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THE PRESENT SUPREME COURT, SOCIAL LEGISLATION
AND THE JUDICIAL PROCESS*

JEFF B. FORDHAM**

A little over twenty years ago Dean Pound penned an article on liberty of contract for the Yale Law Journal. His development of the subject, which brought the artificial character of the concept most effectively under the spotlight of analysis led to the conclusion that the courts had in this regard come to be looked upon with increasing distrust as the guardians of class interests. In the decade, 1910-1920, it seemed that the Supreme Court was out to vindicate itself as a liberal and impartial bench. But in the decade just passed a number of decisions adverse to social legislation induced the belief that Mr. Chief Justice Taft’s Court was predominantly conservative. Today with two new justices upon the Court it may not be amiss to consider the prospects for the future.

Recurring to the doctrine of liberty of contract one finds that at this day as a result of repeated adjudications the most liberal judges on the bench have been compelled to acknowledge its legal force in our system of constitutional law. Historically the case is not so clear. So far at least as the idea of personal liberty is involved liberty of contract is a comparatively new concept. The idea seems to have gained most of its force from individualistic notions of the sanctity of private property.

The English idea of the right to personal liberty has certainly never been so inclusive. In the words of Dicey: “The right to personal liberty as understood in England means in substance a person’s right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification.” We derived the concept from the English and

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*The substance of this article is taken from a paper of the same title prepared under a Sterling Research Fellowship in the Yale Law School.
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1 (1909) 18 Yale L. J. 454.
2 Brown, Due Process, Police Power and the Supreme Court, (1927) 40 Harv. L. Rev. 943, 949. It is not intended to suggest that Mr. Justice Holmes, for example, attributes any great significance to the phrase, established precedents notwithstanding. He is concerned with the adjustment of clashes between individual and public interests. It is with respect to this social problem that liberty of contract has meaning for him.
3 See Pound, loc. cit. supra n. 1, at 482 et seq.
there is little reason to believe that the framers of the fifth and fourteenth amendments put any greater content into the term, liberty, than the English idea of freedom from physical restraint. That function remained for a minority element of the Supreme Court composed of Mr. Justice Bradley, Mr. Justice Field and Mr. Justice Harlan to whom the individualistic concepts of liberty and property were key principles of our jurisprudence. Mr. Justice Peckham came in for a share of glory in the triumph of the doctrine.

The primary development of which liberty of contract is one branch has been the application of the due process clause as a test of the constitutionality of statutes in the domain of substantive law. Here again a case can be made that this application of a phrase is unhistorical. The very phrase itself suggests formal procedural matters. Mr. Justice Brandeis has stated the situation: "Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the states." It is likely that the courts would have found some other constitutional provision under which to test the validity of substantive legislation had the due process clause never been drafted for the purpose. In his dissenting opinion in the Slaughter House Cases Mr. Justice Bradley made an argument that the legislation in question violated the privileges and immunities clause.

These developments have been outlined in order to suggest the extreme importance of the factor of judicial personnel in cases

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Certainly when the Fifth Amendment was drafted American society was so far untouched by any such force as the industrial revolution as to have conditions to suggest any such concept as the liberty of contract of Mr. Justice Field. And the Fourteenth Amendment was, it appears, directed at concrete issues of the day as well as the rendering of the first eight amendments applicable to the states. Flack, The Adoption of the Fourteenth Amendment, (1908), 94; cited by Brown, loc. cit. supra n. 2, at 946.

The triumph of the doctrine was embodied in the case of Lochner v. New York, 198 U. S. 45, 29 S. Ct. 539, 3 Ann. Cas. 1113 (1909). The antecedent development is suggested by Professor Felix Frankfurter in his article, Mr. Justice Holmes and the Constitution, (1927) 41 Harv. L. Rev. 121, at 141-142, and footnote 50.


16 Wall. 36, 112 et seq., 21 L. ed. 394 (1872).
involving constitutional questions. There is probably no single case which better illustrates this point than the famous minimum wage case. Professor Thomas Reed Powell has demonstrated that only the fortuitous course of events prevented there being five members at the time favorable to minimum wage legislation.

The position of the Supreme Court in cases involving social legislation has become increasingly difficult as the social problems of modern legislatures have become more complex and more knotty. The state legislatures necessarily must engage in a form of social experimentation in attempting to adjust problems peculiar to modern conditions. They have fact-finding agencies and facilities to aid them in estimating a supposed evil and planning its eradication. Their members come directly from the people at large and often are personally familiar with the conditions sought to be remedied. Courts, on the other hand, are not investigators. They simply decide controversies as presented by the parties. Moreover, primary questions of policy are not considered to be within the judicial perview. One would suppose that such considerations might be calculated to render a court unwilling to declare a statute unconstitutional except in the clearest sort of case. The position of the courts is a difficult one even were this supposition entirely reliable. With the power of judicial review they are the ultimate arbiters in balancing class interests as well as particular interests.

The old notion that competition is the life of trade still lives on in the minds of legislators and judges as a fundamental economic truth. We have legislative props to support an economic theory the very import of which denies the need of such support, that is, the competitive system is theoretically self-regulatory. Moreover, along with anti-trust laws and the judicial disapproval thereunder of private agreements to boost prices on the one hand we have on the other governmental agencies actively buying wheat on the market in order to maintain prices. The administration operates consistently under no one economic theory in these matters. Naturally there is a difference of opinion upon great economic questions. What is to be deprecated here is the fact that judges often neglect to consider a statute independently of their personal economic views and infuse them into their opinions as

though, for instance, the Constitution ordains the competitive system.

And yet all are agreed that no matter what economic system seems to them ideal there is a point where a business becomes of sufficient public concern that it may be subjected even to price regulation. Just when a business takes on such a character is an inquiry to which no certain criteria have been attached. In the first place some judges consider the inquiry itself a judicial one while others recognize therein what is primarily a function of the legislative body.

The very phrase, affected with a public interest, only suggests legal consequences and renders little assistance in settling a given case. This is illustrated most effectively by the attitudes of several of our Supreme Court Justices toward the phrase. In *Williams v. Standard Oil Company* in which it was held that the business of selling gasoline was not so affected with a public interest as to justify governmental price fixing Mr. Justice Sutherland in his majority opinion felt called upon to define the phrase. He stated that it means "that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public". This was a repetition of his definition in the Tyson case, which he formed by rephrasing a statement made by Mr. Chief Justice Waite in *Munn v. Illinois*. His own language is the best criticism of his definition. "This phrase, first used by Lord Hale 200 years ago it is true, furnishes at best an indefinite standard and attempts to define it have resulted generally, in producing paraphrases, which themselves require elucidation." We await the elucidation.

Mr. Justice Holmes, on the other hand, does not take this set of words so seriously as to undertake the task of defining it. In his dissent in the Tyson case he asserted that "the notion that a business is clothed with a public use is little more than a fiction

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14 94 U. S. 113, 126 (1876). "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."
intended to beautify what is disagreeable to the sufferers. The truth seems to me to be that, subject to compensation where compensation is due, the legislature may restrict or forbid any business when it has a sufficient force of public opinion behind it.'" This fires the imagination but it remained for Mr. Justice Stone calmly to dispose of the phrase. He too found the Tyson case an occasion to attack the expression. He said: "The phrase 'business affected with a public interest' seems to me too vague and illusory to carry us far on the way to a solution. . . . To say that only those businesses affected with a public interest may be regulated is but another way of stating that all businesses which may be regulated are affected with a public interest". Mr. Justice Stone would draw his criterion from past decisions. "An examination of the decisions of this Court in which price regulation has been upheld will disclose that the element common to all is the evidence of a situation or combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community."

In the latest case before the Court Mr. Justice Brandeis, writing the opinion of the Court, relied upon the factor of monopoly in upholding the regulation of the rates of marketing agencies in the Omaha Stockyards. But he did not insist that this would be an essential factor in every case. He, in fact, passed over the matter of the public character of the business with little comment to devote most of his discussion to the procedural aspects of the case. This may tend to explain the fact the case was decided by a unanimous court and suggest that Mr. Justice Brandeis is more concerned with results than with language.

It is just where courts are faced with questions of this sort that the factor of judicial personnel in the decision of cases is most important. It is believed that only in a secondary sense ought judges to participate in formulating matters of policy but this function makes a heavy demand upon judicial statesmanship. One may reasonably expect that the social and economic views of most judges influence their votes in this sort of case. Each new case

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17 Tyson v. Banton, supra n. 14, at 273 U. S. 446.
18 Ibid., at 451.
19 Ibid., at 451-452.
more nearly stands upon its own bottom than is the situation in any other branch of our jurisprudence. There is a correspondingly greater want of certainty in the law, that insistent \textit{dasideratum} of the business world. If one would predict what the Court would decide upon a given state of facts within the present field, which business of prediction is the everyday function of the lawyer, he should consider the implications of the factor of judicial personnel.

In the following pages it will be sought without any effort to ransack the minds of the judges to gather from their opinions some conception of the way they severally approach the decision of constitutional cases involving legislation of a more than common social character.

\textbf{I}

No case affords a better starting block, as it were, than that of \textit{Burns Baking Company v. Bryan}.\textsuperscript{2} It alone almost suffices to present the approaches of Mr. Justice Brandeis and Mr. Justice Butler. A Nebraska statute provided that every loaf of bread made for purpose of sale, or offered for sale in the state should weigh one-half pound, one pound, a pound and a half, or exact multiples of one pound. Loaves of any other weights were prohibited but a tolerance of two ounces in excess of the standard weights was allowed. Whether the standard was satisfied was to be ascertained from the average weight of any twenty-five loaves, which was not to exceed the maximum or be less than the minimum weights. This was an action by four bakers and a retail grocer against the Governor and Secretary of State to enjoin the enforcement of the act on the ground that it violated the due process clause of the Fourteenth Amendment.

In the majority opinion Mr. Justice Butler stated the problem, significantly enough, to be this: "Constitutional protection having been invoked, it is the duty of the court to determine whether the challenged provision has reasonable relation to the protection of purchasers of bread against fraud by short weights and really tends to accomplish the purpose for which it was enacted." It will be observed that this statement declares the judicial function to extend to the primary consideration of the policy of the statute, in short, to decide the case upon the basis of its own opinion as to the reasonableness and appropriateness of the statute.

\textsuperscript{2}264 U. S. 504, 44 S. Ct. 412, 32 A. L. R. 661 (1924).
Upon considering the evidence as preserved in the record the learned Justice found that variable factors in the baking of bread rendered the exact weight of loaves of bread beyond the control of bakers without the use of waxed papers as wrappers. But the act was not a sanitary measure and there existed a strong demand for unwrapped bread. Unwrapped bread, he asserted, was a wholesome article of food. Therefore, it was unreasonable to require, in effect, that bread be wrapped in order to effect the purpose of the act, the prevention of fraud as to the weight of bread.

His next step was to conclude that the statute was not calculated to effect its object since there was no evidence of any deception and it was contrary to human experience that there should be any deception as to the weight of a loaf of bread. This last assumption, of course, assumes the whole answer to the question before the Court and is inconsistent with the Schmidinger case,22 which Mr. Justice Butler approved. If it were unreasonable to assume that there could be any deception as to the weight of bread then the statute failed even of a proper object.

Mr. Justice Butler’s point that the act was not a sanitary measure was especially neat but not so sound. It is a matter of common knowledge that most bakers wrap their bread, which tends to show that to require all to do so would be no very great burden. If the purpose of the statute was a proper subject of legislative action, as the Supreme Court had previously decided in the Schmidinger case, it would seem that the legislature might resort to any not too onerous means to effect its purpose.

In dissenting Mr. Justice Brandeis did not undertake to decide whether the statute was reasonable but concerned himself with whether “the prohibition of excess weights could reasonably be deemed necessary”. Though insisting that there was ample evidence in the record to sustain the statute he declared that in cases of this character the Court should not feel itself confined to the record but should feel free to resort as by judicial notice to any relevant data tending to present the situation which evoked the legislation in question and the accrued actual and experimental

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22 Schmidinger v. Chicago, 226 U. S. 538, 33 S. Ct. 182, Ann. Cas. 1914B, 284 (1913). A Chicago ordinance provided that every loaf of bread made or procured for the purpose of sale or sold in the city should weigh one pound. Sales could be made in half, one and one-half, double, triple, quadruple, quintuple and sextuple loaves and no other way. Every loaf was to bear a label giving its weight and specifying whether it was standard size. The ordinance was upheld despite the fact that it caused considerable inconvenience to the bakers.
experience of the public and specialists therewith. And following this tack he collected much data and made footnote references to more which included reports and opinions, official and unofficial, as well as the experience of Nebraska and other states with the problem attacked by the statute. This data convinced him that the legislature might reasonably have believed that the excess weight provision not overburdensome with respect to the object of the statute and reasonably conducive to that end.

In the Schmidinger case the Supreme Court had upheld a minimum weight provision in a Chicago ordinance. Mr. Justice Brandeis here relied upon that case as an authority. He found that the maximum weight provision was aimed to prevent the selling of an overweight loaf of one standard size as a loaf of a heavier standard and further that experience showed that the prohibition of excess weights was an administrative necessity to the prevention of short weights. The majority opinion here simply cited the Schmidinger case for the proposition that the police power may be exerted "to protect purchasers from imposition by sale of short weight loaves" and passed it by.

Mr. Justice Brandeis concluded his opinion with the following pertinent observation upon the action of the majority: "To decide as a fact that the prohibition of excess weights 'is not necessary for the protection of the purchasers against imposition and fraud by short weights'; that it 'is not calculated to effect that purpose'; and that it 'subjects bakers and sellers of bread' to heavy burdens, is, in my opinion, an exercise of the powers of a super-legislative—not the performance of the constitutional function of judicial review." This searching criticism relates to the nature of the judicial process in the function of judicial review. A word should be devoted to the content of that doctrine before we proceed.

The conception of judicial review embodied in the Brandeis opinion in the baking company case might be called the classical conception thereof. No one has given it more effective and able expression than James B. Thayer. In his words the function of the courts in judicial review is thus set forth:

"If their duty was in truth merely and nakedly to ascertain the meaning of the text of the constitution and of the impeached Act of the legislature, and to determine, as an

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22 See his article, The Origin and Scope of the American Doctrine of Constitutional Law, (1893) 7 HARV. L. REV. 129.
academic question, whether in the court's judgment the two were in conflict, it would, to be sure, be an elevated and important office, one dealing with great matters, involving large public considerations, but yet a function far simpler than it really is. Having ascertained all this, yet there remains a question—the really momentous question—whether, after all, the court can disregard the Act. It cannot do this as a mere matter of course—merely because it is concluded that upon a just and true construction the law is unconstitutional. That is precisely the significance of the rule of administration that the courts lay down. It can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question."

As so conceived judicial review is not a matter of a court giving its own opinion directly as to the validity of legislative action but is the secondary function of deciding whether the legislature might reasonably have deemed its action constitutional. This view Thayer applied to judicial review of the acts of co-ordinate departments. With respect to a paramount authority reviewing the acts of a department not co-ordinate, as would be the case of a federal court considering the validity of a state statute under the federal constitution, however, he conceived that the court must rely upon its own opinion as to constitutionality in order to allow the federal constitution nothing less than its just and true interpretation. At this juncture we would part with Thayer to follow Mr. Justice Holmes, who makes no such distinction. It is believed that this distinction at best should be limited to the constitutional questions arising in connection with the distribution of governmental powers between the federal and state governments. This would leave cases arising under the Fourteenth Amendment within the general principle. They do not involve the paramount authority of the federal government.

Recurring to the approach of Mr. Justice Butler we find a more recent case in which he seems to give effect to the classical conception of judicial review. *Highland v. Russell Car Company* involved the validity of the provisions of the Lever Act authorizing the President to fix the price of coal during the war. The statute was upheld under the war power. Mr. Justice Butler asserted: "the measures here challenged are supported by a strong presump-

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24 Ibid, at 143-144.
tion of validity, and they may not be set aside unless clearly shown to be arbitrary and repugnant to the Constitution." He pointed out that the price which the President had set had not been shown to be less than the price at which coal was subject to requisition by the government. Then followed the disappointing conclusion that the act could, therefore, be deemed to have deprived the plaintiff coal dealer only of the opportunity to sell his coal for more than it was worth, as if coal or any other commodity had any intrinsic value. This is an interesting sidelight upon the economic views of the spokesman.

As in the Burns Baking case so in *Di Santo v. Pennsylvania* the majority was represented by Mr. Justice Butler and the minority by Mr. Justice Brandeis. Here one gets a view of Mr. Justice Butler's matter-of-fact, syllogistic method of disposing of cases involving the commerce clause of the federal Constitution. He conceives that all direct state burdens upon interstate or foreign commerce are invalid, inquires in the given case simply whether there has been such a direct burden imposed and, if he so finds, proceeds to the conclusion that the state action is invalid. In the *Di Santo* case the defendant was indicted for violating a Pennsylvania statute, which required those engaging in the sale of steamship tickets first to procure a license, to make publication of application for licenses, to give proof of good moral character and to give bond in the penal sum of $1,000 against fraud or misrepresentation to purchasers. Mr. Justice Butler in a terse opinion found the statute to be a direct burden upon foreign commerce, which, of course, settled the case under his view of the law. Selling passenger steamship tickets is a well known part of foreign commerce. This statute operated directly to interfere with this business and thus with foreign commerce. The fact that it was a police measure to prevent fraud was immaterial. Congress has complete authority to regulate foreign commerce and thus is the proper body to act in that regard.

In dissenting Mr. Justice Brandeis recognized the major premise of the majority, that a state may not directly burden foreign commerce, as a statement of the applicable rule. But he had a different notion of the content of those words. He first noticed the purpose of the act, to protect people of small means,

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27 273 U. S. 34, 47 S. Ct. 267 (1927).
28 It is worthy of note that Mr. Justice Butler had occasion to urge these views as counsel in the Minnesota rate cases, 230 U. S. 352, 33 L. ed. 729 (1913).
largely immigrants, who were the prey of predatory steamship ticket agents. The statute was, then, a police measure not sought to regulate foreign commerce. The transaction immediately regulated, the purchase of steamship tickets was an intra-state affair, as much so as a purchase of land. Foreign commerce was, thus, affected indirectly only. Attention was directed to instances in which more marked interferences with interstate or foreign commerce by state police regulation had been upheld. Though Congress could have acted it had not "occupied the field". Moreover, the law was proper state action as an inspection law. As for a case cited by the majority as a controlling precedent he insisted that the doctrine of *stare decisis* did not command that the court err a second time and that in the construction of a different statute. In such matters as drawing the line between federal and state authority over commerce the process is one of trial and error. And mistaken decisions should not be followed. "In the case at bar . . . the logic of words should yield to the logic of realities".

In this manner did he obviate the result of a rigid application of a verbal formula; he gave that formula a meaning consistent with facts, the facts which invoke legislation and upon which it is to operate. He applied, in effect, the idea which Mr. Justice Stone proceeded to set out expressly, namely, that the test of the majority was too mechanical, a legal conclusion rather than a formula by which it is reached, which should give way to the inquiry whether upon all the circumstances the interference is of peculiarly local concern not infringing freedom of commerce. Social problems require what is at best sort of experimentation by legislatures. There is not necessarily a best way or only one proper way. This factor of trial and error, thinks Judge Brandeis, should not be disregarded by the courts.

Again Mr. Justice Butler spoke for the majority and Mr. Justice Brandeis registered a dissenting vote in the case of *Quaker City Cab Company v. Pennsylvania*.\(^{20}\) A Pennsylvania statute imposed a tax upon the gross receipts of transportation companies from business done wholly within the state. No such tax was imposed upon individuals or partnerships engaged in the same business as were competitors of the defendant cab company. In the state court the State recovered the tax due under the terms of the statute. Mr. Justice Butler was evidently pleased with

\(^{20}\) *Supra* n. 26, at 273 U. S. 42-43.
\(^{27}\) 277 U. S. 389, 48 S. Ct. 553 (1928).
the argument of Mr. Owen J. Roberts, of counsel for defendant, 
since the line of his reasoning is traceable in the opinion of the 
Court. It was reasoned that the tax was not of a character peculiar 
to corporations such as are capital stock taxes but the classification 
was based solely upon the character of the persons taxed. "The 
discrimination is not justified by any difference in the source of 
the receipts or in the situation or character of the property em-
ployed". The conclusion was that the tax violated the equal 
protection clause of the Fourteenth Amendment. The classifica-
tion was decried in no uncertain terms. "In no view can it be 
held to have more than an arbitrary basis." The writer would 
submit that the very advantages of the corporate form of doing 
business might have been deemed a reasonable basis for classifica-
tion. A corporation is nothing more than a convenient device for 
the purposes of its members. They are the parties in interest. The 
statute simply put an added tax upon persons doing the business 
in question when they chose to do it under the corporate form. A 
state might abolish the corporate form entirely for the future if it 
saw fit.

Mr. Justice Brandeis noticed this distinction. After stating 
the minimum requirement of the Constitution, that the classifica-
tion be reasonable, that is, "one" which an informed, intelligent, 
just-minded, civilized man could rationally favor", he pointed out 
that it was rather customary to discriminate unfavorably against 
corporations in tax matters. The form of the tax, he urged, was 
immaterial. The amount of this tax might with facility have been 
included in a correspondingly swollen franchise tax. So he con-
cluded in true Holmsian fashion that there was nothing in the 
Constitution forbidding the discrimination.

It is not to be supposed upon the basis of the cases discussed 
above without looking further that Mr. Justice Brandeis is in-
capable of a legalistic opinion. As a matter of fact he is quite an 
artist at that character of judicial composition. It is one of his 
tools, so to speak. Thus he will insist upon jurisdictional deficien-
cies on occasion while Mr. Justice Holmes is dissenting upon the 
merits, as in Pennsylvania v. West Virginia." Moreover, he is 
adept at distinguishing past decisions invoked as precedents.**

**262 U. S. 553, 43 S. Ct. 658 (1923).
**Notice the case of Bedford Cut Stone Co. v. Journeymen Stone Cutters’ 
Ass’n., 274 U. S. 37, 47 S. Ct. 522 (1927). In his dissenting opinion Mr. 
Justice Brandeis distinguishes the earlier case of Duplex Printing Press 
Co. v. Deering, 254 U. S. 443, 41 S. Ct. 172, 16 A. L. R. 196 (1921) with 
particular nicety.
As for his economic views his opinions and votes as a member of the Court would classify him neither as an antagonist of big business\textsuperscript{23} nor one indifferent to the situation of the little fellow.\textsuperscript{24} It is true that his great zeal to see justice done renders him sympathetic to the situation of those who feel the crush of economic oppression. Only in this sense could it be said that he takes sides. He is not opposed to large-scale capitalistic enterprise \textit{per se}. He is not a\textit{laissez-faire} philosopher. Rather does he speak the language of modern economists who sense the place of public agencies of regulation and control in the present industrial order.

Mr. Justice Butler, so far as his opinions indicate, is simply representative of the older, more legalistic school of judges. He has adhered to that economic individualism which is the rational handmaid of big business. And his opinions evince a firm belief in federal supremacy. The writer would venture to conclude that both he and Mr. Justice Brandeis are pragmatists, but to different ends.

II

The short period which has elapsed since Mr. Chief Justice Hughes ascended to his place at the head of the bench has not been too short to throw some light on his judicial work from the standpoint of the present inquiry. Before examining opinions written

\textsuperscript{23} In the American Column and Lumber Co. case, 257 U. S. 377, 42 S. Ct. 114, 21 A. L. R. 1093 (1921) we find him dissenting in behalf of the legality of trade associations under the anti-trust laws. In probably the two decisions of the Court most liberal to monopoly, those in United State v. United States Steel Corp., 251 U. S. 417, 40 S. Ct. 293, 8 A. L. R. 1121 (1920) and United States v. United Shoe Machinery Co., 247 U. S. 32, 38 S. Ct. 473 (1917) neither Mr. Justice Brandes nor Mr. Justice Stone took any part.

\textsuperscript{24} In upholding what the writer would term a secondary boycott, but which Mr. Justice Brandeis would not so denominate, he expressed himself as follows in dissenting in the Bedford Stone Cutters’ case: “The Sherman Law was held in United States v. United States Steel Corp. to permit capitalists to combine in a single corporation 50 per cent of the steel industry of the United States, dominating the trade through its vast resources. The Sherman Law was held in United States v. United Shoe Machinery Co. to permit capitalists to combine in another corporation practically the whole shoe machinery industry of the country, necessarily giving it a position of dominance over shoe-manufacturing in America. It would, indeed, be strange if Congress had by the same act willed to deny members of a small craft of workingmen the right to co-operate in simply refraining from work, when that course was the only means of self-protection against a combination of militant and powerful employers. I cannot believe that Congress did so.”

In these remarks one senses a strong sympathy for the underdog. Mr. Justice Brandeis did not participate in the Steel Corporation case because he had expressed an opinion in the matter before the case arose.
by him as Chief Justice consideration should be given to his career as an Associate Justice of the Supreme Court from October 10, 1910 till June 10, 1916.

It will be recalled that in the debate in the Senate over the confirmation of the Chief Justice objection was made that he was a conservative and one who as a lawyer had served as guardian of the interests of big business. It must be granted at once that a man’s professional associations may be expected to have some influence upon his economic and social views. But it is scarcely arguable that the years of corporation practice which followed the tenure of the present Chief Justice as Associate Justice of the Supreme Court have so remolded his views as to render reference to his earlier judicial career valueless. The fact that he has served as an executive officer of the federal government is a reminder that he knows the point of view of the political branches of the government as well as the non-political branch.

During the period, October 10, 1910 till June 10, 1916 the Supreme Court decided 210 cases involving the due process clause of the Fifth and Fourteenth Amendments. This includes every type of due process question. In 28 of these cases it was held that due process had been denied. Of these cases only 13 may be said to have involved social legislation. And in only one of the entire 210 did Mr. Justice Hughes dissent. He conurred in the dissenting opinion of Mr. Justice Day in *Coppage v. Kansas,* wherein it was decided that a Kansas statute prohibiting yellow dog contracts was an unconstitutional impairment of freedom of contract. In only two of these 28 cases did Mr. Justice Hughes write the opinion of the Court and in both instances the question related to alleged confiscatory railroad rates.

None of the cases in which social legislation was invalidated except the *Coppage* case were of very wide significance and eight were of quite narrow scope. Four of them involved a Kentucky anti-trust law, which, as construed by the state court, made illegal combinations entered into for the purpose of controlling prices with the effect of fixing a price greater or less than the real value of the commodity. The statute was held invalid for uncertainty.

236 U. S. 1, 35 S. Ct. 240 (1915).
26 Northern Pacific Railway Co. v. North Dakota, 236 U. S. 585, 35 S. Ct. 429, L. R. A. 1915F, 748 (1915); Norfolk and Western Ry. Co. v. Conley, 236 U. S. 605, 35 S. Ct. 437 (1915). It was Mr. Justice Hughes who wrote the opinion of the Court in the Minnesota rate cases, *supra,* n. 29.
since there was no standard set up by which to ascertain what prices would have been had there been no combination and thus parties could not know when they were violating the law.\textsuperscript{23} The decision has no bearing upon the merits of anti-trust legislation in general. The nature of the remaining four cases is suggested in the footnote.\textsuperscript{20}

On the other hand there were many notable decisions upholding social legislation in this period. Space permits footnote reference only to the bulk of them.\textsuperscript{26} It may fairly be said that the period was one during which the Court was favorably disposed toward social legislation when much legislation of that character was presented to it for review.

The opinion in the oft-cited McGuire case was written by Mr. Justice Hughes.\textsuperscript{41} An Iowa statute abolishing the fellow-servant rule as to railroad companies provided that in no case should a

\textsuperscript{23} International Harvester Co. v. Kentucky, 234 U. S. 216, 34 S. Ct. 853 (1914).

\textsuperscript{20} Southwestern Telegraph & Telephone Co. v. Danaher, 238 U. S. 482, 35 S. Ct. 886 (1915). A statute construed to authorize the imposition of a penalty upon a telephone company for refusing service to patrons who were in arrears for past services was held to take property without due process of law. The opinion by Mr. Justice Van Devanter is quite a good one. In N. Y. Life Ins. Co. v. Head, 234 U. S. 149, 34 S. Ct. 879 (1914) a Missouri statute providing against forfeiture of insurance policies for default in premiums or loans made against policies was held unconstitutional as applied to policy contracts entered into in New York by nonresidents. The same result was reached in a case of the same caption involving the same statute. 234 U. S. 166, 34 S. Ct. 883 (1914). A Texas statute making it a misdemeanor to serve as a conductor on a railroad train without having served for two years as a freight conductor or as a brakeman was found to violate the liberty of contract of those who had not had the experience required by the statute in Smith v. Texas, 233 U. S. 630, 34 S. Ct. 681 (1914).

\textsuperscript{26} They include Noble State Bank v. Haskell, 219 U. S. 104, 31 S. Ct. 156 (1911), (compulsory guaranty by banks of deposits); German Alliance Ins. Co. v. Hale, 219 U. S. 307, 31 S. Ct. 246 (1911), (public fixing of insurance rates); Schmidinger v. Chicago, supra n. 21, (fixing by ordinance the size of loaves of bread); Riley v. Massachusetts, 233 U. S. 571, 34 S. Ct. 469 (1914), (maximum hours for women set by statute penalizing their employment at other times than that posted in a conspicuous place); Keokoo Consol. Coke Co. v. Taylor, 234 U. S. 224, 34 S. Ct. 856 (1914), (requiring wage orders to be redeemable in money); Rail and River Coal Co. v. Yaple, 236 U. S. 335, 35 S. Ct. 359 (1915), (anti-screen law requiring payment of wages of miners to be based on weight of coal before sifting); Patsone v. Pennsylvania, 232 U. S. 138, 35 S. Ct. 142 (1915), (game law making possession of firearms by aliens unlawful); Miller v. Wilson, 236 U. S. 373, 35 S. Ct. 342 (1915), (eight hour day for women); Heim v. McCall, 259 U. S. 175, 36 S. Ct. 78 (1916), (statute preferring New York citizens as workers in construction of public works); Erie R. Co. v. Williams, 233 U. S. 685, 34 S. Ct. 766 (1914), (statute requiring semi-monthly payment of wages of railway workers).

railroad plead as a defense to an action under the statute any benefit or insurance relief contract entered into before the date of the injury. In this action by an employee arising out of injuries received in the course of his employment the statute was invoked to preclude the defendant company from pleading the acceptance by plaintiff of benefits from its relief department. Mr. Justice Hughes granted at once that liberty of contract in the sense of the absence of arbitrary restraint and not absolute liberty was guaranteed by the Constitution. Turning to the decisions he adduced a general principle, that legislative action is bad if arbitrary and without reasonable relation to a purpose government is competent to effect. Conceiving that there was no question but that the state might abrogate the common law fellow-servant rule he found it a ready step to conclude that the legislature had power to forbid any contracts in derogation of the statute. This is the argument that where there is power to do an act there is also the incidental power to do those things necessary to render that act effective. The approach to the question was an entirely abstract inquiry as to the power of the legislature to enact the challenged statute.

With respect to the function of the courts in these cases Mr. Justice Hughes had this to say:

"Where there is a reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry concerning the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

This passage has been lately justly criticized. The learned justice no doubt meant not that a statute is not subject to judicial review unless it has no reasonable relation to a proper purpose but that it is subject to adverse judicial action only where it has no reasonable relation to a proper legislative object. Obviously a court must review a statute in order to ascertain in the first place whether it might reasonably be deemed by the legislature a

Note (1930) Col. L. Rev. 360, 363.
proper means to effect a legislative end. The language used is unfortunate, to say the least. It was not entirely accurate to say that in judicial review courts are not concerned with the policy of legislation but only with the power of the legislature to enact it. In considering the question of power the inquiry is not an abstract one of the construction of a written instrument but the marking out of outer bounds of the range of legislative action. This cannot be done without considering, in a secondary capacity it is true, the social basis and policy of particular enactments.

In *Price v. Illinois* the Supreme Court was concerned with the validity of an Illinois statute which prohibited the use of boric acid in fruit preservatives. Mr. Justice Hughes wrote the opinion of the Court upholding the statute. He declared that to overthrow the statute it must appear that it be an arbitrary interference with the property and liberty of the citizen. "It is plainly not enough that the subject should be regarded as debatable. If it be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury upon the issue which the legislature has decided." This statement marks an adherence to the classical conception of judicial review.

The McGuire opinion is, as suggested, an abstract inquiry into legislative power. There was no searching of the factual background of the legislation. And yet by a strictly legalistic approach what is generally conceived to be a desirable result was reached.

Another legalistic opinion of the present Chief Justice sheds light upon his views, as of 1911 at least, of the federal anti-trust laws. In *Dr. Miles Medical Co. v. John D. Park and Sons Co.* the Supreme Court held that resale price-fixing with respect to patent medicines violated the Sherman Act and was a common law restraint of trade as well. In speaking for the majority Mr. Justice Hughes first noticed the contention that since a manufacturer was not compelled to produce at all he might fix the resale price of his product when he did produce. This, he thought, was a *non sequitur* since a seller might not impose upon a purchaser any restraint he sees fit. Whatever right the manufacturer had did not depend upon his original ownership but upon contract. The validity of the contract was based upon the familiar test of its reasonableness with respect to the interests of the parties sought to be protected and the interest of the public at large.

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220 U. S. 373, 31 S. Ct. 376 (1911).

238 U. S. 446, 35 S. Ct. 892 (1915).
quoting from a famous English case. Here if dealers had by agreement with each other adopted the same price restriction as fixed by the manufacturer thereby achieving the same result such would have been unlawful price-fixing as settled by authority. From this it was reasoned that the manufacturer's resale price-fixing agreement with dealers could "fare no better". So followed the conclusion: "The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

This clever but unreal chain of reasoning may well be contrasted with the analysis of Mr. Justice Holmes, who dissented. He supposed that the right of one to fix the resale price of a single isolated article would hardly be denied. But the fact that there was a general scheme of resale price-fixing with the object of fixing the market price was not enough to render the contract unquestionably bad. By the simple device of making dealers agents in law as well as in fact the manufacturer could effect his purpose without danger of successful attack. This being so why attack the device used. The force of the agency suggestion has since been demonstrated in the General Electric case in which Mr. Chief Justice Taft swallowed it either deliberately or by the hook and sinker method, since at all events the arrangement in question was upheld as an agency. Mr. Justice Holmes, who concurred in that case, did not concern himself with objecting to the reasoning of the Court, no doubt since he was satisfied with the result in favor of resale price-fixing.

In the instant case the following remarks from him are peculiarly revealing and equally as effective:

"I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article as fixing a fair price. What really fixes that is the competition of conflicting desires. We, none of us, can have as much as we want of all the things that we want. Therefore we have to choose. As soon as the price of something that we want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. Of course, I am speaking of things that we can get along without. There may be necessaries that sooner or later must be dealt with like short ration in a shipwreck, but they are not Dr. Miles's Medicines. With regard to things like the latter, it seems to me that the point of most

profitable returns marks the equilibrium of social desires, and
determine the fair price in the only sense that I can find
meaning in those words. . . . I see nothing to warrant my
assuming that the public will not be served best by the com-
pany being allowed to carry out its plan. I cannot believe
that in the long run the public will profit by this court per-
mitting knaves to cut reasonable prices for some ulterior pur-
pose of their own, and thus to impair, if not to destroy, the
production and sale of articles which it is assumed to be de-
sirable that the public should be able to get.\textsuperscript{47}

This passage leaves no one in doubt about the views of the
writer on resale price-fixing. The application of the term, knaves,
to price-cutters is strong language. But whether one agrees with
the economic views of Mr. Justice Holmes or not, it is submitted
that his opinion is more satisfying than that of the majority. In-
stead of simply assuming that resale price-fixing is not opposed to
the public interest he suggested considerations which led him to
that conclusion. Mr. Justice Brandeis would probably have gone
farther to assemble statistical data in support of his conclusion
had he been writing an opinion in the case.

On March 12, 1930 the Supreme Court decided that the provi-
sion of the Ohio Constitution requiring a vote of six to one by
the members of the State Supreme Court to overthrow a statute as
unconstitutional was not a denial of due process or equal protection
under the Fourteenth Amendment.\textsuperscript{48} The opinion of the Court was
rendered by Mr. Chief Justice Hughes. The case was not a diffi-
cult one since, as pointed out in the opinion, a right of appeal is
not essential to due process. But the case reflects an important
development, the constitutional limitation of judicial review.\textsuperscript{49}

In another case readily disposed of the Chief Justice spoke
for the Court in favor of a Louisiana statute providing free school
books for all school children, whether pupils in public or private
schools.\textsuperscript{50} The state court found the statute one in aid of the school
children and not the schools in which they were instructed. Adopt-

\textsuperscript{47}At 220 U. S. 412.
\textsuperscript{48}State of Ohio \textit{ex rel.} Bryant \textit{v.} Akron Metrop. Park Dist., 281 U. S.
74, 50 S. Ct. 228 (1930).
\textsuperscript{49}The device embodied in the Ohio Constitution to limit judicial review
was discussed by Mr. Justice Stone in an address before the American Bar
Association, \textit{Fifty Years Work of the United States Supreme Court}, (1928)
14 A. B. A. JOUR. 428, 8 ORE. L. REV. 248. And see the address of Attorney
General Lee of West Virginia before the State Bar Association evincing
great anxiety over this idea, \textit{Radicalism and the Constitution, Reports of
the West Virginia Bar Association} (1930), p. 273, 287 et seq.
\textsuperscript{50}Cochran \textit{v.} Louisiana State Board of Education, 281 U. S. 371, 50 S. Ct.
335 (1930).
ing this interpretation the Supreme Court upheld the conclusion of the state court that the purpose of the appropriation was a public one, public education, and not for the benefit of private parties as objected by taxpayers.

In *Corporation Commission of Oklahoma v. Lowe*\(^{21}\) Lowe had obtained an injunction in the court below restraining the Commission from issuing a license to the Farmers Union Cooperative Gin Company to construct and operate a cotton gin at P. Under statute cooperatives such as the gin company were empowered to apportion certain of the profits of their business among the patron members according to the amount of their sales to and purchases from the company. The directors, if authorized by the by-laws might allow non-members to participate in this part of the profits on a similar basis as members. Lowe contended that these provisions enabled the cooperative to carry on business on more favorable terms than he could as operator of a ginning business since the company would be compelled to grant rebates to its patron members, though a public utility, while he was prohibited from making rebates. In short, he insisted that he had been deprived of the equal protection of the laws. It was true that the ginning business was a public utility in Oklahoma. Rates were fixed by the defendant Commission.

Upon the oral argument counsel for the Commission contended that under the law of the state Lowe was not prohibited from making rebates. They argued, moreover, that the authorized profit distribution was not a rebate. Lowe was unable to show that the law of Oklahoma denied him the privilege granted the cooperatives. On this basis the Court, in an opinion by the present Chief Justice, decided that Lowe had not made out his contention that he had been deprived of the equal protection of the law. It was deemed unnecessary to consider the question whether the privilege granted the co-operative was a privilege to make rebates.\(^{22}\) The

\(^{21}\) 281 U. S. 431, 50 S. Ct. 396 (1930).

\(^{22}\) The reasoning in the case is misconceived in the discussion by GREGORY HANKIN AND CHARLOTTE HANKIN, PROGRESS OF THE LAW IN THE U. S. SUPREME COURT, 1929-1930, pp. 112 et seq. The authors are quite accurate, however, in indicating that assuming equality of legal privilege the cooperative would still have a distinct economic advantage particularly by reason of greater ability to raise capital through a sort of customer ownership. But this is no greater objection to the validity of the law that an objection that the corporate form of doing business deprives individual competitors of equal protection by reason of economic inequality. An ordinary business corporation could legally do what the cooperative was allowed to do in this case and no one would be so hardy as to say that this denied equal protection to competing individuals.
controlling question was—did Oklahoma law permit Lowe to distribute his net profits in the same manner as the co-operative?

This simple disposition of the case, hinging on a flaw in the oral argument of counsel, may appear extremely legalistic. But it is believed justifiable in view of the result effected. The Oklahoma co-operative ginning experiment was saved. In the Frost case Mr. Chief Justice Taft's court, over the strenuous dissent of Mr. Justice Brandeis on the merits, had held unconstitutional a section of the same statute, which exempted co-operative ginners from the requirement of a certificate of convenience and necessity for obtaining a license to do business. The majority had there relied on the ground that the co-operative was in business for profit and thus there was no acceptable basis for discrimination. In the Lowe case had the Court by judicial notice found that the accepted principle of public utility law that rebates are illegal obtained in Oklahoma, though there was no Oklahoma decision or statute directly in point, the whole difficulty in the Frost case would have been encountered again. There can be no serious doubt that the privilege granted was to make rebates. The question on the merits would, then, have been whether the discrimination as to this privilege was justifiable and proper. If fought out on the merits before the Supreme Court there would have been some doubt about the outcome in view of the Frost case. So, the writer believes, the decision of the court is commendable even though involving a resort to a legalistic device, which dispensed with consideration of the important problems presented on the merits.

The most striking utterance of the new Chief Justice for our purpose was provoked by the case of Texas and New Orleans Railroad Company v. Brotherhood of Railway and Steamship Clerks. The plaintiff Brotherhood had been authorized by a majority of the clerks of defendant company to represent them in all matters relating to their employment. The bill charged that while a controversy between the present parties over wages was pending before the United States Board of Mediation in 1925 the defendant caused a company union to be formed and sought to intimidate and coerce members of the Brotherhood to shift their allegiance to the company union. The bill prayed an injunction against this

23* 281 U. S. 548, 50 S. Ct. 427 (1930). The reported decisions in the courts below are cited in the opinion.
sort of activity on the strength of the Railway Labor Act of 1926, which in terms requires the amicable settlement, if possible, of all industrial disputes of interstate carriers in conference by representatives of the company and the employees. For this purpose, it is declared, representatives shall be designated "without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other". A temporary injunction was granted. The company thereafter recognized the alleged company union as the representative of the clerks and dealt with it accordingly. In civil contempt proceedings the company was ordered to purge itself by disestablishing the company union, reinstating the Brotherhood as the employee representative until the clerks should by secret ballot under court direction designate new representatives and, further, re-employing employees who had been discharged because of union activity. On final hearing the injunction was made permanent and the contempt decree was affirmed by the Circuit Court of Appeals. On certiorari to that court the Supreme Court upheld the decree.

As to the fact of the intimidation and coercion the Chief Justice relied on the findings of the two lower courts under the rule that findings concurred in by two courts will be accepted unless clearly in error, which was not the case here in the face of a strong motive of the company, the avoiding of a wage increase. The legal question considered was whether the Railway Labor Act imposed a duty on the company enforceable by judicial proceedings. With great clarity the Chief Justice pointed out the legislative steps which led to the Act of 1926 in the effort to effect amicable settlement of railway labor disputes. Like former efforts this statute set up a voluntary scheme of arbitration but went further by "buttressing" it with definite legal obligations. Thus an award is made conclusive and binding and a qualification is attached to the right to strike. And here though the affirmative duty to effect an amicable adjustment "may be of imperfect obligation because not enforceable in terms a definite statutory prohibition of conduct which would thwart the declared purpose of the

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42 § 152, par. 3.
43 In case of a failure to adjust a dispute amicably the President is authorized on notification by the Board of Mediation of a threatened "tie-up" to appoint an emergency investigating board. The Act, § 160, forbids the parties to change the status quo for thirty days after the board has reported except by agreement, thus limiting the right to strike.
legislation cannot be disregarded". Intimidation and coercion preventing free choice of representatives would defeat the statutory scheme. Moreover, the prohibition was enforceable. Therefore, enforcement must have been contemplated by Congress. The power to make the prohibition was derived from the commerce clause. Under it Congress may act to protect or advance interstate commerce, which authority would include the fostering of settlements of disputes threatening "tie-ups" of interstate transportation. Finally, if the requirement of the Clayton Act that injunctions be granted in labor disputes only to protect property rights was applicable it was satisfied in this case.\(^7\)

By direct legal argument aided only by a calm examination of the legislative purpose Mr. Chief Justice Hughes did all that a "sociological jurist" could do to warm the hearts of so-called liberals. The opinion is reminiscent of Chief Justice Marchall with its well-turned generalizations, which pave the way to a logical disposition of the case at hand.

In this case seven justices\(^8\) without dissent attached a real modification to the notion of liberty of contract. For purposes of the Railway Labor Act an employer was forced to re-employ clerks who had been discharged in the course of conduct by the company opposed to the policy of the statute. The opinion distinguished the Adair and Coppage cases,\(^9\) which were fatal to statutes attempting to invalidate yellow dog contracts, on the ground that the Act of 1926 does not interfere with an employer’s normal exercise of his right to hire and discharge particular individuals. But the decree here qualified this right for the protection of the right of labor to organize for purposes of collective bargaining under the Act of 1926 and it was this same right to organize, though for broader purposes, that was offered protection in the legislation overthrown in the Adair and Coppage cases. There is a suggestion that this result is "the natural culmination of recent developments in labor law."\(^10\) No doubt the swing has been that way. But the more important factor, probably, was judicial personnel. Of the seven judges sitting on the case at least four would have been expected to vote as they did. The other three may

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\(^7\) As to the nature of the interest as a subject of equitable cognizance see International News Service v. The Associated Press, 248 U. S. 215, 39 S. Ct. 68 (1918). The point is not one of primary interest here.

\(^8\) Mr. Justice McReynolds did not participate.

\(^9\) Adair v. United States, 208 U. S. 161, 28 S. Ct. 277 (1908); Coppage v. Kansas, supra n. 35.

\(^10\) Note (1930) 30 Yale L. J. 92.
not have been troubled by the liberty of contract objection since it related to the decree and not the statute. In any event the significant fact is the increased strength given to the workers in collective bargaining. They now have a right against their employer to organize for purposes of the Railway Labor Act entirely unmolested even by such measures as the discharging of individual workers.

Though Mr. Chief Justice Hughes is probably less philosophical than some of the known liberals upon the Supreme Court, is less a student of the social data behind legislation than Mr. Justice Brandeis and Mr. Justice Stone and has a rather legalistic outlook upon constitutional questions there is nothing in his judicial record to require that he be classified as a reactionary or a champion of vested interests. He is a more dominating personality than his immediate predecessor and thus his outlook is particularly important in this regard. It is believed that he will continue to set a liberal pace for the Court.

III

The judicial technique of Mr. Justice Sutherland may be considered comparatively with that of Mr. Justice Stone since they have in several important cases represented the majority and minority views on the bench respectively.

Mr. Justice Sutherland is generally regarded as the very epitome of conservative sentiment on the bench. Probably more than any of his fellows he is held in the sway of the old abstract legalistic method. Several writers have called attention to the reasoning by analogy in the majority opinion in Ribnik v. McBride.\(^1\) In the Tyson case the Court had held price-fixing legislation relating to the commissions of ticket brokers unconstitutional. Employment agencies also did a brokerage business. It seemed to Mr. Justice Sutherland, therefore, that if one type of brokerage business was a private enterprise not subject to governmental price regulation that went for all of them.\(^2\) To Mr. Justice Stone ticket brokers and employment brokers were similar only in name.\(^3\)

It will not be sought here to reagitate ground already plowed and replowed. But one further reference to the Ribnik case may

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\(^1\) Hamilton, loc. cit. supra n. 12; note (1928) 38 Yale L. J. 225; McAllister, loc. cit. supra n. 12, at 786-787.

\(^2\) Mr. McAllister points out that this reasoning would be expected to have led Mr. Justice Sutherland to have dissented in Tagg Bros. and Moorhead v. United States, supra n. 20. But the decision was rendered by a unanimous court.

be warranted in this connection. Having decided that an employment agency is engaged in a private business Mr. Justice Sutherland was not further concerned with the conditions that evoked the New Jersey statute in question. Thus he wrote: "To urge that extortion, fraud, imposition, discrimination and the like have been practiced to some, or to a great, extent in connection with the business here under consideration, or that the business is one lending itself peculiarly to such evils, is simply to restate grounds already fully considered by this Court. These are grounds for regulation but not for price-fixing, as we have already definitely decided." In this fashion did he state, in effect, that New Jersey could not resort to the only sort of regulation which its legislature found adequate to the purpose. But the attempted distinction between price-fixing and other types of regulation did not satisfy Mr. Justice Stone. His answer was devastatingly put. He declared: "I cannot accept as valid the distinction on which the opinion of the majority seems necessarily to depend, that granted constitutional power to regulate there is any controlling difference between reasonable regulation of price, if appropriate to the evil to be remedied, and other forms of appropriate regulation which curtail liberty of contract or the use and enjoyment of property." To him it seemed obvious that "the Constitution does not require us to hold that a business subject to every other form of reasonable regulation, is immune from the requirement of reasonable prices, where that requirement is the only remedy appropriate to the evils encountered. In this respect I can see no difference between a reasonable regulation of price and a reasonable regulation of the use of property, which affects its price or economic return."

Consider the reasoning of Mr. Justice Sutherland in Williams v. Standard Oil Company. A Tennessee statute providing for government regulation of the price of gasoline was challenged as a violation of due process of law. By assuming a minor premise he reduced the problem to very simple terms. Gasoline, he stated, was a commodity of trade differing in no essential respect, so far as the question before the Court was concerned, from many other common articles of trade. Past decisions supplied the major premise, that these other common articles of trade were not within

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64 Ibid., at 358.
65 Ibid., at 373.
66 Ibid.
67 Supra n. 13.
the comprehension of the phrase, affected with a public interest. It followed as the night the day (or vice versa) that the selling of gasoline was not a business affected with a public interest. Mr. Justice Holmes dissented while Mr. Justice Brandeis and Mr. Justice Stone concurred in the result.

Certainly the case does seem to be so clear a one for the statute as was true of the Ribnik case, where the legislature, as fully indicated in the dissenting opinion of Mr. Justice Stone, was faced with serious evils affecting the daily employment of many of the people of the state. Such evils were not paralleled in this case. However, simply to assume the answer to the whole problem is not very satisfying. One would like to know just what it was that placed the selling of gasoline in the category of business not subject to public price regulation beyond a shadow of a doubt.

It appears that Mr. Justice Sutherland has demonstrated that he can write an opinion in which he treats local legislation with liberality. In *Euclid v. Ambler* we find him writing the opinion of the Court in a case in which the liberal group on the bench prevailed. The Court upheld a comprehensive zoning ordinance which went so far as to mark out the building districts of a city so as to create an exclusively residential area. The following excerpt from the opinion indicates that the writer is not unimpressed on occasion with the importance of social considerations in the judicial process in such cases. The passage has received approving quotation by Mr. Justice Stone in an address before the American Bar Association.

"Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for

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272 U. S. 365, 47 S. Ct. 114 (1926).

Mr. Justice Van Devanter, Mr. Justice McReynolds and Mr. Justice Butler dissented without opinion.

Loc. cit. supra n. 35, at 14 A. B. A. Jour. 432.
reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise."

But there follows the too-revealing statement: "But although a degree of elasticity thus imparted, not to the meaning, but to the application of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall."

In this opinion the spokesman seems to have resorted to the methodology of the "liberals". He considered the social background of zoning legislation, he used the extra-legal material of commissions and experts and went so far as to suggest considerations which might be deemed to satisfy the Constitution. But even here one gets the impression that the conception of law as a body of principles imbued with meaning apart from any social data on which laws operate still has the approval of Mr. Justice Sutherland. Such is the implication, to say the least, of the last sentence of the above passage.

Mr. Justice Stone is inclined to march directly to the task of demonstrating how a challenged statute can be upheld as constitutional as does Mr. Justice Brandeis but unlike Mr. Justice Holmes, who goes no farther than to satisfy himself that the statute is not unconstitutional, a much lower hurdle for the challenged enactment. Like Mr. Justice Brandeis he overleaps the record in a case if necessary to gain a full picture of the setting of a statute. One observes with interest the practice they pursue of annotating their opinions with reference to materials uncovered, at least in large part, in their researches in preparing opinions. This stress upon the facts in constitutional cases is characteristic of Mr. Justice Stone. It is he who has recommended the establishment

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\[\text{272 U. S. 365, at 386-387. See also Zahn v. Board of Public Works of Los Angeles, 274 U. S. 325, 47 S. Ct. 594 (1927); Nectow v. Cambridge, 277 U. S. 183, 48 S. Ct. 447 (1928) (ordinance held invalid).}\]

\[\text{The factual element in constitutional cases has received some secondary consideration. Bilke, Questions of Fact Affecting Constitutionality (1924) 38 Harv. L. Rev. 6; note (1990) 30 Col. L. Rev. 360.}\]
of a research service in Washington in aid of the Supreme Court comparable to legislative research bureaus. Consider the following remarks of the learned Justice delivered in a recent address:

"Lawyers who in the presentation of a negligence case, would prove with meticulous care every fact surrounding the accident and injury, in this field too often go little beyond the challenged statute and the citation of authorities in supposedly analogous cases. The court is thus often left to speculate as to the nature and extent of the social problems giving rise to the legislative problem, or to discover them by its own researches. Intimate acquaintance with every aspect of the conditions which have given rise to the regulatory problems are infinitely more important to the courts than are the citation of authorities or the recital of bare formulas."

The brief of Mr. Justice Brandeis as counsel in *Muller v. Oregon* is known as a model brief of the sort for which his fellow justice was making a plea here.

The opinions of Mr. Justice Stone are notable for their directness and clarity of statement. Although he shares the reluctance of some of his brothers on the bench to consider a constitutional question simply to vindicate an abstract right, when he does speak he does not mince matters. *Muller v. Schoene* involved the validity of a Virginia statute requiring the destruction of cedar trees within a radius of two miles of any apple orchard upon a finding by the state entomologist that such trees were infected with cedar rust, a disease destructive of the fruit and foliage of apple trees. Appellant's ornamental cedar trees were ordered destroyed under the authority of this statute. Counsel insisted that the operation of the statute amounted to the bald taking of one man's property for the benefit of that of another. The statute as construed by the state court did not allow compensation for trees destroyed. One has only to drive through western Virginia to see that the growing of apples is one of her principal industries.

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*Loc. cit. supra n. 35, at 14 A. B. A. Jour. 433.*


*See his dissent in Frost v. Corporation Commission, supra n. 52a. Under Oklahoma law only co-operative associations could obtain licenses to do a ginning business without a showing of public convenience and necessity. The plaintiff having already procured a license and conducted business sought to enjoin the issuance of a license to a co-operative association. Mr. Justice Stone made the point that since plaintiff already had his license he was not injured by the statute and should not be allowed to complain of a discrimination. Injury sustained through increase in competition would be *damnum absque injuria.* This reasoning is persuasive.

*276 U. S. 272, 48 S. Ct. 246 (1928).*
Mr. Justice Stone wrote the opinion of the Court upholding the statute. He viewed the situation as one where the state was compelled to make a choice between preserving one or the other class of private property. Because of the importance of the apple-growing industry in Virginia there was a preponderant public interest in the preservation of apple orchards which removed the case from the class of conflicts of merely private interests. The legislature remained within constitutional bounds when it decided upon the destruction of one class of property in order to save another it deemed of the greater importance to the public. This simple and effective opinion speaks for itself. The only surprising thing about the case is that there were no dissents.

To Mr. Justice Stone legal distinctions are differences of degree only. This belief, is, no doubt, one factor which impels him to give the full benefit of the doubt to challenged legislation. Thus he is averse to overthrowing a statute as violative of the equal protection clause of the fourteenth amendment where the classification depends upon peculiar conditions better known to the legislature. In Clarke v. Deckebach a city ordinance prohibiting the operation of pool rooms by aliens was in question. Mr. Justice Stone thought the legislative body entitled to some latitude in appraising local evils and making a choice of methods to combat them. "It was competent for the city to make such a choice, not shown to be irrational, by excluding from the conduct of a dubious business an entire class rather than its objectionable members selected by more empirical methods." In the opinion of the writer this judge is setting a fine standard of judicial statesmanship in his approach to modern constitutional questions.

IV

Little may be said concerning the judicial methodology of Mr. Justice Van Devanter in the field of social legislation for the reason that he has written few opinions in that neck of the legal woods. During the five years since Mr. Justice Stone moved up from the post of Attorney-General his brother Van Devanter has written only two opinions involving constitutional questions of the character treated herein. And in one of these, the opinion of the Court in Chas. Wolff Packing Co. v. The Court of Industrial Relations of Kansas; he was simply in large part following the

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7 274 U. S. 392, 47 S. Ct. 630 (1927).
8 267 U. S. 555, 45 S. Ct. 441 (1925).
trail blazed by the Chief Justice in a case involving the same parties and wherein the decision was unfavorable to the Kansas industrial court experiment.\textsuperscript{79} The other case is one of considerable interest for its own sake.

In the case of \textit{New York ex rel Bryant v. Zimmerman}\textsuperscript{80} Bryant was seeking a writ of \textit{habeas corpus} to test the lawfulness of his detention for violation of a New York statute. It was urged that the statute was in conflict with the Fourteenth Amendment. The statute embodied the New York effort to uncloak the Ku Klux Klan. It provided that oathbound associations other than labor unions and benevolent societies should file with the secretary of state a sworn copy of their constitutions, by-laws, rules, regulations and oaths of membership and rosters of their members and officers. To become a member or remain in the membership of such an order with knowledge that it was violating the publicity provisions of the statute was made a misdemeanor. This was the offense with which relator was charged.

With respect to the publicity provisions of the statute under the due process clause Mr. Justice Van Devanter simply stated the theory of the statute, that if the public record was made as required it would constitute a deterrent to violations of public and private right to which secret orders are tempted, and concluded that the "requirement is not arbitrary or oppressive, but reasonable and likely to be of real effect". Granting the power to compel disclosure there existed, of course, the incidental power to punish members conniving at a failure to disclose. Thus he disposed of the due process question by a mere resort to formulae. He practically assumed his answer. But his treatment of the equal protection problem was more searching. Relator complained that the statute did not extend to labor unions and benevolent societies. First Mr. Justice Van Devanter gathered formulae from opinions in past cases such as \textit{Patsone v. Pennsylvania}.\textsuperscript{81} Next he noted the differences upon which the statute was based, which had been marked by the courts below. Among these were the tendency of the Ku Klux Klan, for example, to use secrecy as a cloak for terrorism. At this point he turned to facts concerning such organizations as the Klan and thereby gave body to his opinion. He assumed that the legislature had had before it the report of a

\textsuperscript{79} 282 U. S. 522, 43 S. Ct. 630 (1923).
\textsuperscript{80} 278 U. S. 63, 49 S. Ct. 61 (1928).
\textsuperscript{81} \textit{Supra} n. 40.
Congressional Committee on the Klan when it framed the statute and then proceeded to the background of the order and its violent prejudices against certain elements in the community. These matters convinced him that there was a "real and substantial basis" for the classification. He did not limit himself to saying that the legislature might reasonably have so found but so found himself though this was beyond the requirements of judicial action in the case.

It would appear that as regards interstate commerce Mr. Justice Van Devanter follows the general formula of Mr. Justice Butler—if a state statute imposes a direct burden upon interstate commerce it is invalid. The well-known case of Pennsylvania v. West Virginia is illustrative. A West Virginia statute required, in effect, that the local demand for natural gas be satisfied before any should be piped across the state line into neighboring states. It appeared that the natural supply of gas in West Virginia would not last very much longer and already the demand so exceeded production that the statute would necessarily operate to cut down the amount of gas piped into Ohio and Pennsylvania. These two states brought suit to enjoin the enforcement of the act alleging that irreparable damage would result to their citizens and to many of their public eleemosynary institutions which relied upon the gas for heat and light if the statute were enforced.

After graphically stating the circumstances which evoked the statute Mr. Justice Van Devanter proceeded to find that the case presented a justiciable controversy since both the complaining states represented substantial interests, those of their consuming publics and the interests of certain of their public institutions. He then attacked the principal inquiry—whether the statute was an unconstitutional regulation of interstate commerce. "A state law, whether of the state where the gas is produced or that where it is to be sold which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce,—a prohibited interference. The West Virginia Act is such a law". Though the pipe line companies were public service companies of West Virginia they might not be compelled to furnish service in West Virginia to the subordination of their interstate business. He dismissed the contention that the act was simply a measure to conserve natural resources for the benefit of the citizens of the state with a quotation from the opinion of the Court

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*Supra n. 31.*
in *West v. Kansas Natural Gas Company,* therein it was stated that were the contention to prevail all the states might place embargoes upon their distinctive natural products and thus freeze interstate commerce therein.

Mr. Justice Holmes waxed quite legalistic in his dissent. His contention that a state might regulate its products until they are actually started upon their way to a point beyond its borders is reminiscent of the view of the Court in *United States v. E. C. Knight and Company* that a combination of sugar manufacturers whose plants were all located in Pennsylvania but who, of course, sold sugar in interstate commerce was not a combination in restraint of interstate commerce but simply an intrastate combination in manufacturing. His more serious position was that there was "nothing in the commerce clause to prevent a State from giving a preference to its inhabitants in the enjoyment of its natural advantages". Certainly Congress has no power to require private owners to transport gas in interstate commerce and here the extent to which West Virginia gas was a public utility was entirely a matter of West Virginia law.

One must agree with Mr. Justice Van Devanter that the statute was calculated to operate directly in restraint of interstate commerce in the sense that by the cutting off of a flow of goods interstate commerce is reduced. Where his reasoning is doubtful is his characterizing the statute as a regulation of commerce in the sense that Congress is empowered to regulate commerce and that without considering its purpose. The statute was not formed in that character any more than a state statute which gives local people a preference as to game killed in the state. Congress could not force owners to ship their goods in interstate commerce though it might regulate such shipping when done or might prohibit it. That being the case it was a rather pinched view of state autonomy that considered a state impotent to prefer its citizens in the exploitation of its natural resources. The fact that the volume of interstate commerce is decreased by state action is a consequence which does not impair the commerce power of Congress but does affect its field of application.

*Hammer v. Dagenhart,* the first of the federal child labor cases, in which a federal statute forbidding the shipment of the
products of child labor in interstate commerce was declared unconstitutional, is available for purposes of contrast. The majority including Mr. Justice Van Devanter overthrew the statute. Mr. Justice Holmes dissented. This state of affairs is difficult to explain so far as Mr. Justice Van Devanter is concerned. Mr. Justice Holmes would give either the federal or a state legislature plenty of rope. The possibility that Mr. Justice Van Devanter was really acting upon his views upon the merits of child labor legislation loses cast by reason of the fact that he voted with the Court in *Sturges v. Beuchamp* in which case an Illinois statute prohibiting child labor in hazardous employments was held valid. It is noticeable that of all the judges on the Court he is the most likely to adhere to the majority. He may be expected to dissent never alone and seldom with others.

V

Probably the most difficult man on the Supreme bench to estimate in a study of this sort is Mr. Justice McReynolds. One never knows just when to expect him to dissent. He is, in truth, the most independent dissenter on the bench. He has his own views and does not hesitate to stand out alone for them. It may be, and often is, his view that a given case may be disposed of upon jurisdictional grounds and he proceeds to express himself to that effect.

Added to the indefinite characterization that he is a judicial individualist it appears that he may also fairly be denominated a believer in the theory sought to be embodied in the anti-trust laws; he is, in fact, a "trust-buster," having served as Attorney General under Wilson. The following remarks taken from his opinion in the familiar Maple Flooring case in which trade association activities were held not to violate the anti-trust laws are suggestive: "It seems to me that ordinary knowledge of human 231 U. S. 320, 34 S. Ct. 60, L. R. A. 1915A, 1196 (1914).

Interesting to observe, however, he filed not a dissenting vote during the October Term, 1920. See Frankfurter and Illinois, *The Business of the Supreme Court at October Term, 1929* (1930) 44 HARV. L. REV. 1.

His dissenting opinion in *Pennsylvania v. West Virginia*, supra n. 31, is an outstanding expression of this tendency. It is a matter of some interest, however, that he concurred in the majority opinion in *Frost v. Corporation Com'n*, supra n. 52a, when a splendid means of avoiding consideration on the merits was at hand, as demonstrated in the dissenting opinion of Mr. Justice Stone. Notice also his separate opinion in *Springer v. Philippine Islands*, 277 U. S. 212, 48 S. Ct. 450 (1928).

nature and of the impelling force of greed ought to permit no serious doubt concerning the ultimate outcome of the arrangements. We may confidently expect the destruction of that kind of competition long relied upon by the public for the establishment of fair prices, and to preserve which the Anti-Trust Act was passed.''

Here he gave play to his unusual faculty for stating a proposition blackest for the view contrary to his own. His admirable exercise of this talent in his dissenting opinion in Wilson v. New must not escape notice at this point. There the Court upheld the Adamson Act fixing the minimum wages of railway trainmen for a temporary period in order to avert a threatened nation-wide strike. Mr. Justice McReynolds declared:

"I have not heretofore supposed that such action (as the statute here in question) was a regulation of commerce within the fair intendment of those words as used in the Constitution; and the argument advanced in support of the contrary view is unsatisfactory to my mind. I cannot, therefore, concur in the conclusion that it is within the power of Congress to enact the statute.

"But considering the doctrine now affirmed by a majority of the Court as established, it follows as of course that Congress has power to fix a maximum as well as a minimum wage for trainmen; to require compulsory arbitration of labor disputes which may seriously and directly jeopardize the movement of interstate traffic; and to take measure effectively to protect the free flow of such commerce against any combination, whether of operatives, owners, or strangers."


22 In Southern Pacific Railway Co. v. Bogert, 250 U. S. 483, 39 S. Ct. 533 (1919) the Supreme Court held that minority stockholders who had been frozen out entirely by the bondholders and the majority stockholders upon the reorganization of a Texas railroad company and who had for twenty-five years litigated in vain to overturn the reorganization were entitled upon finding this the proper remedy, to have a trust impressed upon the stock in the new company held by the majority stockholder. Mr. Justice McReynolds' ironical dissent was most effective. He declared: "Having long emphatically condemned, attacked, and sought without success to annul petitioner's action, respondents finally come before a court of equity saying in effect—Although represented by counsel of great eminence we have not heretofore known the law; notwithstanding all solemnly declared to the contrary, we now maintain that petitioner was acting for us, our trustee indeed; and we wish to share in the plan which it has carried to success against our persistent opposition. Such a claim exhales a very bad odor." This judicial irony is exceeded only by that of Mr. Justice Clarke in the American Column and Lumber Co. case, supra n. 32.
Mr. Justice Van Devanter also dissented in Wilson v. New. And thus it was the expected thing when he and Mr. Justice McReynolds concurred in the minimum wage decision in 1923. Doubtless the vote of the latter in the New case was influenced as much by his views on social legislation as his conception of the commerce clause. Certainly it is true that in the great cases involving social legislation upon which the Court has been divided he has voted with what is known as the conservative majority.

Fairmont Creamery Co. v. Minnesota probably as nearly as any case presents his approach in this field. A Minnesota statute made it a misdemeanor for buyers of milk to pay less for it in one locality than another after allowing for transportation costs to the locality of manufacture or disposal. It was aimed at the large milk products organizations which by paying high prices in given communities for a time had been eliminating competing buyers of milk. The Fairmont Creamery Company was prosecuted for violation of the statute. Mr. Justice McReynolds spoke for the Court when the case reached the Supreme Court. He began by quoting the statute and outlining the course of the litigation in which exercise he quoted at some length from the opinion of the state court. He then stated the purpose of the statute to be the preventing of powerful buyers from paying excessive prices in order to destroy competition. His first score was the assertion that "enforcement of the statute would amount to fixing the price at which plaintiff in error may buy, since one purchase would establish this for all points without regard to ordinary trade conditions." The real question was whether the State could for the present purpose prevent plaintiff in error from carrying on its business as it was wont in a way theretofore deemed beneficial and not shown to work evil results in the ordinary course of events. Having thus framed the question it was easy to reach the conclusion that the prohibition of the statute had no reasonable relation to its object. The Tyson case was quoted to indicate the invalidity of price-fixing statutes. Mr. Justice Holmes, Mr. Justice Brandeis and Mr. Justice Stone dissented without opinion.

\[\text{Supra} \text{ n. 10.}\]

\[\text{Thus he was with the Court in Coppage v. Kansas, supra n. 37; in Tyson v. Banton, supra n. 14; in Ribnik v. McBride, supra n. 57; and in Williams v. Standard Oil Co., supra n. 13.}\]

\[274 \text{ U. S. 1, 47 S. Ct. 596 (1927).}\]
The majority opinion suggests no inquiry into the background of the statute. It does not independently discuss the evils at which the act was directed. It does not consider the question from the standpoint of whether the legislature might reasonably have found the means appropriate to the end but finds as a primary judgment in the matter that the means were not reasonably related to the "anticipated evil". Moreover, the writer of the opinion places himself between the proverbial Scylla and Charybdis by attacking the statute as destructive of competitive conditions. That possibility alone was aside from the point. The legislature was forced to choose between public regulation and the destruction of competition by strong buyers if it took no action since the forces of competition had failed to regulate the situation. Granting that the statute operated to fix prices that did not conclude the controversy on its merits. (The point, however, brought the case nicely within the range of past decisions). The Court seemed more concerned with nominal *laissez faire* than with some effective means to place a class of small producers on more even terms with strong buyers in the bargaining struggle.

In a more recent case Mr. Justice McReynolds has spoken more favorably with respect to a statute framed to protect agrarian interests. In *Liberty Warehouse Company v. Burley Tobacco Growers Co-operative Marketing Association* the Court considered the validity of a Kentucky Statute which made it a crime to induce the breach of the marketing contract of a member of a co-operative marketing association or for a warehouseman knowingly to permit delivery of goods in violation of such a contract. The action was brought by a co-operative association for the statutory penalty for violation of the act by the warehouse company. Mr. Justice McReynolds, for the Court, granted that the act restricted liberty of contract. But this was done to protect contracts deemed by the legislature to be of great importance to the public. And viewed in the light of widespread co-operative marketing legislation elsewhere and the judicial approval thereof it could not be

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276 U. S. 71, 48 S. Ct. 291 (1928). In *Frost v. Corporation Com’n*, *supra* n. 52a, however, Mr. Justice McReynolds concurred in a decision overthrowing an Oklahoma statute favoring stock membership co-operative associations by exempting them from the requirement of showing public necessity to procure a license to do a ginning business. Doubtless he was influenced by the view that the association was a business corporation in substance and not a real co-operative out for profit. *Cf.* *Corporation Commission of Oklahoma v. Lowe*, *supra* n. 51, where he concurred in a decision favorable to the legislation in question.
said that the restriction upon freedom of contract was beyond the power of the legislature.

One would suppose that this very fact, that co-operative marketing legislation was so widespread, would certainly make it hard for a court to overthrow such legislation even though the judges were disposed against it. But experience tells a different story.17

It is in matters relating to interstate commerce that it is most difficult to place Mr. Justice McReynolds. He dissent most unexpectedly. In Frost v. Railroad Commission of California18 we find him dissenting along with Mr. Justice Holmes and Mr. Justice Brandeis. A California statute providing for the regulation of transportation for compensation over the public highways of the state required that a permit and a certificate of convenience and necessity be obtained from the commission before engaging in such business. The statute extending to automotive carriers of persons operating under private contracts. The state supreme court upheld an order requiring Frost et al. to secure a certificate of public convenience and necessity before continuing to haul fruit over the public highways for compensation. Here the federal Supreme Court found the statute an unconstitutional attempt to convert a private carrier into a common carrier by legislative fiat and not simply a regulation of the use of public highways. The opinion was the work of Mr. Justice Sutherland. Mr. Justice McReynolds thought that since California had built the roads it certainly might regulate the use of them even to the extent of allowing only public intrastate carriers for hire to use them. He very wisely remarked that "the states are now struggling with new and enormously difficult problems incident to the growth of automobile traffic, and we should carefully refrain from interference unless and until there is some real, direct, and material infraction of rights guaranteed by the Federal Constitution."19

17Thus the subsequent adverse decision in Frost v. Corporation Com'n. went off on the ground that the corporation was a business company out for profit.

18271 U. S. 583, 46 S. Ct. 605 (1926).

19Ibid, at 271 U. S. 603, in Foster Packing Co. v. Haydel, 278 U. S. 1, 48 S. Ct. 1 (1928) the Court passed upon the validity of a Louisiana statute which declared all shrimp in Louisiana waters to be the property of the state; forbade the exportation of shrimp from which the heads and shells had not been removed; but granted the taker such an interest that the shrimp might be sold within the state; and left the meat after removal of heads and shells open to sale beyond the confines of the state without restriction. In the opinion of the Court Mr. Justice Butler found the enactment to lay a direct
In truth Mr. Justice McReynolds is quite a judicial individualist, whether spontaneously or deliberately so the writer does not venture to suggest. And he seems to be carrying on the tradition of some of his famous predecessors on the bench in his strong attachment to economic individualism. Probably that feature of his methodology which most distinguishes him from the other so-called conservatives on the Supreme Court is the exercise of his ability to formulate questions and propositions in a way calculated to confound the opposition.

VI

No other modern jurist looms in such heroic proportions in the public eye as Mr. Justice Holmes. Worthier pens have already paid fitting tribute to his genius. At this point one looks simply at his approach in cases involving social legislation.

He has gone farther than any other judge on the present Court in the application of the classical conception of judicial review. Granting that the function requires the exercise of judgment by the courts he yet has consistently maintained that such judgment is distinctly a secondary one. This fact and the general characteristics of his approach are too well known to require any extended comment on this occasion. The article, "Mr. Justice Holmes and the Constitution", by Professor Felix Frankfurter is a particularly illuminating contribution.

Concerning judicial review the flavor of Mr. Justice Holmes' judicial utterances suggest a deep-rooted consciousness of the relativity of human opinions and of human values. In reading his opinions one observes that he does not set out affirmatively to show the constitutionality of a statute in a given case but goes only so far as to satisfy himself that the opinion of the legislature in the matter might reasonably be entertained and is accordingly entitled to judicial respect. Sometimes one feels that his generalizations in this behalf are too broad. Consider the following excerpt from his opinion in Weaver v. Palmer Brothers Company.

burden upon interstate commerce and, of course, found it invalid. He thought the statute a subterfuge to favor the canning business in Louisiana and not a measure to retain shrimp for the use of the people of the state. Mr. Justice McReynolds alone dissented. He denied that the record disclosed any subterfuge and insisted that the state might regulate the sale and transportation of wild life in ways not permissible with respect to things subject to absolute ownership.

295 Supra n. 6.
296 Supra n. 25.
A Pennsylvania statute forbade the use of "shoddy" (a material the lower quality of which consisted of bits of rags and second hand garments but the better quality of which was made of new cloth), whether sterilized or not, in the manufacture of bedding. The Supreme Court held the statute unconstitutional. But Mr. Justice Holmes thought the Court should not interfere. "If the Legislature of Pennsylvania was of opinion that disease is likely to be spread by the use of unsterilized shoddy in comfortables I do not suppose that this Court would pronounce the opinion so manifestly absurd that it could not be acted upon. If we should not, then I think that we ought to assume the opinion to be right for the purpose of testing the law." This amounts to saying that the Court should accept the opinion of the legislature as final, since it asserts that if the legislature thought the statute in question was proper the Court would not declare it too absurd to be acted upon. This shows with emphasis his disposition to leave legislative bodies free range in the exercise of their broad powers.

Upon first thought it might be supposed that Mr. Justice Holmes is a believer in states rights. It would hardly be accurate to describe him as such in the usual sense of the term, however. He is not concerned with guaranteeing to the states a preponderant slice in the distribution of governmental powers. His views are non-political. His interest lies in keeping courts in their secondary place in matters of public policy or a political character whether a challenged statute be a state or a federal enactment. He knows that courts make law, that their decisions give definite content to constitutional and statutory generalizations and he is loathe to abuse the power." This consciousness explains his rejection of the now too well established doctrine of Swift v. Tyson, that in matters of so-called general commercial law or general jurisprudence

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103 "Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts." American Banana Co. v. United Fruit Co., 213 U. S., 347, 356, 29 S. Ct. 511 (1908). See also his dissenting opinion in Kuhn v. Fairmont Coal Co., 215 U. S. 349, 30 S. Ct. 140 (1910). "The Supreme Court of a state does something more than make a scientific inquiry outside of and independent of it. It says with an authority that no one denies except when a citizen of another state is able to invoke an exceptional jurisdiction that thus the law is and shall be. Whether it be said to make or to declare the law, it deals with the law of the state with equal authority, however its function may be described." Black and White Taxicab Co. v. Yellow and Brown Taxicab Co., 276 U. S. 518, 535, 48 S. Ct. 404 (1928).
104 16 Pet. 1, 10 L. ed. 865 (1841).
state decisions are not controlling upon the federal courts in adjudicating controversies governed by the common law of a state.\footnote{Kuhn v. Fairmont Coal Co., \textit{supra} n. 103; Black and White Cab Co. v. Yellow and Brown Cab Co., \textit{supra} n. 103.} His dissent in \textit{Hammer v. Dagenhart}\footnote{\textit{Supra} n. 86.} and his majority opinion in \textit{Missouri v. Holland},\footnote{252 U. S. 416, 40 S. Ct. 382, 11 A. L. R. 984 (1920).} the migratory bird case, are rather convincing evidence of his disposition to grant the federal government its mite of power.

Holmes opinions are characteristically brief. One wonders how he frames his noted epigrammatic utterances, philosophical summaries as it were, upon such small canvasses. He does not attempt the intensive factual study characteristic of the dissenting opinions of Mr. Justice Brandeis. He is quite aware, however, of the importance of social data in constitutional law cases. He is satisfied with the social perspective necessary to the formation of his own judgment in the matter.

\textit{Block v. Hirsh}\footnote{256 U. S. 135, 41 S. Ct. 458, 16 A. L. R. 165 (1921); Marcus Brown Co. v. Feldman, 256 U. S. 170, 41 S. Ct. 465 (1921).} leaves no doubt as to his emphasis upon the facts in the decision of constitutional cases. The distressing shortage of housing facilities in Washington during and shortly after the late war led Congress to provide in the Lever Act for the regulation of rental rates as well as to permit tenants to hold over after the expiration of their terms. It was a case of emergency legislation, pure and simple. In framing the opinion of the Court Mr. Justice Holmes for once set about showing the affirmative validity of the statute. He was clear that a change in conditions may clothe the letting of buildings with a public interest in the sense of the rule of \textit{Munn v. Illinois}. "Circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern."\footnote{\textit{Supra} n. 108, at 256 U. S. 155.} The circumstances which called forth this legislation, he was satisfied, supplied the public interest. That being the case the power to regulate rates, its exercise being appropriate, was undoubted.

The logic of this reasoning requires that emergency legislation die with the emergency. This Mr. Justice Holmes grants in the later case of \textit{Chastleton Corporation v. Sinclair}\footnote{264 U. S. 543, 44 S. Ct. 405 (1924).} involving the
same statute as renewed by Congress. "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed."

It would be difficult to imagine a judge less hedged by legalisms than Mr. Justice Holmes. Indisputably he knows all the tricks of the trade and can write a neat legalistic opinion on occasion. But he does not permit legal phrases any larger place in his scheme of things than a pocket in his judicial tool box. Results concern him more than refinements of language. Words have no more content than one puts into them. Thus to him there is no peculiar sanctity in the phrase, police power. "The only valuable significance of the much-abused phrase police power is this power of the State to limit what otherwise would be rights having a pecuniary value when a predominant public interest requires the restraint."

VII

Since this paper entered the preliminary stages of publication an opinion has been published in a case which indicates the new alignment on the Court. Speaking through Mr. Justice Brandeis a majority of five upheld a New Jersey statute limiting commissions of fire insurance brokers to "a reasonable amount" which should not exceed the commission allowed by a company "to any one of its local agents on such risks in this state." Mr. Justice Brandeis disposed of the case easily on the basis of the New Jersey

\[11\] *Ibid*, at 547-548.

\[12\] *Frost v. Railroad Com'n*, *supra* n. 98, at 271 U. S. 601. He applies the same notion to personal interests of a non-pecuniary sort. In *Buck v. Bell*, 274 U. S. 200, 47 S. Ct. 554 (1927) the Court upheld a Virginia statute providing for the sterilization of insane criminals. Mr. Justice Butler voiced the only dissent. Speaking for the Court Mr. Justice Holmes went on to say: "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be so by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination (*Jacobson v. Massachusetts*, 197 U. S. 11, 25 S. Ct. 358 (1905) is broad enough to cover cutting the Fallopian tubes?".

practice which requires the presence of facts in the record sufficient to overcome the presumption of constitutionality in support of a charge of discrimination where the subject regulated is within the scope of the police power. He did not find such facts in the record. Mr. Justice Van Devanter, Mr. Justice McReynolds, Mr. Justice Sutherland, and Mr. Justice Butler dissented in a joint opinion. Thus one finds Mr. Justice Roberts voting with the so-called liberal side of the bench and swinging the balance of power with him.