and until the New Deal, the vast majority of policy decisions affecting the lives of Americans were made in state legislatures rather than by the U.S. Congress. The Taney Court inferred from the Tenth Amendment that the individual states were endowed with the Police Power, namely the "power to govern men and things," to "promote the happiness and prosperity of the community" and to "provide for the public health, safety, and good order."[8] Thus, the states determined the substantive meaning of citizenship for those living within their boundaries through the enactment of most varieties of law, ranging from those pertaining to property and education to statutes regarding the family and morality. The national government, conversely, refrained from engagement in the regulatory arena, and limited its activities primarily to the promotion of commercial activity, through policies regarding internal improvement, subsidies, tariffs, and the like.[9]

In the laissez-faire era of turn-of-the-century constitutional law, "dual federalism" came to mean that certain subject matters, namely production and the employer-employee relationship, were solely the business of the states and could not be reached by any valid actions conducted by the national government. The Supreme Court interpreted the "commerce power" to extend only to a very limited realm of "interstate commerce," meaning that Congress could only legislate in matters pertaining to the literal transport of goods across state lines. All other steps and phases in the production of goods, as well as services related to the process, were understood to be within the province of "intrastate commerce" and thus under the domain of state and local governments.[10] But neither were states at liberty to regulate labor conditions: in a landmark case of the era, the Supreme Court invalidated a New York state maximum hours law and pronounced the inviolability of a constitutionally protected "freedom of contract."[11] Combined, the restrictive interpretation of the commerce clause and the expansive notion of "freedom of contract" principles were utilized to forbid nearly all attempts at regulation of the workplace by both the national and state governments.

8. Corwin, "The Passing of Dual Federalism," pp. 15-16.

9. Theodore J. Lowi, *The Personal President* (Ithaca, NY: Cornell University Press, 1985), pp. 22-30; Harry N. Scheiber, "The Conditions of American Federalism: An Historian's View," in *American Intergovernmental Relations,* ed. Laurence J. O'Toole, Jr. (Washington, DC: Congressional Quarterly Press, 1993), pp. 67-74.

10. For an historical treatment of interpretations of the commerce clause, see Richard A. Epstein, "The Proper Scope of the Commerce Power," *Virginia Law Review,* 73 (November 1987): 1387-1455.

11. *Lochner v. New York,* 198 U.S. 45 (1905).

The antipathy of government to regulation of the work place, a position sometimes enforced violently, discouraged labor unions from seeking labor standards through legislative means. The predominant union of the early twentieth century, the American Federation of Labor, regarded social and labor legislation skeptically, wary that good intentions would backfire and lead to state control over unions. Instead, the organization espoused the ethic of voluntarism and concentrated on collective bargaining in the work place.[12] But union activities did little for women workers, particularly because organizing rarely crossed the lines of occupational segregation. The AFL existed primarily to protect skilled workers, who tended to be white, native-born males, rather than unskilled workers, who included the majority of women workers, immigrants, and non-white citizens.[13]

Advocates of women workers instead attempted to utilize the prevalent gender ideology of the day, the notion that "woman's place" lay in the domestic sphere, to forge change through female-specific legislation. The quest for protective labor legislation was spearheaded by the National Consumers League (NCL), led by Florence Kelley and other women with backgrounds in social work in the settlement houses. Their early efforts were legitimized in the 1908 case *Muller v. Oregon* when the Supreme Court upheld an Oregon law that placed limits on the working hours of women only. The Court reasoned that in the case of women, the state's interest took priority over liberty of contract because, "as healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest and care in order to preserve

12. Alice Kessler-Harris, *Out to Work: A History of Wage-Earning Women in the United States* (New York: Oxford University Press, 1982), pp. 180-84; Skocpol and Ritter, "Gender and the Origins of Modern Social Policies," pp. 70-74; Martin Shefter, "Trade Unions and Political Machines: The Organization and Disorganization of the American Working Class in the Late Nineteenth Century," in *Working Class Formation: Nineteenth-Century Patterns in Western Europe and the United States,* ed. Ira Katznelson and Aristide R. Zolberg (Princeton: Princeton University Press, 1986), pp. 197-278; Ruth Milkman, "Organizing the Sexual Division of Labor: Historical Perspectives on 'Women's Work' and the American Labor Movement," *Socialist Review,* 10 (January-February 1980): 95-144; Gwendolyn Mink, "Manhood, Motherhood, and Unsocial Democracy in the United States" (paper presented at the Annual Meeting of the American Political Science Association, 1987), pp. 23-24.

13. Milkman, "Organizing the Sexual Division of Labor," pp. 114-17. On various occasions throughout the Progressive Era, the AFL tried to defend itself against charges that it discriminated against women. See the Philip Taft Papers, Labor-Management Documentation Center, M.P. Catherwood Library, Cornell University (hereafter, LMDC), Collection 5541, Box 14, File 2.

the strength and vigor of the race.''[14] In essence, the reformers had succeeded in piercing a tentative loophole in the doctrine of "freedom of contract" by advancing state-level protective labor legislation for women workers.

Since the strategy worked, women reformers commenced an era of state-by-state efforts to improve the conditions of women workers through the regulation of hours and wages and the enactment of seating laws, rest periods, night work prohibitions, and prohibitions of female employment in some occupations. A coalition of women's organizations, such as the Women's Trade Union League and the General Federation of Women's Clubs, joined the NCL's campaign for state-level wage and hour laws for women. The national leadership of the AFL, on the other hand, opposed minimum wage laws, fearing that they would stymie efforts at organizing and collective bargaining and that "the minimum would become the maximum." The organization's support for labor laws was limited to the endorsement by some state federations of hours limitations for women only.[15] Hence, two streams of activism for improved working conditions evolved in the Progressive Era: trade union participation for men, and the struggle for legal protection for women.

The well-organized and broadly based advocacy groups that worked toward legislative reforms on behalf of women workers remain an impressive example of social movements poised for change through the legal system, but the protective labor legislation route toward improved working conditions for women proved in fact to be laden with obstacles and to yield policies of questionable value for working women. On the one hand, the reformers achieved stunning success as most states enacted lasting maximum hours laws for women workers during the Progressive Era, as well as regulatory measures like seating laws and occupational prohibitions for women. Working on the premise of *Muller* that women's biological role meant that they needed protection, the Courts were willing to waive "freedom of contract" in regard to such stipulations. By contrast, however, minimum wage laws for women were much more difficult to attain, since states feared losing their ability to attract businesses if they mandated higher pay than neighboring states. The sixteen state minimum wage laws enacted between 1912 and the early twen-

14. 208 U.S. 412 (1908). See Judith A. Baer, *The Chains of Protection* (Westport, CT: Greenwood Press, 1978), pp. 1-69.

15. Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge: Harvard University Press, 1992), pp. 373-423.

ties, furthermore, rested on tenuous judicial ground.[16] Most were destroyed by the Supreme Court in the 1923 decision, *Adkins v. Children's Hospital,* which struck down a minimum wage law in the District of Columbia.[17] In effect, working fewer hours for the same pay simply meant that women workers, already at the bottom of the wage scale in many jobs, earned even less than before; also the night work and occupational prohibitions and hours limitations hurt women's opportunities to compete for the best-paying jobs, reinforced occupational segregation and made unions refrain from organizing women.

Though unemployment sky-rocketed as the Depression hit, the structure of occupational segregation protected many women's jobs because those industries employing women tended to contract less than those employing men. Consequently, women continued to increase their numbers in the work force as they had in the previous decades, and among them in the 1930s were many more married, middle-class, middle-aged white women who took jobs when their husbands became unemployed.[18] Women were only able to find employment, however, in a narrow range of occupations that tended to offer the lowest pay and fewest opportunities for advancement, and in some cases, long hours and difficult working conditions. For every ten women workers, three were in clerical or sales work, two were factory operatives (especially in the low-wage clothing and textile industries), two were employed as domestic servants, one was a professional (usually a nurse or a teacher), and one worked in a personal service job (as a cook, waitress, beautician, etc.). Black women were twice as likely as white women to be in the paid work force, and they were overwhelmingly employed in domestic service or agriculture.[19]

In sum, under the American system of "dual federalism," individual states shaped the content of citizenship and the Courts kept a tight rein on labor regulations. Women reformers managed to gain judicial

16. Irving Bernstein, *A Caring Society: The New Deal, the Worker, and the Great Depression* (Boston: Houghton Mifflin Co., 1985), p. 122; Skocpol, *Protecting Soldiers and Mothers,* p. 422.

17. 261 U.S. 525 (1923).

18. Ruth Milkman, "Women's Work and Economic Crises: Some Lessons of the Great Depression," *Review of Radical Political Economy,* 8 (Spring 1976): 75-77; Kessler-Harris, pp. 251-72; Jacqueline Jones, *Labor of Love, Labor of Sorrow* (New York: Basic Books, 1985), pp. 46-47; Julia Kirk Blackwelder, *Women of the Depression* (College Station: Texas A&M University Press, 1984).

19. Susan Ware, *Holding Their Own: American Women in the 1930s* (Boston: Twayne, 1982), pp. 25-26, 30-31.

approval of state-level hours limitations laws for women workers, but minimum wage laws were hard to achieve and rested on perilous ground. Consequently, as the Depression deepened, the vast majority of women worked in particularly exploited occupations for miserly pay.

II. The Formation of the Fair Labor Standards Act of 1938

President Franklin D. Roosevelt, responding to economic misery and popular discontent, announced the need for national wage and hour standards as an indispensable pillar of the New Deal. The earliest incorporation of minimum wage and hour standards in New Deal legislation appeared in the National Industrial Recovery Act (NIRA) of June 1933, but the entire law was declared unconstitutional in *Schechter Poultry Co. v. United States* during May 1935.[20] Having foreseen that possibility, Secretary of Labor Frances Perkins had an alternative bill drafted that would also regulate wages and hours of all industries engaged in interstate commerce.

Yet, as late as the spring of 1936, hopes to advance a national labor standards bill were dashed when the Supreme Court erected a stone wall in the way of any efforts to enact social and labor legislation. With two decisions, *Carter v. Carter Coal Company* and *Morehead v. N.Y. ex rel. Tipaldo,* the Court insisted that the Constitution prohibited both Congress and the states from regulating the conditions of labor. In the *Carter* decision, the Court loudly reiterated its traditionally narrow interpretation of the commerce clause, thus forbidding work place regulations.[21] In *Tipaldo,* the Supreme Court once again set aside minimum wage laws for women and children, insisting as in the *Adkins* decision that such laws violated freedom of contract.[22]

Within a two-week period, the Supreme Court had once again slammed the door on constitutional validation of both national and state minimum wage laws, but this time the response was public outrage and electoral mobilization. Roosevelt capitalized on popular sentiments by

20. 295 U.S. 495 (1935).

21. Bernstein, *A Caring Society,* pp. 128-29. In the *Carter* case, Justice Sutherland, author of the majority opinion, insisted that working conditions pertained to production, which was distinct from commerce, defined strictly as "intercourse for the purpose of trade." He reiterated the primacy of local control in such matters: "the evils (regarding working conditions) are all local evils over which the Federal Government has no legislative control. The relation of employer and employee is a local relations." *Carter v. Carter Coal Company,* 298 U.S. 238 (1936).

22. *Morehead v. N.Y. ex rel. Tipaldo,* 298 U.S. 587 (1936).

making national labor standards legislation a central issue in his 1936 campaign, and proceeded to win a landslide victory.

Some months later, the Supreme Court handed down the series of decisions now identified with "the first constitutional revolution" and signified unprecedented willingness to approve regulation of the economy by Congress. In *West Coast Hotel v. Parrish,* the Court announced its decision to uphold a Washington state minimum wage law for women and children, thus overturning the *Adkins* decision of 1923, and denying the existence of a constitutional principle of "freedom of contract."[23] Two weeks later, the Court upheld the National Labor Relations Act in *National Labor Relations Board v. Jones and Laughlin Steel Corporation* (*NLRB*), seemingly affirming the revised interpretation of the commerce clause in which all stages of the production process were understood to be interdependent and thus within Congress's power to regulate.[24] At last the Supreme Court had dismantled key structural supports of "dual federalism" and paved the way for national labor standards. With the judicial obstacles finally removed, the Roosevelt Administration prepared to send to Congress a comprehensive wage and hours bill.

The Wage and Hours Bill of the Roosevelt Administration

Accounts of the formation of the Fair Labor Standards Act tend to begin with analysis of the significant court cases preceding the introduction of the bill and then jump to the story of the law's turbulent journey through Congress; the policymaking role of the executive branch receives little or no attention.[25] But it was in the quiet drafting of the bill by the Roosevelt officials that the majority of low-paid women workers and blacks, those who could have benefited most from national labor standards, were exempted from coverage. In this process, administration officials were reined in not by the Constitution itself, but rather by their uncertainty about the permanence of the Supreme Court's recent conversion on New Deal policies and by their desire to write a bill that would pass muster with the increasingly conservative Congress.[26]

23. *West Coast Hotel v. Parrish,* 300 U.S. 79 (1937).

24. 301 U.S. 1 (1937). Also see Alexander Feller and Jacob E. Hurwitz, *How to Operate Under the Wage-Hour Law* (New York: Alexander, 1938), pp. 91-99.

25. Bernstein, *A Caring Society,* pp. 116-45; Jonathan Grossman, "Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage," *Monthly Labor Review,* 101 (June 1978): 22-30.

26. Frances Perkins, *The Roosevelt I Knew* (New York: Harper & Row, 1964), pp. 246-58.

On the surface, the Administration's bill appeared to be an unprecedented example of gender-neutral regulation of American labor conditions. In contrast to both the Progressive Era laws for women only and the National Industrial Recovery Act of the early New Deal, which had permitted sex differentials in wages for one-quarter of the industry codes, the "interstate commerce" criteria in the FLSA displaced the sex-based rationale for labor standards. The new basis of legitimacy meant that the bill could be applicable to both men and women.[27] But the discourse of governmental domain was no more rooted in objective evaluation regarding the place of different groups of persons in relation to government than had been the supplanted rationale of biological essentialism.

In anticipation of the Court decision that declared the NRA unconstitutional, Secretary Perkins had already directed the drafting of an alternative bill to restore the wage and hours provisions. She drew on the model of the Black-Connery "thirty-hour bill," which proposed to fine industrialists who shipped goods in interstate commerce that had been produced under sub-standard labor conditions. The hours bill was backed by labor unions, and the terms of its coverage ("any mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment") pertained to mostly male-dominated occupations (the notable exceptions being canneries and mills).[28] Amidst the convulsions of the Supreme Court over the next two years, Perkins consulted with numerous constitutional lawyers and administration officials about the viability of the interstate commerce approach.[29]

The bill produced by the Administration, though clearly defying the extremely restrictive approach of the 1936 *Carter* case, set the terms of coverage in a realm with parameters suggested by the definitions of interstate commerce used in the earlier *Schecter* decision from 1935, on the one hand, as well as those from the most recent and expansive definition in the 1937 *NLRB* case, on the other. In *Schecter,* Justice Charles Evans Hughes had written that congressional power with regard to the commerce clause pertained only to the direct effects of interstate transactions, whereas indirect effects "remain within the domain of State

27. Kessler-Harris, *Out to Work,* p. 262. Frances Perkins defended the lack of sex differentials in the law in congressional hearings. U.S., Congress, Senate, Committee on Education and Labor and House of Representatives, Committee on Labor, Fair Labor Standards Act of 1937, Joint Hearings, 75th Cong., 1st sess., June 2, 1937 (Washington, DC: U.S. Government Printing Office), Pt. I, pp. 187-88, 190-91, 205. See also testimony of Lucy Mason, p. 404.

28. *Cong. Rec.,* 21 Dec. 1932, p. 820.

29. Perkins, *The Roosevelt I Knew,* pp. 249-55.

power." Seeming to define interstate commerce far more broadly, the *NLRB* case upheld the extension of congressional power over those industries which "affect" commerce. But rather than assuming that the *NLRB* decision would prevail over the more cautious approach in *Schecter,* the Administration steered a prudent middle course. The language of the labor standards bill was to apply to employees "engaged in commerce or in the production of goods for commerce," clearly voicing the intent to include the manufacturing sector that preceded trade.[30] In deference to *Schecter*'s exemption of those enterprises in which the "flow" of interstate commerce had come to a final rest, the distributional activities following trade were assumed to be excluded from coverage under the law.[31]

Thus, the Administration marked off terrain it considered to be beyond the scope of the FLSA, established the territory clearly within the bill's coverage, and suggested a middle ground that remained subject to qualifications in Congress and subsequent administrative judgments. Conceding to *Schecter,* policymakers omitted the heavily-female retail sector from coverage.[32] They considered other jobs, especially female occupations in the service sector, to be so firmly embedded in "intrastate" commerce that clarification of their exemption was barely required. Conversely, coverage was widely understood to include the mostly male occupations associated most directly with industry: manufacturing, mining, transportation, and public utilities. The ambiguity in the law lay in the definition of "production of goods for commerce."

The fact that the Administration's drafting process was shaped by politics rather than simply by a constitutional blueprint is well illustrated by the situation of agricultural workers in the law. Though agriculture had been considered in previous cases pertaining to interstate commerce, the Administration made agricultural workers exempt from the wage and hour provisions of the bill from the start.[33] In the battles over the Social Security Act of 1935, the Administration had already discovered the extreme resistance to regulation of agriculture among southern and rural Democrats in Congress, whose support for New Deal legislation was so

30. U.S., Public Law 718, Fair Labor Standards Act of 1938, 75th Congress, S. 2475, Sec. 6(a).

31. Bernstein, *A Caring Society,* pp. 125-26, 133; Perkins, *The Roosevelt I Knew,* pp. 151-52; Paul Douglas and Joseph Hackman, "The Fair Labor Standards Act of 1938, I: The Background and Legislative History of the Act," *Political Science Quarterly,* 53 (1938): 499.

32. Douglas and Hackman, "The FLSA, I," pp. 499, 514.

33. Epstein, "Commerce Power," pp. 1440, 1449-50.

critical for passage. The exclusion of agricultural workers from the FLSA meant the omission of more than 50 percent of southern black employees, men and women, from coverage.[34] Because poll taxes, literacy tests, and other voting restrictions were used to limit severely the electoral participation by blacks during the period, their needs could easily be ignored by the New Deal Democratic Party and priority given to the interests of the southern planters so well represented in Congress. The child labor prohibition of the FLSA, on the other hand, was extended to agriculture except in instances where children were "not legally required to attend school," underscoring the groundswell of political support for such provisions in contrast to the disinterest in the plight of black workers.[35]

The status in the FLSA of most low-paying women's occupations similarly reflected political considerations rather than structural imperatives of the Constitution alone. Among the greatest beneficiaries of the new law were women workers in the garment and textile trades. As the New Deal state granted government sanction to union activities, the representatives of unions gained political influence in the realigned Democratic Party. Sidney Hillman, president of the Amalgamated Clothing Workers of America (ACWA), worked closely with Frances Perkins in the drafting of the FLSA, assuring coverage of the "sweatshops."[36] The masses of low-paid women in service occupations, by contrast, were excluded. The statute failed to extend to workers in laundries, hotels, hairdressing, restaurants, and domestic service, in part because persons with influence in the Administration tended to assume out of hand that such types of employment lay well within the confines of "intrastate commerce," but also because they assumed the Progressive Era tradition of state level laws ought to continue. Felix Frankfurter, who had represented the NCL in protective labor legislation cases during the Progressive Era and whom Perkins consulted for advice on drafting labor standards legislation, recognized the commerce clause as a flexible instrument but still thought that state laws were preferable for such measures. A defender of federalism, he wanted to preserve the possibilities for experimentation in social policy at the state level. He, like some in the Administration, believed that national labor standards legislation would serve to promote

34. Robert C. Lieberman, "Race and the Organization of Social Policy" (paper prepared at the Annual Meeting of the American Political Science Association, Chicago, Illinois, September 3-6, 1992).

35. Fair Labor Standards Act, Sec. 13(a)(6); Sec. 12(a); Sec. 13(c).

36. Steve Fraser, *Labor Will Rule: Sidney Hillman and the Rise of American Labor* (New York: Free Press, 1991), p. 391.

state level initiatives to cover workers in "intrastate commerce."[37] Some women's occupations, furthermore, were considered to belong to an entirely different realm than those industries of "production" that had become a target of state action. When concerns arose among southerners that the FLSA would mandate that housewives "pay your negro girl eleven dollars a week," Roosevelt was clear: "No law ever suggested intended a minimum wages and hours bill to apply to domestic help." As Vivien Hart notes, "the fact that the President thought of these women as help, not as labor, sums up their problem."[38]

Though women reformers and some Progressive Democrats hoped for more expansive labor standards legislation, they lacked the ability to alter the debate. In the first place, despite the achievement of suffrage in 1920 and though numerous individual women held important posts in the Roosevelt Administration, women had not yet begun to vote in sufficiently large numbers nor as a bloc in such a manner as to gain sustained attention from policymakers.[39] Secondly, the women reformers groups, led by the NCL, had been mobilizing in the wake of *Tipaldo* for an amendment to the U.S. Constitution that would effectively overhaul the structures of restraint, "giving both the federal and state governments power to enact labor and social legislation, with the federal standard controlling unless the states create higher standards."[40] While many in the Administration believed that *West Coast Hotel* and *NLRB* eliminated the need to pursue such a strategy, the absence of such an amendment meant that the subsequent FLSA approach was curbed by earlier Court decisions. Finally, the NCL and its affiliates were not about to

37. Liva Baker, *Felix Frankfurter* (New York: Coward-McCann, Inc., 1969), pp. 114-15; Helen Shirley Thomas, *Felix Frankfurter: Scholar on the Bench* (Baltimore: The Johns Hopkins University Press, 1960), pp. 315-19, 324-25; Michael E. Parrish, "Felix Frankfurter and American Federalism," in *Federalism: Studies in History, Law, and Policy: Papers from the Second Berkeley Seminar on Federalism,* ed. Harry N. Scheiber (Berkeley: University of California Press, 1988), pp. 27-35; Felix Frankfurter, *The Commerce Clause* (Chapel Hill: University of North Carolina Press, 1937), pp. 21-22.

38. Hart, "Minimum Wage Policy," pp. 336-37.

39. On the "New Deal network" of women, see Susan Ware, *Beyond Suffrage: Women in the New Deal* (Cambridge, MA: Harvard University Press, 1981). Though the Women's Bureau in the U.S. Department of Labor consistently presented copious data showing the dire status of women workers and argued for inclusion of women in New Deal social and labor policies, the agency had little influence. Judith Sealander, *As Minority Becomes Majority: Federal Reaction to Women in the Work Force, 1920-1963* (Westport, CT: Greenwood Press, 1983), p. 162.

40. John A. Salmond, *Miss Lucy of the CIO* (Athens: University of Georgia Press, 1988), pp. 61-62, 72; Minutes of the Sixty-Second Meeting of the Board of Directors, National Consumers League (NCL), June 11, 1936, p. 3.

propose that national laws displace state initiatives, for they were anxious to protect the hard-earned state level protective labor laws they had achieved over the previous decades.[41]

The original FLSA bill was lengthy and cumbersome. It vested broad powers to fix minimum wages and maximum hours in a Labor Standards Board made up of five members. Though the bill contained no numbers, the Administration indicated that they opted for 40 cents and 40 hours as national standards. Beyond that, the Board would be empowered to fix higher wages up to 80 cents per hour in particular industries if it evaluated collective bargaining to be ineffective therein, or if the cost of living, value of services and other factors necessitated higher pay for a "fair" wage. Labor by children under age sixteen was outlawed. No regional differentials were to be included in the bill, but administrative flexibility was assumed to enable allowances for economic differences between geographic regions.[42]

Roosevelt's officials had failed to seize the opportunity to promote broad coverage of national labor regulations. Upon first seeing the Administration's bill, Merle Vincent, counsel to the International Ladies Garment Workers Union (ILGWU), wrote to union president David Dubinsky, "It has a very narrow definition of interstate commerce which will exclude several million workers from the benefits of the Act."[43] Women and blacks fell disproportionately into those categories, in agriculture, as domestics, and in retail and service work.

The Tumultuous Journey of the FLSA through Congress

While the Roosevelt Administration had already delineated the new expanse of "interstate commerce" in a manner that would make for a gender divide in the coverage of labor standards, Congress proceeded to weaken the administrative power granted by the legislation and to establish extremely low minimum wage standards for those few workers who would be affected. Organized labor and southern Democrats, both essential elements of the New Deal Democratic coalition, provoked controversy as they charged that the bill advanced harmful extensions of national government power. While the remodeling of federalism had given unions a place in national politics, their actions in the FLSA battles quickly seemed to resemble the more expected reactions of southern

41. Minutes of the Board of Directors, NCL, March 17, 1937, p. 3.

42. Bernstein, *A Caring Society,* p. 137.

43. Merle Vincent, Letter to David Dubinsky, May 22, 1937, Records of the ILGWU, 3/10/2, Box 81, File 7B, LMDC.

elites as they sought to deter further alterations of federalism, thus preventing non-unionized workers from gaining standing comparable to their own under the domain of national government.[44]

Roosevelt submitted the wage and hour bill to Congress in May 1937. Administration officials were optimistic that the bill would pass quickly, given its widespread popular support and the cautious measures already taken in the drafting process. Yet, early in the congressional hearings, conflicts arose over the bill among the ranks of organized labor. The effect of the impasse over the bill among advocates of workers gave Members of Congress reason for pause, which in turn gave groups in the south time to mobilize against the bill and to pressure Congress to dilute the legislation further.[45]

Though unions representing the low-paid, female-dominated garment and textile industries, namely the ACWA and ILGWU, voiced enthusiastic support for the FLSA, the AFL and the new CIO, both representing industries of mostly men workers, expressed strong reservations. The men's unions feared the law would supplant collective bargaining and thus act to weaken unions; they were leery of power vested in a national board charged with administration of the bill; and they continued to warn that a statutory minimum wage would lower the wage scale, thus affecting their own wages, which were much higher.[46] These notions were entwined with the gender ideology that upheld the "family wage." As phrased by John L. Lewis of the CIO,

> I am violently opposed to a system which by degrading the earnings of adult males, makes it economically necessary for wives and chil-

44. The treatment of the FLSA in Congress illustrates Terry Moe's observation that groups opposing a piece of legislation tend to press for fragmented procedures of administration and other features aimed at undermining the chances of the law's success. See Moe, "The Politics of Bureaucratic Structure," in *Can the Government Govern,* ed. John E. Chubb and Paul E. Peterson (Washington, DC: Brookings Institution, 1989), p. 326.

45. Perkins, *The Roosevelt I Knew,* p. 257; James MacGregor Burns, *Congress on Trial: The Legislative Process and the Administrative State* (New York: Harper & Brothers, 1949), p. 70.

46. FLSA of 1937, Joint Hearings, pp. 221, 273-74. Though AFL spokesman William Green did not address the issue directly at the June hearings, the AFL came out in staunch opposition to the FLSA at an October 1937 convention, insisting that a national labor standards board would become too powerful and undermine the strength of organized labor to engage in collective bargaining. Beginning to feel constrained by the National Labor Relations Board itself, the AFL had grown wary of boards organized by government to administer labor relations. Christopher L. Tomlins, *The State and the Unions* (New York: Cambridge University Press, 1985), p. 165. Also see Jerry Voorhis, *Confessions of a Congressman* (Garden City, NY: Doubleday & Co., 1947), p. 88; Douglas and Hackman, "The FLSA, I," pp. 508-13.

> dren to become supplementary wage earners, and then says, "See the nice income of the family."[47]

In other words, advocates of women workers strongly supported the construction of an administrative state to intervene on behalf of powerless and exploited employees. By contrast, advocates of men's unions sought to protect the political and economic agency of organized men in more secure sectors of the economy. The latter group managed to influence lawmakers to discard the original plan for administration by a Board with broad discretionary powers and to enact instead a law in which Congress set wage and hour rates and administrators were more restrained.

While the bill became bogged down amidst conflicts in the ranks of organized labor, southern forces intent on preserving the region's low-wage scale mobilized against the pending legislation.[48] Organized groups such as the Southern Pine Industry Committee, the National Association of Manufacturers, and the Chamber of Commerce swayed southern Members of Congress, especially powerful committee chairs, to oppose the bill.[49] In the Senate, the bill did not pass until it was severely watered down by the addition of numerous other exemptions. All workers involved in the first processing of food for marketing, such as in the heavily female canning industry, for example, were excluded from coverage of the law.

After numerous obstacles, the administration's bill was defeated in the House at the end of the 1937 congressional session. Roosevelt was outraged, the wage and hour bill being the first bill with his support that had failed on the House floor since early in 1933. He vowed to renew efforts for passage of the bill and asked Perkins to simplify and shorten it during the congressional recess.

Early in 1938, FDR urged Congress to pass a revised version of the bill, which proposed to create a division of wages and hours under an administrator who would appoint tripartite boards to investigate, hold hearings, and recommend wage-hours standards within the limitations of 40 cents per hour and 40 hours per week.[50] The AFL, however, continued to oppose the plan, still fearing overly broad powers vested in a federal administrator over labor matters. A legislative quagmire besieged the bill

47. FLSA of 1937, Joint Hearings, p. 275.

48. James T. Patterson, *Congressional Conservatism and the New Deal* (Lexington: University of Kentucky Press, 1967), pp. 149-54, 179-80, 196.

49. Southern Pine Industry Committee, "Effects of Black-Connery Wage and Hour Bill" (New Orleans, LA), LMDC.

50. Burns, *Congress on Trial,* p. 79.

once again. But, when southern Senate candidate Claude Pepper won a decisive victory after campaigning vigorously for the wage and hour law, the tide turned: large numbers of representatives signed the discharge petition immediately and on May 24 the House passed its Labor Committee's version of the FLSA by a vote of 314-97.[51]

The divisions within labor plagued the labor standards bill to the bitter end as the AFL continued to denounce the Senate version once the conference committee tried to iron out the vast differences between the two forms. At last, on June 11, the committee agreed on a bill providing for a single administrator within the Department of Labor, provisions for industry advisory committees, a number of exemptions, and extremely low minimum wage rates: 25 cents an hour in 1938 increasing to a maximum of 40 cents an hour by 1945. With such paltry standards, the FLSA posed almost no threat to southern industrialists who had feared they would have to close shop and was irrelevant for male union constituencies who earned far more generous wages already. The House and Senate accepted the conference report on June 14, and Roosevelt signed the act into law on June 25, 1938.[52]

Just one month later, the U.S. Women's Bureau publication, "Woman Worker" summed up the results well. The Bureau applauded the advances made for those women workers employed in industries to which the law applied, especially in the garment and textile trades. The Bureau pointed out, however, that large portions of the female labor force were exempt from the law's coverage: they noted the low-paid jobs of retail workers, laundry and dying and cleaning operatives, cannery workers, waitresses, other hotel and restaurant employees, beauty operators, agricultural laborers, household employees, and many clerical workers.[53] In short, the judicial vestiges of dual federalism had combined with the politics of New Deal federalism to exempt from coverage under national labor standards the majority of women workers in the lowest-paid jobs, leaving them to plead their case to the individual states.

51. George Brown Tindall, *The Emergence of the New South, 1913-1945* (Baton Rouge, Louisiana State University Press, 1967), pp. 534-35; Patterson, *Congressional Conservatism,* pp. 242-46.

52. U.S., Congress, House, *Fair Labor Standards Act of 1938, June 11, 1938, Conference Report,* 75th Cong., Rept. 2738; Bernstein, *A Caring Society,* p. 142.

53. U.S., Dept. of Labor, Women's Bureau, "The Federal Wage-Hour Law and Women Workers," *Woman Worker* (July 1938): 3.

III. Conclusion

The framers of the FLSA did succeed in creating a law that the Supreme Court would consider constitutional: the statute was upheld in the 1941 case *U.S. v. Darby Lumber Co.*[54] The Court, by then having a majority of justices appointed by Roosevelt, stated that the constitutionality of wage and hours legislation was beyond question and confirmed that such legislation could apply to both sexes.

But although administration leaders were jubilant to have achieved legislation that affirmed the principle of labor standards, the actual gains of the FLSA in its early years were exceedingly slim. The narrow interpretation of "interstate commerce" in the FLSA and the occupational exemptions meant that only about one-third of the work force was covered by the new law. The Department of Labor itself estimated that only 300,000 workers would see an increase in their wages under the 25 cents per hour minimum in the law's first year of implementation, with another 650,000 benefitting under the 30 cents per hour standard.[55]

Although nearly equal portions of the male and female work force were exempt from the minimum wage provisions, 64.9 percent of male employees and 67.9 percent of female employees, such exclusion had a very different meaning for women compared to men. Evaluating the wages of workers left out of the law, I found that 62.1 percent of exempt women as opposed to 35.6 percent of exempt men earned annual wages below the $800 per year baseline established in the FLSA.[56] Exemption from FLSA coverage was irrelevant for most men, in fact, except for those in agriculture, because the rest tended to earn the highest salaries offered in 1940 as professionals, businessmen, government workers, skilled craftsmen, and managers. Conversely, only those exempt women who were employed as professionals and in selected clerical and sales

54. 312 U.S. 100 (1941).

55. A. F. Hinrichs and A. Sturges, *Estimated Number of Workers in April 1939 Subject to Provisions of FLSA, Effective October 24, 1939* (Washington, DC: U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, 1939).

56. Employees working at the FLSA standards of 40 cents per hour and 40 hours per week would earn $800 a year for 50 weeks of pay. Regarding coverage under the FLSA, see U.S. Dept. of Labor, *Opinion Manual of the General Counsel, Wage and Hour Division* (Washington, DC: Government Printing Office, 1940), 1; Raymond S. Smethurst and Reuben S. Haslam, *Cases on the Fair Labor Standards Act of 1938* (Washington, DC: 1949); U.S. Dept. of Labor, *First Annual Report of the Administrator of the Wage and Hour Division, 1939* (Washington, DC: Government Printing Office, 1940); Louis Weiner, *Federal Wage and Hour Law* (Philadelphia: American Law Institute, 1977), p. 113. For a fuller discussion of the differential effects of the FLSA for men and women workers, see Mettler, "Divided Citizens," ch. 9.

jobs earned on average more than $800 per year; other women, especially those employed in the service sector, earned extremely low wages. Thus, although women had the most to gain from the FLSA, the vast majority of those who needed the benefit of a guarantee to minimum wages had been eliminated from the jurisdiction of the law.

Whereas the New Deal had incorporated working men in the newly enlarged national state through such guarantees as collective bargaining and labor standards, such reforms bore little significance for the majority of working women. Instead, women remained largely dependent on the individual states to force improvement in their working conditions. Advocates of women workers, once again led by the NCL, returned to the states and struggled over the next couple of decades to strengthen and expand labor laws that applied to low-paying service sector jobs. But the majority of state governments remained both reluctant and incapable of rising to the challenge, making such reforms hard-earned and meager at best. That story, however, lies beyond the scope of this article.[57]

Scholars of constitutional law have pointed to the *U.S. v. Darby* decision to emphasize the end of dual federalism. In a 1950 article, Edward S. Corwin observed how the Supreme Court's broad application of the "necessary and proper" clause and the "supremacy" clause in the case signalled the end of the era in which the national and state governments were understood as separate sovereignties with distinct roles in the governing process.[58] More recently, a critic of the New Deal charged that decisions such as *U.S. v. Darby* "showed that the 'internal concerns of a state' had become an empty vessel."[59] But such claims tell only part of the story. Although Court rulings of the late 1930s and early 1940s affirmed the potential of still broader definitions of "interstate commerce," in fact the individual states retained substantial powers, particularly in regard to the welfare of women and blacks who had not been incorporated into the national polity by the New Deal.

Over the decades following, Congress gradually approved broader coverage of workers under the FLSA, though the exemption of agricultural workers was not lifted until 1966, nor were most retail, service, and domestic service employees covered before 1974.[60] The congressionally approved wage standard still lags well behind inflation, so that workers in minimum wage jobs, especially women and minorities, earn wages below the poverty line.

57. See Mettler, "Divided Citizens," ch. 9.
58. Corwin, "The Passing of Dual Federalism," p. 17.
59. Epstein, "The Proper Scope of the Commerce Power," p. 1447.
60. Weiner, *Federal Wage and Hour Law,* pp. 122-34.

While federalism did indeed undergo dramatic alterations in the New Deal, the transformation was far less complete than has been claimed. Features of dual federalism persevered even as the construction of cooperative federalism began, and the functions of each became differentiated in relation to gender. The national government, with its augmented power and extended reach, found the ability to intervene in the labor conditions of working men. But although working women were most in need of a strong, centralized state to act on their behalf, the New Deal eluded them, leaving them to the realm of uneven but generally unyielding state governments.