THE RIGHT TO STRIKE [1]

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"Neither the common law nor the Fourteenth Amendment confers the absolute right to strike." [2] Such is the recent authoritative declaration of the United States Supreme Court. And what is perhaps more surprising, these are the words of Mr. Justice Brandeis, a liberal who holds progressive views on industrial questions. Well known for his advocacy of the *Oregon Minimum Wage Law* and legislation limiting hours of labor, to say nothing of his now famous dissenting opinions in *Duplex Printing Company v. Deering* [3] and other important labor cases, Mr. Justice Brandeis enjoys a reputation among labor leaders that has served to deny the publicity to this case that usually follows decisions that affect adversely the rights of organized labor.[4] Although fully appreciating the broad scope of the Court's declaration, the legal information bureau of the American Federation of Labor comments, quite submissively, on the decision as follows:

> "It now seems clear that our various state legislatures may declare strikes for certain objects to be unlawful, and any one urging such a strike may be deemed guilty of a felony, and be subject to fine and imprisonment. This decision in the Dorchy case will undoubtedly be the forerunner of several attempts to curtail the right of labor unions to strike." [5]

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[1] See Lewis, *The Modern American Cases Arising Out of Trade and Labor Disputes* (1905) 53 U. OF PA. L. REV. 465; Darling, *The Law of Strikes and Boycotts* (1904) 52 *ibid.* 73.

[2] Dorchy v. Kansas, 272 U. S. 306, 47 Sup. Ct. 86 (1926).

[3] 254 U. S. 443, 41 Sup. Ct. 172 (1921). See also his dissenting opinions in Truax v. Corrigan, 257 U. S. 312, 42 Sup. Ct. 124 (1922), and Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association, 274 U. S. 37, 47 Sup. Ct. 522 (1927).

[4] It is customary for labor leaders to regard adverse decisions of the Court as perversions of the existing law. Examine, for instance, the AMERICAN FEDERATIONIST's comment on the decisions in the cases of Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301 (1908); Duplex Printing Co. v. Deering, *supra* note 3; United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 42 Sup. Ct. 570 (1922), and the recent case of Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association, *supra* note 3.

[5] (1926) 33 AMERICAN FEDERATIONIST 1502.

As a matter of fact, one finds little or nothing in the opinion to warrant any such prediction.[6] The Court's concise statement simply makes it clear that the common law sets limits on the right to strike and suggests that state legislatures are not without authority to prescribe certain restrictions within the bounds of the Fourteenth Amendment. The purpose of this paper is to consider the limitations which the common law places on the right to strike and to review the most important legislation bearing on the subject.

The proverb of a strike for "a good reason, a bad reason, or no reason at all" had, until recently, become almost axiomatic among labor leaders. Prior to 1842, however, such a broad assertion of the right of laborers to stop work in a body enjoyed scant support.[7] In that year, an eminent Chief Justice of the Supreme Court of Massachusetts, Lemuel Shaw, laid down certain tests according to which labor's right to strike may be determined.[8] The first concerned the object or purpose of the strike; the second had to do with the means employed. In the case before him, for instance, he held that a strike whose object was to secure the exclusive employment of union men was not unlawful at common law as a criminal conspiracy. From this decision, which in the light of earlier cases, was certainly liberal, laborers naturally jumped to the conclusion that there were no limits on the right to strike. A closer examination of Chief Justice Shaw's opinion, however, reveals that a strike may not, in the light of the law, always be motivated by a proper and legitimate purpose. An association, he declared, "may be formed the declared objects of which are innocent . . . and yet they may have secret articles, or an agreement communicated only to the members, by which they are banded together for purposes injurious to the peace of society or the rights of its members." [9] Such a purpose, Chief Justice Shaw concluded, would undoubtedly be a

[6] The Court was careful to point out that "the question requiring decision is not . . . the broad one whether the legislature has power to prohibit strikes." 272 U. S. 306, 309, 47 Sup. Ct. 86 (1926).

[7] See MASON, ORGANIZED LABOR AND THE LAW (1925) c. 4.

[8] Commonwealth v. Hunt, 4 Metc. 111 (Mass. 1842).

[9] *Ibid.* at 129.

criminal conspiracy however meritorious and praiseworthy the professed object of the union.

On the subject of means, the Chief Justice added:

> "The legality of such an association (an association with a lawful purpose) will therefore depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair or honorable and lawful means, it is, to say the least, innocent; if by falsehood or force, it may be stamped with the character of conspiracy." [10]

These rather serious qualifications of the right to strike have been generally overlooked in the opinion, and the decision upholding the right to secure a closed-shop, by lawful means, led laborers to the extreme conclusion that a strike, whatever its object, is lawful: that the right to strike is absolute. Moreover, the fact that this decision was scarcely challenged by actual litigation for almost fifty years served to cement this view in the minds of laborers. Thus, the contrary rulings of the court in the latter eighties and early nineties came as a rude shock to laborers. Limitations undoubtedly exist, but how definitely can they be ascertained?

Writing in 1887, the most definite statement of the law that Hampton L. Carson could make, after a most elaborate study of the cases, was as follows:

> "The result of all the cases, ignoring matters of detail or special circumstances, appears to be as follows: Workmen may combine lawfully for their own protection and common benefits; for the advancement of their own interests, for the development of skill in their trade or to prevent overcrowding therein, or to encourage those belonging to their trade to enter their guild; for the purpose of raising their wages or to secure a benefit which they can claim by law. The moment, however, that they proceed by threats, intimidation, violence, obstruction, or molestation, in order to secure their ends; or when their object be to impoverish third persons, or to extort money from their employers, or to ruin their business, or to encourage strikes or breaches of contract among others, or to restrict the freedom of others for the purpose of compelling employers to conform to their views,

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[10] *Ibid.* at 134.

or to attempt to enforce rules upon those not members of their association, they render themselves liable to indictment. 'The rights of workmen are conceded, but the exercise of free-will and freedom of action within the limits of the law is also secured equally to the masters.'" [11]

About all this concise statement of the law amounts to as applied to the strike is that "a strike may be lawful or it may be unlawful and criminal. Whether it is lawful or not depends upon its object and the manner in which it is conducted." [12] This, in fact, was the rule laid down by the highest state court of Connecticut in 1904 and signifies nothing more or less than the application of the doctrine of conspiracy to the strike. It was the same test of legality which Chief Justice Shaw had announced fifty years earlier.

But, someone inquires, who is to say whether any particular strike is motivated by a lawful object or purpose? Is not this criterion of legality rather difficult to apply? [13] The purpose of practically every strike is avowedly legitimate and proper. Who can deny it? The answer is the court. In the words of the highest state court of Massachusetts, written in 1911:

"Whether the purpose for which a strike is instituted is or is not a legal justification for it, is a question of law to be decided by the court. To justify interference with the rights of others, the strikers must in *good faith* strike for a purpose which the court decides to be a legal justification for such interference. . . . To make a strike a legal strike the purpose of the strike must be one which the court as

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[11] WRIGHT, THE LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS (1887) 178. The law on the same subject, as found in the American cases, is discussed by Hampton L. Carson in the same volume.

[12] State v. Stockford, 77 Conn. 227, 58 Atl. 769 (1904).

[13] "It is most difficult," writes John A. Fitch, "to determine what is the primary motive of the workingman in undertaking a strike or a boycott. They aim both to injure the employer and to benefit themselves. . . . In the last analysis, the decisions of the court in these delicate questions of intent and interest will be decided by the political economy of the court." THE CAUSES OF INDUSTRIAL UNREST (1924) 342, citing COMMONS AND ANDREWS, PRINCIPLES OF LABOR LEGISLATION (1927), and ADAMS AND SUMNER, LABOR PROBLEMS (1917) 187. See also HOXIE, TRADE UNIONISM IN THE UNITED STATES (1917) 233, 235-236.

matter of law decides is a legal purpose of a strike, and the strikers must have acted in good faith in striking for such purpose." [14]

The court is obviously placed in rather a difficult position: it not only has to determine, according to this court, whether the professed object is legal, but must go further and delve into the motives or intent of the strikers. Did the combination strike in "good faith" for a purpose which the court decides to be legal? Much criticism has been directed against the test of object and intent as applied to acts of labor combinations, and perhaps rightly so since it may well be inquired, how can a court determine with any degree of accuracy what any particular labor combination intends? [15] The rule most frequently followed is that "the law . . . presumes that a person (or combination) intends the natural result of his (or its) act. . . . If the injury which has been sustained or which is threatened is not only the natural but the inevitable consequence of the defendant's acts, it is without effect for them to disclaim the intention to injure." [16]

The point is well illustrated by Mr. Justice Sutherland's opinion in the recent *Bedford Cut Stone* case.[17] Denying the claim of the union that the legitimacy of its ultimate purpose to promote self-interest and unionize the plaintiffs justified such restraint of interstate commerce as resulted from its activities, the Court said:

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[14] De Minico v. Craig, 207 Mass. 593, 598, 94 N. E. 317, 319 (1911).

[15] COMMONS AND ANDREWS, PRINCIPLES OF LABOR LEGISLATION (1927) 107. The theory underlying the doctrine of conspiracy as applied to acts of labor combinations is that an act of many is different from an act of an individual. A combination may make dangerous or oppressive that which, if proceeding from a single person, would be otherwise. In the one case, motive becomes a determining factor; in the latter case, it may be relatively unimportant. See MASON, ORGANIZED LABOR AND THE LAW (1925) 32-35, 80-82.

[16] Barr v. Essex Trades Council, 53 N. J. Eq. 101, 118, 30 Atl. 881, 887 (1894). It is well established that a labor combination may under no circumstances resort to violent, coercive, or intimidating means, since the results that follow such methods may serve to taint the most laudable purposes with illegality. But, it may be objected, those terms are themselves so vaguely defined as to permit almost any conduct to be condemned as violent, coercive or intimidating. See COMMONS AND ANDREWS, PRINCIPLES OF LABOR LEGISLATION (1927) 109-110; MASON, ORGANIZED LABOR AND THE LAW (1925) 94-95.

[17] Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association, 274 U. S. 37, 47 Sup. Ct. 522 (1927).

> "Respondent's chief contention is that 'their sole and only purpose . . . was to unionize the cutters and carvers of stone at the quarries.' And it may be conceded that this was the ultimate end in view. But how was this end to be effected? The evidence shows indubitably that it was by an attack upon the use of the product in other states to which it had been and was being shipped, with the intent and purpose of bringing about the loss or serious reduction of petitioner's interstate business, and thereby forcing compliance with the demands of the union. And, since these strikes were directed against the use of petitioner's product in other states, with the plain design of suppressing or narrowing the interstate market, it is no answer to say that the ultimate object to be accomplished was to bring about a change of conduct on the part of the petitioners in respect of the employment of union members in Indiana.
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> "A restraint of interstate commerce cannot be justified by the fact that the ultimate object of the participants was to secure an ulterior benefit which they might have been at liberty to pursue by means not involving such restraints." [18]

Nor was the Court concerned with the question of whether an injunction would have issued in the absence of a statute. Concluding that the defendant's acts fell within the prohibitions of the anti-trust laws, the contention that the action of the union was justifiable as a necessary defensive measure was disposed of by saying that "the anti-trust act had a broader application than the prohibition of restraints unlawful at common law." [19] Its effect, declares Mr. Justice Sutherland, who spoke for the Court, was to declare illegal "every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be the parties to it, which directly or necessarily operates in restraint of

[18] *Ibid.* at 47, 47 Sup. Ct. at 525.

[19] The Court's view of the scope of the act clearly belies the intentions of the framers as expressed by Senator Sherman. Explaining the purpose of the Sherman Act, 26 STAT. 209 (1890), 28 U. S. C. c. 1 (1926), he declares: "It does not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our state and federal government. . . . The purpose of this bill is to enable the courts of the United States to apply the same remedies against combinations which injuriously affect the interests of the United States that have been applied in the several states to protect local interests." RECOLLECTIONS OF FORTY YEARS (1895) 1072. See also *The Anti-Trust Laws and the Rule of Reason* (1927) 9 LAW AND LABOR 81.

trade or commerce among the several states." [20] It is obvious that the Court is here reading the act literally, ignoring, apparently, the "rule of reason" laid down in the *American Tobacco* and *Standard Oil* cases.[21] The statute sets up no standard of reasonableness. The judges must supply one, and they are by no means in agreement.[22] To Mr. Justice Brandeis, in the case under consideration, "the propriety of the unions' conduct can hardly be doubted by one who believes in the organization of labor." [22a] "As an original proposition," Mr. Justice Stone would have considered the action of the union as reasonable. But Mr. Justice Sutherland is firmly convinced that the acts of the union constitute an unreasonable and illegal restraint of trade. Who can doubt that the divergent points of view flow from a difference in the political economy of the respective members of the Court?

There is no need to pursue the subject further. The important point is that "the question of when a strike is legal or of

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[20] This quotation purports to be § I of the Sherman Act. The language of the section, although sweeping enough, is not so all-inclusive as Mr. Justice Sutherland would lead us to believe. Section I reads in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal." See the dissenting opinion of Mr. Justice Brandeis, at 65, 47 Sup. Ct. at 531, who argues that the restraint of trade in question is a reasonable one. "The Sherman Law," Justice Brandeis points out, "was held in U. S. v. United Shoe Machinery Co., 247 U. S. 32, 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 to 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."

[21] U. S. v. American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632 (1911); Standard Oil Co. v. U. S., 221 U. S. 1, 31 Sup. Ct. 502 (1911).

[22] The state of mind of the judges on this point is indicated by the separate opinion of Mr. Justice Stone, *supra* note 17, at 55, 47 Sup. Ct. at 528: "As an original proposition," he observes, "I should have doubted whether the Sherman Act prohibited a labor union from peaceably refusing to work upon material produced by non-union labor or by a rival union, even though interstate commerce were affected. In the light of the policy adopted by Congress in the Clayton Act with respect to organized labor, and in the light of Standard Oil Co., v. U. S., 221 U. S. 1; U. S. v. American Tobacco Co., 221 U. S. 106, 178-180, I should not have thought that such action as is now complained of was to be regarded as an unreasonable and therefore prohibited restraint of trade." Mr. Justice Stone goes on to say that the Court took a different view of the matter in the Duplex case and since the Court considers that case controlling in the present case, he concurs with the majority in holding the acts of the union "unreasonable."

[22a] *Supra* note 17, at 58, 47 Sup. Ct. at 529.

what organized labor may do in the conduct of a legal strike or in the carrying on of a controversy with an employer, whether through strike or otherwise, is not defined by statute anywhere in the United States." [23] Neither the *Clayton Act*,[24] nor the state statutes patterned after it, serves to make the law much more definite.[25] The right to strike, therefore, under common law as well as statute law, federal and state, is largely a matter for judicial determination by the gradual process of judicial inclusion and exclusion. In other words, one must glean a knowledge of the legal rights of labor in this country by recourse to the decisions of the court in damage suits and injunction cases. Thus, the courts generally hold that a strike may be properly instituted for the following purposes: to increase or maintain the scale of wages, to determine hours of labor, to improve working conditions, to enforce contract rights and so forth. A strike may not, however, be declared even for these or other legitimate purposes, if their accomplishment involves breach of contract, restraint of interstate commerce, secondary boycott, unlawful interference with an employer's business, violence, intimidation, or any other illegal acts.[26] After an examination of judicial opinions and decisions, one is apt to arrive at the conclusion that the activities of labor are lawful so long as they are confined to means which are ineffective for achieving perfectly legitimate purposes. As for the *Sherman Act*, it should certainly be a matter of no little concern to labor that the "rule of reason" is not as applicable in its interpretation in labor cases as in those involving capitalistic interests.[27] In the light of the *Standard Oil* and *American Tobacco* cases [28] and

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[23] FITCH, THE CAUSES OF INDUSTRIAL UNREST (1924) 277.

[24] *Infra* note 29.

[25] See especially SPELLING AND LEWIS, A TREATISE ON THE LAW GOVERNING INJUNCTIONS (1926) 272; HARDMAN, AMERICAN LABOR DYNAMICS (1928) *Futility of the Present Anti-Injunction Laws*, 269. One finds in state statutes against conspiring to interfere with another's exercise of his trade or calling the same type of phraseology that characterized the statement of the doctrine of conspiracy at common law. See, in this connection, OAKES, THE LAW OF ORGANIZED LABOR AND INDUSTRIAL CONFLICTS (1927) 860 ff.

[26] See, in this connection, OAKES, THE LAW OF ORGANIZED LABOR AND INDUSTRIAL CONFLICTS (1927) c. 23.

[27] *Supra* note 19.

[28] *Supra* note 21.

especially in view of the policy adopted by Congress in the *Clayton Act* [29] with respect to organized labor, it appears that little argument would be needed to justify it.

The right to strike, then, being relative rather than absolute, must be exercised with due regard for the rights of others. Under common law as well as under statute law, the right of the non-union worker freely to pursue his calling and the right of the employer to conduct his business free from interference have been most frequently set up by the courts as restrictions. More recently, the public is the party which has most stoutly asserted a claim to protection against the absolute right to strike. The result has been the enactment of statutes providing compulsory arbitration of industrial disputes in those industries considered to be "affected with a public interest." What sanction do the courts give to such legislation?

It has long been recognized that persons engaged in public service are under obligation to the public to conduct that service in the interest of the general welfare. Is the legal position of a proprietor of a public utility to be distinguished from that of a workman employed in such a concern? It is now well established that the right to work is a property right,[30] and as such it is perhaps to be comprehended within the basic principle of the law of public utilities as announced in *Munn v. Illinois:*

> "When 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." [31]

None of the public utilities under control of the national government so vitally touches the public interest as does the busi-

[29] 38 STAT. 730 (1914), 15 U. S. C. §§ 12 *et seq.* (1926).

[30] One of the first expressions of opinion on this subject is to be found in Mr. Justice Bradley's dissenting opinion in the Slaughter House Cases. "This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed." 16 Wall. 36, 116 (U. S. 1873). See also Truax v. Corrigan, 257 U. S. 312, 42 Sup. Ct. 124 (1921), and cases there cited.

[31] 94 U. S. 113, 126 (1876).

ness of interstate commerce. Here the supremacy of the public interest as opposed to the absolute right to strike was attested as early as 1893.[32] It was not until 1917, however, that the Supreme Court, in passing upon the *Adamson Act*,[33] spoke definitely upon the power of Congress to regulate the right to strike in interstate commerce. This was in the case of *Wilson v. New*.[34]

> "Whatever," declared Chief Justice White, "would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them, *and by concert of action to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest,* and as to which the power to regulate commerce, possessed by Congress, applied and the resulting right to fix, in case of disagreement and dispute, a standard of wages, as we have seen necessarily obtained." [35]

The question before the Court was whether the power of Congress to regulate interstate commerce extended to the enactment of special legislation, providing a permanent eight-hour day and a temporary standard of wages, when, in the face of a threatened strike, that was necessary to secure a continuous flow of interstate commerce. The Court answered this question in the affirmative and reasserted the proposition that Congress has the power to enact any law appropriate and necessary for the regulation of interstate commerce.

In 1916 the country was faced with a situation in which the movement of interstate commerce was seriously threatened. The only course open to Congress was to provide a temporary standard of wage to prevent the stoppage of interstate commerce caused by the failure of the parties to agree. In the Court's own language Congress had the power "to compulsorily arbitrate the dispute between the parties by establishing . . . a legislative

[32] Toledo, Ann Arbor, etc., Ry. v. Pennsylvania, 54 Fed. 730 (C. C. Ohio 1893).

[33] 39 STAT. 721 (1916), 45 U. S. C. § 65 (1926).

[34] 243 U. S. 332, 37 Sup. Ct. 298 (1917).

[35] *Ibid.* at 352, 37 Sup. Ct. at 303. Italics are the writer's.

standard of wages . . . binding . . . upon the parties. . . ."[36] Now, if Congress can legislate specifically to relieve an impending emergency, would not that body enjoy equal authority to provide permanent legislation to prevent the occurrence of similar contingencies? More specifically, may Congress confer upon a board or commission the power to enforce its decisions or authorize such board or commission to arbitrate compulsorily all cases submitted to it? From Chief Justice White's opinion it is clear that this question must be answered affirmatively.[37]

Congress, however, in framing subsequent legislation, has cautiously avoided making any provision for compulsory arbitration. Anti-strike provisions were inserted in the original *Esch-Cummins Bill;* strikes in interstate commerce were prohibited and a penalty of $500 or six months imprisonment was imposed. But these provisions were struck out by the House and the bill became law without providing the Railroad Labor Board with power to enforce its decisions.[38] In 1921, President Harding, apparently realizing the futility of the measure, recommended to Congress that the decisions of the Board be given the force of law and that strikes in interstate commerce be prohibited. But nothing resulted from the proposal.

Under the present *Watson-Parker Act of 1926,*[39] the law still falls short of an absolute prohibition of the right to strike. This legislation seeks to prevent strikes in the nation's basic industry not by a drastic statutory law but by a scheme of conciliation

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[36] *Ibid.* at 351, 37 Sup. Ct. at 303.

[37] Although this legislation was upheld solely on the authority of the power of Congress to regulate interstate commerce (and not as an emergency measure), the Court has subsequently declared that the decision reached the border line of constitutionality. In fact, Chief Justice Taft's opinion in the Wolff Packing case, *infra* note 46, embodies almost as strong an implication *against* the power of Congress to settle labor's disputes by recourse to compulsory arbitration as Chief Justice White's implication in its favor. See *infra* p. 67.

[38] 41 STAT. 457 (1920), 49 U. S. C. c. 3 (1926). The Supreme Court has held that there was nothing compulsory in the provisions of the act as against either a railroad company or its employees. The functions of the board were merely advisory, its decisions being enforceable only by the force of public opinion and not in a court of law. Pennsylvania Railroad System v. Pennsylvania Railroad Co., 267 U. S. 203, 45 Sup. Ct. 307 (1925).

[39] 44 STAT. 577 (1926).

and arbitration concluded jointly by carriers and unions. A strike may be declared, as a last resort, but only after every other resource, involving considerable delay, has been exhausted. So the ultimate right to strike in the railroad industry remains.

The recent formula of the American Bar Association points to a middle course between compulsory arbitration and industrial war with its incidents of strikes or lockouts. This scheme leaves both parties free to arbitrate or not, but having agreed to arbitrate it makes such agreement a legally enforceable contract. Thus, rather than compel arbitration by a general statute, arbitration under this plan is a matter to be settled in each particular case by the parties voluntarily. Although generally approved by leaders of labor as well as capital, it seems unlikely that the scheme will gain general acceptance. Indeed it has already been effectively criticised on the score of superficiality.[40] "The weakness in the proposal," as one critic expresses it, "lies in the fact that it is confined entirely to machinery. Guiding principles are neglected. Its treatment of the problem of industrial conflict is superficial and not fundamental or lasting." The first step, so it seems, in

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[40] What is especially needed, according to W. Jett Lauck, is a set of guiding principles around which the industrial conflict rages; machinery for the adjustment of industrial disputes is secondary, if not futile, without a code of principles on the basis of which the machinery can function. There are many points of controversy, declares Mr. Lauck, concerning which certain common principles must be agreed upon before industrial machinery can function effectively. Among them are:

"1. The right of employees to organize and bargain collectively through representatives of their own choosing.

"2. The right of organized workers against discrimination because of membership in labor unions, and the right of unorganized workers against coercion or discrimination by unionized workers.

"3. The right of unskilled workers to a just and reasonable wage, which is variously defined as a 'living wage,' a 'saving wage' or an 'American standard of living.'

"4. The right of skilled workers to a participation in net revenue gains of industry according to their productivity or their 'increased productive efficiency.'

"5. The right of wage earners to a just and reasonable work day, and to one day rest in seven.

"6. The right of women and children to be protected against excessive hours of labor and against night work."

This list is intended to be suggestive rather than exhaustive. "It is obvious from past experience," Mr. Lauck concludes, "that no machinery for arbitration or for the judicial settlement of disputes, however elaborate or however carefully planned, can in itself have any permanent effect." New York Times, Feb. 12, 1928.

the direction of industrial peace lies in the formulation of and agreement upon guiding principles; machinery is a matter for secondary consideration.

In the field of state regulation, a species of compulsory arbitration was inaugurated in 1915, when the state of Colorado made it unlawful "for any employer to declare or cause a lockout, or for an employee to go on strike on account of any dispute prior to or during an investigation, hearing or arbitration of such dispute by the commission, or the board, under the provisions of this act; *Provided,* That nothing in this act shall prohibit the suspension or discontinuance . . . of any industry or the working of any person therein which industry is not affected with a public interest." [41]

The act came before the highest state court is 1921.[42] Here it was held that the business of coal mining was "affected with a public interest" within the meaning of the act and therefore such limitation upon the right to strike as the statute provided contravened neither the state constitution nor the Fourteenth Amendment. The statute has not passed under the scrutiny of the United States Supreme Court.[43]

The most far-reaching attempt on the part of a state to prevent interruption by labor disputes of businesses "affected with a public interest" is illustrated by the *Kansas Industrial Court Act of 1920.*[44] Among the businesses covered by the statute are the manufacture of food and its transportation, mining or production of fuel, the manufacture of wearing apparel and all public utilities and common carriers. The assumption on which this legislation rests is that these businesses are so "affected with a public inter-

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[41] Colo. Session Laws (1915) c. 180 § 30. The act as amended does not contain the portions under discussion. COLO. COMP. STAT. (1921) § 4354.

[42] People v. United Mine Workers of America, 70 Colo. 269, 201 Pac. 54 (1921).

[43] It would be interesting to speculate on the fate of the statute before the United States Supreme Court. As will be observed in a moment the provisions of the Colorado act were not so drastic as those found in the Kansas statute. The limitations on the right to strike were effective before and during investigation and arbitration of a dispute. There was no attempt to compel acceptance of the commission's findings. For this reason it is possible that the Court could uphold the one and deny the constitutionality of the other.

[44] KAN. REV. STAT. ANN. (1923) § 44-601 *et seq.*

est"[45] that the state may compel their continuance and, if the owner and employees cannot agree, may fix the terms through a public agency to the end that there shall be continuity of operation and production. A court of industrial relations was established whose function was to hear and settle controversies in any of the industries mentioned in the act.

Opposed by both employers and employees, the statute was hotly contested from the outset. The act first came before the Supreme Court in 1923, in the case of *Wolff Packing Co. v. Court of Industrial Relations.*[46] The dispute arose when the Wolff Packing Company made a general reduction of wages. The Meat-Cutters' Union objected and appealed to the Industrial Court. As a result of a hearing the court found that an emergency existed and ordered an increase of wages and prescribed the hours of labor to be observed. The company ignored the court's order and a writ of mandamus was necessary to compel compliance therewith. From this order which issued from the state supreme court the company appealed to the United States Supreme Court contending that the Kansas statute was in conflict with the Fourteenth Amendment.

The state attempted to justify compulsory arbitration and the resulting interference with liberty of contract on the authority of *Munn v. Illinois*[47] and *Wilson v. New.*[48] However, Chief Justice Taft who spoke for the Court doubted that the business of the meat packing company could be said to be affected with a public interest in the sense of the businesses involved in these cases. Three classes of businesses were declared to be clothed with the public interest and subject to *some* public regulation:

> 1. Those carried on under the authority of a public grant of privileges which either expressly or impliedly impose the affirmative duty of rendering a public service demanded by any member of the public, such as railroads, common carriers and public utilities.

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[45] *Ibid.* § 44-603.
[46] 262 U. S. 522, 43 Sup. Ct. 630 (1923).
[47] 94 U. S. 113 (1876).
[48] 243 U. S. 332, 37 Sup. Ct. 298 (1917).

2. Certain exceptional occupations which have always been regarded as clothed with a public interest, such as innkeepers, cabs and grist mills.

3. Those which were not public at their inception, but became so because of changed conditions.

It is quite clear that meat packing could not possibly fall under either of the first two classifications; the question was whether it might be brought under the third head. Did the public interest attach to the meat packing business in such a way and to such an extent as to justify the regulation involved? What, in other words, are the tests of "public interest"? "The mere declaration by a legislature . . . is not conclusive of the question whether its attempted regulation on that ground (of public interest) is justified." "Clothed with a public interest . . . means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered." It may arise from "the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation." [49] But why be concerned, the Court argued, with the question of whether the meat packing business was affected with a public interest? The attempted regulation—that of compelling continuity—could not be sustained anyway. Even in the case of *Munn v. Illinois* [50] it was recognized, as the Court pointed out, that the owner could discontinue the business if he desired. Here the very purpose of the regulation was to insure continuity.[51] Very special and extraordinary circumstances must exist to justify such a regulation.

[49] *Supra* note 46, at 536, 538, 43 Sup. Ct. at 633, 634.

[50] *Supra* note 47.

[51] It may well be questioned whether any such distinction can properly be drawn between the two cases. The obvious purpose of the statute was to secure such continuity of the business as the legislature believed would result from the settlement of industrial disputes by compulsory arbitration. Certainly there was no purpose to compel continuity against the will of the owner, but rather to establish conditions to which the owner must submit if he desired to continue in the business. Thus the act stood on all fours with the one involved in Munn v. Illinois, and the difference between the acts is not one of kind but of degree. (1924) 18 AM. POL. S. REV. 68.

> "The power of a legislature," declares the Chief Justice, "to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct and is assumed when the business is entered upon. A common carrier which accepts a railroad franchise is not free to withdraw the use of that which it has granted to the public. . . . It may give up its franchise and enterprise, but short of this, it must continue. Not so the owner (of a business of another type) when by mere changed condition his business becomes clothed with a public interest. He may stop at will whether the business be losing or profitable.
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> "The minutely detailed government supervision, including that of their relations to their employees, to which the railroads of the country have been gradually subjected by Congress through its power over interstate commerce, furnishes no precedent for regulation of the business of the plaintiff in error whose classification as public is at the best doubtful. It is not too much to say that the ruling in *Wilson v. New* went to the border line, although it concerned an interstate common carrier in the presence of a nation-wide emergency and the possibility of great disaster." [52]

Accordingly the Chief Justice held that "the Industrial Court Act, in so far as it permits the fixing of wages in plaintiff in error's packing house, is in conflict with the Fourteenth Amendment and deprives it of its property and liberty of contract without due process of law." [53]

As a result of this decision the Kansas Supreme Court modified its writ of mandamus with reference to the fixing of wages, allowing that portion of the original order dealing with hours of labor to stand. The company still insisted that it was being denied rights guaranteed by the Fourteenth Amendment, so the *Wolff* case was again brought before the Supreme Court in 1925.[54] Speaking this time through Mr. Justice Van Devanter, the Court merely extended the reasoning of the earlier case to cover hours of labor. This decision was considered to have dealt

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[52] *Supra* note 46, at 543, 43 Sup. Ct. at 636.
[53] *Ibid.* at 544, 43 Sup. Ct. at 636.
[54] 267 U. S. 552, 45 Sup. Ct. 441 (1925).

the Kansas Industrial Court a mortal blow. In fact even before it was announced the Kansas Legislature had abolished the Industrial Court and transferred its functions to a public service commission. It has been argued on the basis of the Supreme Court's decisions that the commission is doomed to play a role, in the settlement of industrial disputes, similar to that of the United States Labor Board set up under the *Transportation Act of 1920*,[55] with power to investigate, suggest remedies and give them publicity, but no power to enforce its decisions. So one may well wonder whether there is anything left for the public service commission to do.[56]

No very definite answer can be given to the question of the sanction which the Court will give in future cases to the principle of compulsory arbitration. This much, however, is clear: A state may not, within the limits of the Fourteenth Amendment, provide a system of compulsory arbitration for the settlement of disputes in those industries that have become clothed with a public interest merely as a result of changed conditions. In denying the constitutionality of the compulsory features of the Kansas statute, the Court was consistent in principle, at least, with a rule laid down in earlier cases:[57] exceptional and extraordinary restrictions upon liberty of contract and property rights can only be justified by extraordinary circumstances. The Court found the provisions of the act compelling continuity of business in accordance with the orders of the Industrial Court (even though such continuity involved heavy losses and the denial of the right to strike against the Court's orders) exceptional restrictions unaccompanied by exceptional circumstances. "It has never been supposed," the Court declares, "since the adoption of the Consti-

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[55] 41 STAT. 469 (1920), 45 U. S. C. c. 7 (1926).

[56] While it seems unlikely, for reasons given below, that compulsory arbitration can be sustained even in those businesses affected with a public interest mentioned under the first two heads given by Chief Justice Taft in the Wolff Packing Company case, yet it is quite probable that public operation of industries in case of emergency as contemplated by § 20, the voluntary submission of disputes to arbitration as provided under § 21, and provisions for investigation and inquiry under § 24, are not affected by the Court's decisions. See Kansas Special Session Laws (1920) c. 29.

[57] See Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394 (1923); Block v. Hirsh, 256 U. S. 135, 41 Sup. Ct. 458 (1921).

tution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation." [58]

Moreover, even in the case of the concerns covered under the first two heads of businesses affected with a public interest, such as public utilities and interstate commerce, it is doubtful whether compulsory arbitration would be valid. The Court has, it is true, given, as already pointed out, a considerable degree of sanction to such legislation in *Wilson v. New*.[59] In the *Wolff Packing* case [60] also the Court declared with particular reference, apparently, to the businesses mentioned under the first two classifications that the power can only arise "where the obligation to the public of continuous service is direct, clear and mandatory and arises as a contractual condition express or implied of entering the business either as owner or worker." In almost the same breath, however, the Court qualifies the statement somewhat by saying that such limitations as compulsory arbitration involves, although sometimes justified, "can only arise when investment by the owner and entering the employment by the worker create a conventional relation to the public somewhat equivalent to the *appointment of officers and the enlistment of soldiers and sailors in military service.*" [61]

It should also be mentioned again, in this connection, that compulsory arbitration, involving, as it does, extraordinary restrictions on liberty and property rights, must be accompanied, even when invoked in the settlement of industrial disputes in public utilities and interstate commerce, by circumstances of a similar character. In the case of *Wilson v. New*,[62] it required "a nation-wide dispute over wages between railroad companies and their train operatives, with a general strike, commercial paralysis, and grave loss and suffering overhanging the country" [63]

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[58] 262 U. S. 522, 537, 43 Sup. Ct. 630, 633 (1923).
[59] *Supra* note 48.
[60] *Supra* note 46, at 541, 43 Sup. Ct. at 635.
[61] *Supra* note 58, at 541, 43 Sup. Ct. at 635. Italics are the writer's.
[62] *Supra* note 48.
[63] *Supra* note 58, at 541, 43 Sup. Ct. at 635.

to justify the *Adamson Act* [64] constitutionally. Even so, it was not "too much" for the Court to say that the ruling upholding the act "went to the border line" of constitutionality. It must always be remembered that any attempt at regulation on the ground of public interest is subject to judicial inquiry. The business may be one admittedly affected with a public interest and the particular regulation still may not be valid, but arbitrary and unreasonable.

Let it not be supposed, however, that the Kansas act [65] has been entirely emasculated. The recent case of *Dorchy v. Kansas* affords convincing testimony to the contrary.[66] This case involved sections 17 [67] and 19 [68] of the act, the first of which makes it unlawful to conspire to induce others to quit their employment "for the purpose and with the intent to hinder, delay, limit, or suspend the operation" of any business affected with a public interest. Section 19 makes it a felony for any officer of a labor union to use power or influence incident to his office to induce another person to violate any provision of the act. It appeared that Dorchy, an officer of the union, called a strike solely to compel the payment of contested wages claimed by an ex-employee. Convicted under section 19, Dorchy brought the case before the Supreme Court on a writ of error. His claim was that the sections in question were unconstitutional, prohibiting, as they do, the right to strike and thus denying, as he alleged, liberty guaranteed by the Fourteenth Amendment. Rejecting this claim and upholding sections 17 and 19 of the act, Mr. Justice Brandeis observed:

> "The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union formerly employed in

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[64] 39 STAT. 721 (1916), 45 U. S. C. § 65 (1926).

[65] *Supra* note 44.

[66] 272 U. S. 306, 47 Sup. Ct. 86 (1926).

[67] KAN. REV. STAT. ANN. (1923) § 44-617.

[68] *Ibid.* § 44-619.

the business is not a permissible purpose. . . . To enforce payment by a strike is clearly coercion. The legislature may make such action punishable criminally as extortion or otherwise." [69]

This holding, however, is not so far-reaching as it may seem at first glance. The legality of the strike might well have been denied, without the statute, because it was a conspiracy at common law. In declaring that "a strike may be illegal because of its purpose," Mr. Justice Brandeis was giving utterance to a well-established doctrine of common law. Lest, moreover, an erroneous implication be drawn from the decision, the Court makes it a point to declare that "the question requiring decision is not . . . the broad one whether the legislature has power to prohibit strikes." [70]

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[69] *Supra* note 66, at 311, 47 Sup. Ct. at 87.
[70] *Ibid.* at 309, 47 Sup. Ct. at 86.