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## MR. JUSTICE BRANDEIS AND THE CONSTITUTION

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Long before he came to the Supreme Court, Louis Dembitz Brandeis had emphasized the law's need of social and economic intelligence. With prophetic insight he foreshadowed many of the challenging problems which confront our world today, and devised "social inventions" to cope with them. There was hardly a phase of economic, industrial and social life to which he did not turn his hand; labor, trusts, railroads, insurance, finance are but part. So he brought to the Court an unequalled wealth of experience in such matters, and a new technique in dealing therewith, infinitely valuable to the Court and the country at large.

His liberal views on social and economic issues and his methods of approach, were already well known. His ideas on public questions, no less than his methods of brief-making, ran absolutely counter to the smug, conventional constitutionalism of the American bar. Thus there was obvious danger in appointing to the highest Court a man so thoroughly grounded in the intricacies and complexities of modern business; a man who looked at industrial problems from the point of view of the public and of the employee; and one, moreover, who would probably continue to press on beyond the bounds of legal technicality and judicial precedent to the realms of fact and reality. The fears of those who on these grounds opposed his appointment were proved genuine.

Shortly after his elevation to the Supreme Court, that body considered the now famous *Employment Agency* case,<sup>1</sup> in which its five to four decision overturned a Washington state statute prohibiting employment agencies taking fees from workers. The state had argued that the private

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<sup>1</sup>Adams v. Tanner, 244 U. S. 590, 37 Sup. Ct. 662 (1916).

employment agency was "economically . . . nonuseful, if not vicious, because it compels the needy and unfortunate to pay for that which they are entitled to without fee or price, that is, the right to work".<sup>2</sup> Although such placement costs could well be met by the employer, Mr. Justice McReynolds demurred, applying for the Court the principle that legitimate and useful businesses, when attended by abuses, may be regulated; while obnoxious and vicious businesses can be prohibited and destroyed. His conclusion that private employment agencies are of the former type was reached, characteristically enough, by recourse to judicial precedents, with no examination whatever into the evils attending this business in the state of Washington or anywhere else.

In a strong dissenting opinion, Mr. Justice Brandeis minces no words regarding the inadequacy of the Court's treatment of the question at issue. Comparatively little space is given to precedents, and much of it is devoted to showing that no correct decision can be reached by reasoning from past cases. He absolutely denied the authority of the courts to set aside social legislation "unless, in looking at the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law' . . . Whether a measure relating to the public welfare", he continues, "is arbitrary or unreasonable, whether it has no substantial relation to the end proposed, is obviously not to be determined by assumptions or by *a priori* reasoning. The judgment should be based upon a consideration of relevant facts, actual or possible—*Ex facto jus oritur*. That ancient rule must prevail in order that we may have a system of living law."<sup>3</sup>

In accordance with the technique he had developed ten years earlier in argument before the Supreme Court,<sup>4</sup> it was necessary in this case, he thought, to make the following inquiries: "What was the evil which the people of Washington sought to correct? Why was the particular remedy embodied in the statute adopted? And, incidentally, what has been the experience, if any, of other states or countries in this connection?"<sup>5</sup>

None of these questions is raised by Mr. Justice McReynolds and, as far as one can judge from his opinion, no official investigation of these matters might ever have been made. Mr. Justice Brandeis, on the other hand, gathered his materials from official reports of the United States Bureau of Labor, the United States Commission on Industrial Relations, and the writings of acknowledged experts. Such pertinent and easily available sources revealed evils of far-reaching effect—extortionate fees, discrimination, misrepresentation as to conditions of work and terms of employment, fee-splitting with foremen, and so on.

<sup>2</sup> *Ibid.* at 594, 37 Sup. Ct. at 664.

<sup>3</sup> *Ibid.* at 599, 37 Sup. Ct. at 666.

<sup>4</sup> See Mason, *Mr. Justice Brandeis: A Student of Social and Economic Science* (1931) 79 U. OF PA. L. REV. 665.

<sup>5</sup> *Adams v. Tanner*, *supra* note 1 at 600, 37 Sup. Ct. at 666.

The congressional report of the United States Commission on Industrial Relations showed that many private employment agencies were quite unable to meet the needs for which they were supposed to exist. Rather than actually relieve unemployment and secure jobs for men out of work, these agencies were operated so as to congest the labor market and to increase the irregularity of employment. The peculiar defects of these agencies and the pressing need for their regulation in the state of Washington, were fully demonstrated in a published report of the State Bureau of Labor.

Nor had the abuses of employment agencies been accepted as inevitable and unavoidable. Twenty-four states had attempted direct regulation by statutes and by municipal ordinances; nineteen had undertaken indirect control by establishing municipal employment offices. This rather extensive experience in regulating employment agencies had developed the conviction "that the evils of private agencies were inherent and ineradicable, so long as they were permitted to charge fees to the workers seeking employment".<sup>6</sup>

Furthermore, Mr. Justice Brandeis saw in the Washington statute a purpose evidently not appreciated at all by Mr. Justice McReynolds. The purpose behind the act was not merely a negative one; it was also positive: to strike at that paramount evil in the workingman's life—irregularity of employment.

"The problem which confronted the people of Washington was far more comprehensive and fundamental than that of protecting workers applying to the private agencies. It was the chronic problem of unemployment—perhaps the gravest and most difficult problem of modern industry . . . Students of the larger problem of unemployment appear to agree that establishment of an adequate system of employment offices or labor exchanges is an indispensable first step toward its solution. There is reason to believe that the people of Washington not only considered the collection by the private employment offices of fees from employees a social injustice; but that they considered the elimination of the practice a necessary preliminary to the establishment of a constructive policy for dealing with the subject of unemployment."<sup>7</sup>

This opinion is typical of the research Mr. Justice Brandeis has made into various social and economic problems with which the Supreme Court has had to deal during the past sixteen years. It also illustrates the true

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<sup>6</sup> *Ibid.* But in making such inquiries as Mr. Justice Brandeis undertook, there was no purpose to ascertain whether the remedy adopted by the Washington legislature was wise, or even to discover what were the actual facts, merely as facts: "The sole purpose of the enquiries is to enable this court to decide, whether in view of the facts, actual or possible, the action of the state of Washington was so clearly arbitrary and unreasonable, that it could not be taken 'by a free government without a violation of fundamental right'." *Ibid.*

<sup>7</sup> *Ibid.* at 613, 37 Sup. Ct. at 671. Mr. Brandeis has long insisted that "the greatest need of the working man is regularity of employment. Irregularity of employment creates hardships and demoralization. It is the most sinful waste". Brandeis, *Organized Labor and Efficiency* (1911) 26 SURVEY 150. See also Brandeis, *The Road to Social Efficiency* (1911) 98 OUTLOOK 291-292.

nature of that principle of judicial review on which his investigations are based. In passing upon economic and social legislation, he insisted, the Court should know the facts. He had comparatively little faith in reason: "Knowledge is essential to understanding; and understanding should precede judging. Sometimes, if we would guide by the light of reason, we must let our minds be bold."<sup>8</sup> But in no case should an inquiry into the facts be made an excuse for judging the wisdom of the disputed legislation, or for making such determination of the facts as would enable the Court to substitute its own findings for those of the legislature. The "performance of the constitutional function of judicial review" he insisted, should not be extended to "an exercise of the powers of a super-legislature".<sup>9</sup>

"Put at its highest, our function is to determine, in the light of all facts which may enrich our knowledge and enlarge our understanding, whether the measure, enacted in the exercise of an unquestioned police power and of a character inherently unobjectionable, transcends the bounds of reason. That is, whether the provision as applied is so clearly arbitrary or capricious that legislators acting reasonably could not have believed it to be necessary or appropriate for the public welfare."<sup>10</sup>

His theory is that unless the Court knows "the facts on which the legislators may have acted", it "cannot properly decide whether they were (or whether their measures are) unreasonable, arbitrary or capricious".<sup>11</sup> But the Court is powerless to decide, *as a fact*, whether conditions required the particular measure enacted, or even whether it be calculated to effectuate the purpose the legislature had in mind.

### *Labor Economics*

While at bar Mr. Brandeis frankly stated his particular concern for the working man. He saw in the growth of the employer's economic power

<sup>8</sup> Jay Burns Baking Co. v. Bryan, 264 U. S. 504 at 520, 44 Sup. Ct. 412 at 416 (1924).

<sup>9</sup> *Ibid.* at 534, 44 Sup. Ct. at 421.

The position here taken as to judicial review in cases involving social legislation is essentially that stated by Mr. Brandeis in 1911:

"The real test, as I conceive it, is: 'Is there an evil? If there is an evil, is the remedy, this particular device introduced by the Legislature, directed to remove that evil which threatens health, morals, and welfare? Does it bear a reasonable relation to it? And in applying it, is there anything discriminatory, which looks like a purpose to injure and not a purpose to aid? Has there been an arbitrary exercise of power . . .?'" Brandeis, *Minimum Wage and the Constitution* (1911) 33 SURVEY 490 at 523.

"Some may doubt whether this particular remedy is the best remedy, or whether its adoption may not lead to some other evils which later legislatures may have to deal with, possibly by a repeal of this law. Even if you entertained a doubt well founded, you cannot interfere because you have doubts as to the wisdom of an act, provided that act is of such a character that it may conceivably produce results sought to be attained. When we know . . . that the evil exists which it is sought to remedy, the legislature must be given latitude in experimentation." *Ibid.* at 521.

<sup>10</sup> Jay Burns Baking Co. v. Bryan, *supra* note 8, at 534, 44 Sup. Ct. at 421.

<sup>11</sup> *Ibid.* at 520, 44 Sup. Ct. at 416.

a serious threat to the worker's liberty and to the general welfare; and he felt there would be but "little possibility (in most trades) of attaining the best possible conditions unless in some form a union of employees exist".<sup>12</sup> For this reason he believed that peace and prosperity could not be achieved by weakening trade unions and by lessening collective bargaining. "Our hope lies rather in their growing strength and stability."<sup>13</sup>

This point of view is maintained in his labor decisions. His dissent in the famous *Hitchman* case<sup>14</sup> is not based so much on any nice distinction between "agreeing to join the union" and "joining the union", or on the technical question whether there had or had not been a breach of contract. The essential difference is of emphasis and point of view. For the Court, the right "to make non-membership in a union a condition of employment . . . is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation . . ." <sup>15</sup>

Moreover, Mr. Justice Pitney, speaking for the Court, saw in the activity of the union organizers no purpose other than an illegal one: to compel the company to change its method of operation. To Mr. Justice Brandeis' mind such activity was motivated by a bona fide desire to increase membership, and hence the bargaining power, of the union. His opinion reveals realistic evaluation of the trade union as an agency for promoting economic security among workers; whereas equitable protection of a "yellow dog" contract, (such contract being rooted in disparity of bargaining power, and utterly lacking in reciprocal obligation) would seriously jeopardize trade union growth. What to him was necessary to equalize bargaining power between employer and employee, and "to establish the equality between the parties in which liberty of contract begins",<sup>16</sup> was denounced by the majority of the Court as an unconstitutional infringement on that very liberty.

Thus two kinds of right were brought in conflict: the property right of the employer—his right to be protected against illegal interference with his contract by third parties, and the human or social right of the employee—the right to such increased bargaining power as unionism affords. In contests between property rights and human rights, one and then the other has

<sup>12</sup> BRANDEIS, BUSINESS—A PROFESSION (1925) 18.

<sup>13</sup> *Ibid.* at 20. "There is no hope for American democracy unless the American workingman is permitted to combine, and, through combination and collective bargaining, secure for himself the rights of industrial liberty." Hearings before the Committee on Investigation of the United States Steel Corporation, Jan. 29, 1912, p. 2862

"Of course there isn't any such thing as a law of supply and demand as an inexorable rule. . . . One reason why the trades union had to come into existence was because the law of supply and demand did not work properly between the opposing forces of the powerful employer and the individual worker." Hearings of the New York State Factory Investigating Commission, January 22, 1915, Vol. 5, p. 2881.

<sup>14</sup> *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65 (1917).

<sup>15</sup> *Ibid.* at 251, 38 Sup. Ct. at 72.

<sup>16</sup> Words of Justice Holmes, dissenting in *Coppage v. Kansas*, 236 U. S. 1 at 27, 35 Sup. Ct. 240 at 248 (1914).

gained ascendancy, but for Mr. Justice Brandeis the emphasis is always on human rights.

Although the Supreme Court has not since spoken definitely on the question in the *Hitchman* case, there is good reason for thinking the Court has come around to Mr. Justice Brandeis' view.<sup>17</sup> The Court today would, I believe, refuse to aid the enforcement of a "yellow dog" contract. There is, moreover, growing recognition of a need for wider unionization, which justifies interference by those not parties to the immediate controversy. In certain quarters Mr. Justice Brandeis' position has already received more than verbal recognition. Since the *Hitchman* case, the "yellow dog" contract has been hounded out of the jurisdiction of New York;<sup>18</sup> in the statutory enactments of certain states it has been declared against public policy;<sup>19</sup> a nomination to the Supreme Court has been rejected largely because the candidate refused to follow Mr. Justice Brandeis' dissent in the *Hitchman* case.<sup>20</sup> Today it is almost inconceivable that equity would sanction the "yellow dog" contract.<sup>21</sup>

The wide divergence of judicial viewpoint that characterized the *Hitchman* case is illustrated also in the *Duplex Printing* case.<sup>22</sup> Here the

<sup>17</sup> See *Texas and New Orleans Ry. v. Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 50 Sup. Ct. 427 (1931) where the Court by a unanimous vote sustained an injunction to protect the integrity of collective bargaining against the establishment of a company union. See also, Carey and Oliphant, *The Present Status of the Hitchman Case* (1929) 29 COL. L. REV. 441.

<sup>18</sup> *Exchange Bakery & Restaurant v. Rifkin*, 216 App. Div. 663, 215 N. Y. Supp. 753 (1926); *Interborough Rapid Transit Co. v. Green*, 131 Misc. 682, 227 N. Y. Supp. 258 (1928). In the former the court took a position entirely opposed to that of Mr. Justice Pitney in the *Hitchman* case: "All engaged in a trade are affected by the prevailing rate of wages. All, by the principle of collective bargaining. Economic organization today is not based on a single shop."

<sup>19</sup> Wisconsin recently enacted a statute declaring "yellow dog" contracts "to be contrary to public policy, and wholly void and shall not afford any basis for the granting of legal or equitable relief by any court." Wis. Laws 1929, c. 123. Similar measures were passed in 1931 in the following states: Arizona (C. 19), Colorado (C. 112), Ohio (S. B. 108) and Oregon (C. 247).

A bill sent by Congress to President Hoover on March 18, for approval declares the "yellow dog" contract "to be contrary to public policy of the United States, shall not be enforceable and shall not afford any basis for the granting of legal or equitable relief by any court of the United States." H. R. 5315, 72nd Cong., 1st Sess.

The Supreme Judicial Court of Massachusetts, in an advisory opinion (*In re Opinion of the Justices*, 171 N. E. 294 (1931)) held unconstitutional a provision denying legal or equitable protection to the "yellow dog" contract.

For a discussion of the constitutionality of the Wisconsin act, see MacDonald, *The Constitutionality of Wisconsin's Statute Invalidating "Yellow Dog" Contracts* (1931) 6 WIS. L. REV. 86. The constitutionality of the federal bill is discussed in Frankfurter and Green, *Congressional Control Over the Labor Injunction* (1931) 31 COL. L. REV. 385.

<sup>20</sup> The *Hitchman* precedent was followed by Judge Parker in *International Organization v. Red Jacket Consolidated Coal & Coke Co.*, 18 F. (2d) 839 (C. C. A. 4th, 1927) and this was certainly instrumental in barring him from the Supreme Court.

<sup>21</sup> A close reading of the Court's opinion in the *Hitchman* case might conceivably lead to the conclusion that the decision was confined to cases of breach of "yellow dog" contracts where the means employed by the union involved deception and misrepresentation; that the injunction was sustained as a protection against these abuses rather than as a protection of the "yellow dog" contract itself. In other words, if the solicitations of labor's representatives are not accompanied by threats, intimidation, or deceit, they are within their right, and cannot be restrained. These latter facts were present in the *Tri-City* case, 257 U. S. 184, 42 Sup. Ct. 72 (1921) and here Justice Brandeis concurred in the majority opinion.

<sup>22</sup> *Duplex Printing Co. v. Deering*, 254 U. S. 443, 41 Sup. Ct. 172 (1921).

employer asked for an order restraining the activities of a labor organization which sought to unionize his shop. The defendants claimed immunity from injunctive relief under the labor clauses of the *Clayton Act*; <sup>23</sup> Mr. Justice Pitney, again speaking for the Court, construed the labor clauses of that statute narrowly, closing his eyes entirely to trade union program and policy. He saw in labor's activities no other motive than malicious injury to the employer. The federal courts, he held, were denied equity jurisdiction under section twenty of the *Clayton Act*, only in cases where the parties to the dispute were employer and employee, or persons employed and those seeking employment. The defendants "standing in no relation of employment under complainant, past, present or prospective . . ." therefore have no right "to make that dispute their own and proceed to instigate sympathetic strikes, picketing, and boycotting against employers wholly unconnected with the complainant's factory . . ." <sup>24</sup>

Moreover, in order to enjoy equity exemption, the dispute in question, Mr. Justice Pitney said, must arise out of "terms or conditions of their own employment, past, present or prospective". <sup>25</sup> "Congress had in mind particular industrial controversies, not a general class war; . . . and it would do violence to the guarded language employed were the exemption extended beyond the parties affected in a proximate and substantial, not merely a sentimental or sympathetic, sense of the cause of dispute." <sup>26</sup>

Only when one reads Mr. Justice Brandeis' dissent does one discover an analysis of the situation evincing sympathetic appreciation of the facts that underlie modern industrial controversies. He then learns that there are only four manufacturers of printing presses in the country, all in active competition. All had been unionized save the Duplex Company. Finally two of the manufacturers that had consented to union conditions, notified the union that because of competition they would be obliged to terminate their agreement unless the Duplex Company raised its standard of labor. The local machinist's union thereupon called a strike against the Duplex factory in Battle Creek to compel the Duplex Company to unionize. The strike order was ineffective; only eleven union machinists actually quit work. Representatives of the International Machinists Association then instituted boycotting again Duplex products in and around New York City, by threatening customers, and intimidating haulers and installers of Duplex presses.

Mr. Justice Brandeis held that the defendants "injured the plaintiff, not maliciously, but in self-defense; . . . that the contest between the company and the machinists' union involves vitally the interest of every

<sup>23</sup> 38 STAT. 730 (1914), 15 U. S. C. A. 12 (1927).

<sup>24</sup> Duplex Printing Co. v. Deering, *supra* note 22, at 471, 41 Sup. Ct. at 178.

<sup>25</sup> *Ibid.* at 472, 41 Sup. Ct. at 178.

<sup>26</sup> *Ibid.*

person whose co-operation is sought. May not all", he asks, "with a common interest join in refusing to expend their labor upon articles whose very production constitutes an attack upon their standard of living and the institution which they are convinced supports it?"<sup>27</sup> Mr. Justice Pitney's opinion harks back to a common law rule applicable in the days of handicraft, while for Mr. Justice Brandeis the problem is that of the legal limits of group activity in an industrial society:

"When centralization in the control of business brought its corresponding centralization in the organization of workingmen, new facts had to be appraised. A single employer might, as in this case, threaten the standing of the whole organization and the standards of all its members."<sup>28</sup>

Thus he recognized "the unity of interest throughout the union, and that, in refusing to work on materials which threaten it, the union was only refusing to aid in destroying itself". This view formed the basis for Mr. Justice Brandeis' conclusion that the Court's ruling: that the controversy was not one "involving, or growing out of, a dispute concerning terms or conditions of employment",<sup>29</sup> was "founded upon a misconception of the facts". Mr. Justice Pitney regarded the case as a dispute between two litigants; Mr. Justice Brandeis saw the issue as one of far-reaching social consequences.

The essential point in the *Duplex* case was whether the *Clayton Act* had forbidden federal courts to issue an injunction in that type of case; the question of reasonable or unreasonable restraint was not involved. The latter point came before the Court in the more recent *Bedford Cut Stone* case.<sup>30</sup> The significance of this decision can be gleaned from the analysis by Mr. Justice Brandeis—an analysis unchallenged by the majority:

"The combination complained of is the co-operation of persons wholly of the same craft, united in a national union, solely for self-protection. No outsider—be he quarrier, dealer, builder or laborer—was a party to the combination. No purpose was to be subserved except to promote the trade interests of members of the Journeymen's Association."<sup>31</sup>

Thus the facts in this case differed essentially from those in the *Duplex* case.

<sup>27</sup> *Ibid.* at 481, 41 Sup. Ct. at 181.

<sup>28</sup> *Ibid.* at 482, 41 Sup. Ct. at 182.

<sup>29</sup> Language of § 20 of the Clayton Act.

<sup>30</sup> *Bedford Cut Stone Co. v. Journeymen Cutters' Ass'n.* 274 U. S. 37, 47 Sup. Ct. 522 (1927).

<sup>31</sup> Mr. Justice Brandeis pointed out that the union consisted of approximately 5000 workers, divided into 150 locals. Standing alone these locals were weak. The average employer could destroy a local over night by importing scabs from other cities. It was only through combining 5000 organized stonecutters in a national union and developing loyalty to it, that the individual stonecutter anywhere can protect his own job. *Ibid.* at 60, 47 Sup. Ct. at 529.



“There was no attempt by the unions to boycott the plaintiffs. There was no attempt to seek the aid of members of any other craft, by a sympathetic strike or otherwise. The contest was not a class struggle. It was a struggle between particular employers and their employees. But the controversy out of which it arose, related, not to specific grievances, but to fundamental matters of union policy of general application throughout the country.”<sup>32</sup>

To protect their interests, the union had begun to enforce the provision of their constitution that “No member of this Association shall cut, carve or fit any material that has been cut by men working in opposition to this Association.”<sup>33</sup> It was against union effort to enforce this order that the Bedford Cut Stone Company sought an injunction. After Judge Anderson of the Indiana District Court and Judge Alschuln of the Circuit Court of Appeals had refused to grant the order, finding no warrant for issuing it, the Supreme Court arguing that the *Duplex* opinion “might serve as an opinion in this case”, reversed the two lower courts and ordered an injunction to issue. And this although the conduct of the union was admittedly innocent unless, in the *Sherman Act*, Congress had declared it illegal as a restraint upon the plaintiff’s interstate trade, for union officials to urge members not to work on stone cut by men opposed to the union. According to Mr. Justice Sutherland’s decision the activities of the union had precisely the effect of contravening the *Sherman Act*. He held that although the union was lawful and had a lawful end in view, its operations “necessarily threatened to destroy or narrow petitioners’ interstate trade”.<sup>34</sup>

Such a ruling was extraordinary in view of the fact that even Chief Justice Taft, whom labor has usually regarded as unsympathetic with its claims, had recognized the social advantages of trade unions, the necessity of extending the combination beyond one shop, and the right of laborers to refuse to work on the product of employers who seek destruction of the union. It ignored, moreover, the “rule of reason” which the Court had held applicable in the interpretation of the *Sherman Act* as regards cases involving capitalistic interests. Mr. Justice Brandeis’ reaction to the extraordinary situation thus created, is expressed in concluding his dissenting opinion :

“Members of the Journeymen Stone Cutters’ Association could not work anywhere on stone which had been cut at the quarries by ‘men working in opposition’ to it, without aiding and abetting the enemy. Observance by each member of the provision of their constitution which forbids such action was essential to his own self-protection . . .

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.* at 56, 47 Sup. Ct. at 528.

<sup>34</sup> Compare with Chief Justice Taft’s opinion in *United Leather Workers v. Herbert & Meisel Trunk Co.*, 265 U. S. 457, 44 Sup. Ct. 623 (1924).

If, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman Law and the Clayton Act an instrument for imposing restraints upon labor which reminds of involuntary servitude."<sup>35</sup>

It was settled in the *Standard Oil*<sup>36</sup> and *American Tobacco*<sup>37</sup> cases that only unreasonable restraints of trade are forbidden by the *Sherman Act*. But this statute set up no standard of reasonableness. The judges must supply one, and they are by no means in agreement. Their judgment is likely to turn not upon law but rather upon the views they severally hold regarding economic policy, or the ideas they have as to freedom to be allowed various economic forces.

To Mr. Justice Sutherland "the Anti-Trust Act had a broader application than the prohibition of restraints of trade unlawful at common law".<sup>38</sup> Reading the Act strictly, he held its effect 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 trade or commerce among the several States".<sup>39</sup> It was easy then to bring the activities of the unions within its provisions. But to Mr. Justice Brandeis, "the propriety of the union's conduct can hardly be doubted by one who believes in organization of labor". He insisted, moreover, that the "rule of reason" is as applicable in construing the *Sherman Act* in labor cases as it is in capital cases:

"The Sherman Law was held in *United States v. United States Steel Corporation*, 251 U. S. 417, 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.*, 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 cooperate in simply refraining from work, when that course was the only

<sup>35</sup> *Bedford Cut Stone Co. v. Journeymen Cutters' Ass'n*, *supra* note 30, at 64, 47 Sup. Ct. at 531.

<sup>36</sup> *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 632 (1911).

<sup>37</sup> *United States v. American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632 (1911).

<sup>38</sup> *Bedford Cut Stone Co. v. Journeymen Cutters' Ass'n*, *supra* note 30, at 52, 47 Sup. Ct. at 527.

<sup>39</sup> *Ibid.* The Court's conception of the scope of the act clearly belies the intentions of the framers as expressed by Senator Sherman: "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." SHERMAN, RECOLLECTIONS OF FORTY YEARS (1895) 1072.

means of self-protection against a combination of militant and powerful employers. I cannot believe that Congress did so."<sup>40</sup>

Mr. Justice Stone evidently appreciated the force of this conclusion, for as "an original proposition" he would "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".<sup>41</sup> In view of the policy as to organized labor adopted by Congress in the *Clayton Act* and in view of the Court's decisions in the *Standard Oil* and *American Tobacco* cases, he would not have thought "that such action as is now complained of was to be regarded as an unreasonable and therefore prohibited restraint of trade".<sup>42</sup> And yet a strange deference to authority moved him to concur. Views which logically he should not have hesitated to apply here, were rejected on the authority of the *Duplex Printing* case. "For that reason alone", he agreed with the majority.

Mr. Justice Brandeis pays no such respect to past cases. "*Stare decisis*", he believes, "is ordinarily a wise rule of action. But it is not a universal, inexorable command."<sup>43</sup> It "does not command that we err again when we have occasion to pass upon a different statute".<sup>44</sup> This proposition, I suppose, would be equally applicable in the interpretation of the same statute. This would seem to follow from his observation that "it behooves us to reject, as guides, the decisions which prove to have been mistaken . . . The logic of words should yield to the logic of realities".<sup>45</sup> In short, Mr. Justice Brandeis feels that the peculiar virtue of our system of law lies in the fact "that the process of inclusion and exclusion, so often employed in developing a rule, is not allowed to end with its enunciation and that an expression in an opinion yields later to the impact of facts unforeseen".<sup>46</sup> "The rule as announced must be deemed tentative. For the many and varying facts to which it will be applied cannot be foreseen. Modification implies growth. It is the life of the law."<sup>47</sup>

English policy defines the rights of labor by legislative enactment; in this country such definition has been largely the work of the courts. Our legislatures, both federal and state, have been signally unsuccessful in ameliorating the stringency of judge-made labor law. Both have made

<sup>40</sup> *Bedford Cut Stone Co. v. Journeymen Cutters' Ass'n*, *supra* note 30, at 65, 47 Sup. Ct. at 531. See, in this connection, the interesting observations of Professor Corwin in his recent article, *The Anti-Trust Acts and the Constitution* (1932) 18 VA. L. REV. 355 at 372 *et seq.*

<sup>41</sup> *Ibid.* at 55, 47 Sup. Ct. at 528.

<sup>42</sup> *Ibid.*

<sup>43</sup> See *Washington v. Dawson & Co.*, 264 U. S. 219, 238, 44 Sup. Ct. 302, 309 (1924) for citation of cases in which the Court has disregarded the principle of *stare decisis*.

<sup>44</sup> *Di Santo v. Pennsylvania*, 273 U. S. 34 at 42, 47 Sup. Ct. 267 at 270 (1927).

<sup>45</sup> *Ibid.*

<sup>46</sup> *Jaybird Mining Co. v. Weir*, 271 U. S. 609 at 619, 46 Sup. Ct. 592 at 595 (1926).

<sup>47</sup> *Washington v. Dawson & Co.*, *supra* note 43, at 235, 239, 44 Sup. Ct. at 308, 309.

repeated efforts to rid labor of the injunction incubus. But the courts have either construed the immunity clauses narrowly, and held the statute largely declaratory of the existing law (as was true as to the labor clauses of the *Clayton Act*), or have held the statute wanting on constitutional grounds. Even if the *Clayton Act* had exempted labor from the injunction in such disputes as the *Duplex* case, the exemption would be of questionable constitutionality in the light of Chief Justice Taft's decision in *Truax v. Corrigan*.<sup>48</sup>

This case involved an Arizona statute which placed much the same limitation on state courts of equity as was imposed upon federal courts of equity to sections six and twenty of the *Clayton Act*. Chief Justice Taft found the statute wanting under both the "equal protection" clause and the "due process" clause of the Fourteenth Amendment. He held that persons may be as effectively denied equal protection of the laws by conferring a favor as by imposing a penalty; that even in the absence of violence an employer may not be deprived of the only effective protection he has against such operations of labor, namely the injunction. Chief Justice Taft's argument boils down to the proposition that there is a minimum of protection to which a property or business owner is entitled, and of which he may not be deprived by denial of equitable relief without invading those fundamental rights guaranteed by the Fourteenth Amendment.

Mr. Justice Brandeis evidently felt that this decision was reached without adequate appreciation and consideration of the facts of modern industrial life. "The divergence of opinion", he observed, "in this difficult field of governmental action should admonish us not to declare a rule arbitrary and unreasonable merely because we are convinced that it is fraught with danger to the public weal, and thus to close the door to experiment within the law."<sup>49</sup> He also detailed the sort of consideration the case before the Court demanded:

"Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary, can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial and political, of the community to be affected thereby. Resort to such facts is necessary, among other things, in order to appreciate the evils sought to be remedied and the possible effects of the remedy proposed. Nearly all legislation involves a weighing of public needs as against private desires; and likewise a weighing of relative social values. Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly, when the public conviction is both deep-seated and widespread and has been reached after deliberation. What, at any partic-

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<sup>48</sup> 257 U. S. 312, 42 Sup. Ct. 124 (1921).

<sup>49</sup> *Ibid.* at 357, 42 Sup. Ct. at 139.

ular time, is the paramount public need is, necessarily, largely a matter of judgment. Hence, in passing upon the validity of a law challenged as being unreasonable, aid may be derived from the experience of other countries and of the several States of our Union in which the common law and its conceptions of liberty prevail."<sup>50</sup>

Therefore, he made, in brief compass, the most thorough investigation yet undertaken of the development of labor law in the English-speaking countries. This study revealed, among other things, that, in England, improvement of the condition of workingmen and their emancipation appear to have been deemed recently the paramount public need; resort to the injunction has not been frequent and it has played no appreciable part there in the conflict between capital and labor; that the history of the rules governing contests between employer and employee in several English-speaking countries illustrates both the susceptibility of such rules to change and the variety of contemporary opinion as to what rules will best serve the public interest.<sup>51</sup>

But in the United States it was felt that

"The equitable remedy, although applied in accordance with established practice, involved incidents which . . . endangered the personal liberty of wage-earners . . . ; that the real motive in seeking the injunction *was not ordinarily to prevent property from being injured nor to protect the owner in its use, but to endow property with active, militant power which would make it dominant over men.* In other words, that, *under the guise of protecting property rights, the employer was seeking sovereign power.* And many disinterested men, solicitous only for the public welfare, believed that *the law of property was not appropriate for dealing with the forces beneath social unrest; that in this vast struggle it was unwise to throw the power of the State on one side or the other according to principles deduced from that law; that the problem of the control and conduct of industry demanded a solution of its own; and that, pending the ascertainment of new principles to govern industry, it was wiser for the State not to interfere in industrial struggles by the issuance of an injunction.*"<sup>52</sup>

As to the growth of this opinion, Mr. Justice Brandeis points out that legislative anti-injunctive proposals have occupied the attention of Congress during every session but one in the twenty years between 1894 and 1914. But not until the present session of Congress did these efforts culminate in the Norris Bill sent to President Hoover for his approval on March 18. Several states had previously passed legislation on the subject.<sup>53</sup> More-

<sup>50</sup> *Ibid.* at 356, 42 Sup. Ct. at 138.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.* at 366, 368, 42 Sup. Ct. at 142, 143. The italics are the writer's.

<sup>53</sup> For list of citations to these statutes, see Mason, *Organized Labor as Party Plaintiff in Injunction Case* (1930) 30 COL. L. REV. 466, n. 2.

over, Mr. Justice Brandeis contends, the constitution does not stand in the way of such legislation.

"States are free since the adoption of the Fourteenth Amendment as they were before, either to expand or to contract their equity jurisdiction. The denial of the more adequate equitable remedy for private wrongs is in essence an exercise of the police power, by which, in the interest of the public and in order to preserve the liberty and the property of the great majority of the citizens of a State, rights of property and the liberty of the individual must be remoulded, from time to time, to meet the changing needs of society."<sup>54</sup>

Here, as elsewhere, Mr. Justice Brandeis looks beyond the immediate dispute to its underlying social implications: "it is of the nature of our law that it has dealt not with man in general but with him in relationships."<sup>55</sup> He understands that a relationship such as employer and employee may furnish legal basis for a classification which satisfies the equal protection requirement of the Fourteenth Amendment; that the law is "'forced to adapt itself to new conditions of society, and, particularly to the new relations between employers and employees as they arise'".<sup>56</sup>

Although a staunch advocate of industrial liberty and collective bargaining, Mr. Justice Brandeis has never condoned abuses by trade unions.<sup>57</sup> He admits that their action is frequently hasty and ill-considered; that they too often ignore laws which seem to restrict their efforts.

As a member of the Supreme Court he has followed the principle he announced while at bar, that "industrial liberty, like civil liberty, must rest upon the solid foundation of law".<sup>58</sup> For the excesses of trade unions he

<sup>54</sup> *Truax v. Corrigan*, *supra* note 48, at 376, 42 Sup. Ct. at 146.

<sup>55</sup> Mr. Justice Brandeis paid this same deference to legislative discretion in his dissenting opinion in the Duplex case: "The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contests and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat." *Duplex Printing Co. v. Deering*, *supra* note 22, at 488, 41 Sup. Ct. at 184.

<sup>56</sup> Quoted from Holden v. Hardy, 169 U. S. 366 at 387, 18 Sup. Ct. 383 at 386 (1898) in his dissenting opinion in *Adams v. Tanner*, *supra* note 1, at 616, 37 Sup. Ct. at 673.

<sup>57</sup> The plea of trade unions for immunity, be it from injunction or from liability for damages, is as fallacious as the plea of the lynchers . . . We gain nothing by exchanging the tyranny of capital for the tyranny of labor. Arbitrary demands must be met by determined refusals . . . at any cost. *BRANDEIS, op. cit. supra* note 12, at 26.

"No one can be more conscious than I am of the abuses of trade organizations. Their acts are in many instances acts to be condemned, acts to be opposed, acts to be suppressed; but they are like all the abuses of liberty with which we are familiar. We must maintain liberty, political liberty, in spite of its abuses, and we must maintain the liberty of combination and encourage combination on the part of unions, but hold them up to the high responsibility of using that will power which is intrusted to them; and to my mind, if we once come to a time where instead of fighting for their existence, their existence is assured them, and they fight only for their rights, a large part of the abuses of which we complain today on the part of organized labor will cease." Statement by Mr. Justice Brandeis before the House Committee, Hearings on Investigations of the United States Steel Corporation, Jan. 29, 1912, p. 2862.

<sup>58</sup> *BRANDEIS, op. cit. supra* note 12, at 26.

offered a remedy that no orthodox trade unionist has thus far been willing to accept—that of incorporation.<sup>59</sup> Thus it was easy for him to join Chief Justice Taft, in the *Coronado* case,<sup>60</sup> in ruling that a trade union, although an unincorporated association, is suable and liable to treble damages under sections seven and eight of the *Sherman Act*.

Denounced by laborers on all sides as a most serious “blow to human freedom”,<sup>61</sup> Mr. Justice Brandeis doubtless saw in the decision a gain for labor of no small importance. He understood that that immunity from suit and legal responsibility, cherished by labor, erected foundations for the greatest grievance labor has suffered at the hands of the court—so-called government by injunction. In his opinion “if courts had been dealing with a responsible union instead of irresponsible defendants, they would doubtless in many of the cases, have refused to interfere by injunction”.<sup>62</sup>

Now, with the bestowal of legal capacity upon trade unions by judicial decision, making them suable and the funds accumulated for the purpose of conducting strikes subject to execution in suits for torts, the chief grounds on which appeals to equity courts have succeeded are seriously undermined. In the *Coronado* decision he could see the partial attainment of that for which labor had been working since the *Debs* case,<sup>63</sup> namely, limitation upon the use of injunctions in labor disputes. More than that, he believed incorporation would tend to correct trade-union abuses.<sup>64</sup> And not least of the reasons for incorporating trade unions is that it would re-

<sup>59</sup> Brandeis, *The Incorporation of Trade Unions* (1902) 15 GREEN BAG II.

<sup>60</sup> *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 42 Sup. Ct. 570 (1922). Mr. Brandeis, in an address delivered in 1902, anticipated the *Coronado* decision:

“The rules of law established by the courts of this country afford . . . no justification for this opinion [that trade unions cannot be made legally responsible for their acts]. A union, although a voluntary unincorporated association, is legally responsible for its acts in much the same way that an individual, a partnership, or a corporation is responsible. If a union, through its constituted agents, commits a wrong or is guilty of violence or of illegal oppression, the union, and not merely the individuals who are the direct instruments of the wrong, can be enjoined or made liable for damages to the same extent that the union can be if it were incorporated; and the funds belonging to the unincorporated union can be reached to satisfy any damages which might be recovered for the wrong done.” Brandeis, *op. cit. supra* note 59, at 12.

<sup>61</sup> The AMERICAN FEDERATIONIST, official organ of the American Federation of Labor, commented on the decision as follows: “The Supreme Court has not only rendered a decision which goes beyond the previous decision of that tribunal in its antagonism and opposition to labor, but it has rendered such a decision when under the law of the land and under practices hitherto obtaining its decision should have been exactly the reverse.” (1922) 29 AMERICAN FEDERATIONIST 509.

<sup>62</sup> Brandeis, *op. cit. supra* note 59, at 13. “While the rules of legal liability apply fully to the unions, though unincorporated, it is, as a practical matter, more difficult for the plaintiff to conduct the litigation, and it is particularly difficult to reach the funds of the union with which to satisfy any judgment that may be recovered. There has consequently arisen, not a legal, but a practical immunity of the unions, as such, for any wrongs committed.” *Ibid.* at 12-13.

“This practical immunity of the labor unions from suit and legal liability is deemed by many labor leaders a great advantage. To me it appears to be just the reverse. It tends to make officers and members reckless and lawless, and thereby to alienate public sympathy and bring failure upon their efforts.” *Ibid.* at 13.

<sup>63</sup> *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900 (1895).

<sup>64</sup> “For these defects, [hasty, ill-considered and lawless action among trade unionists,] being but human, no complete remedy can be found; but the incorporation of labor unions would, in some measure, tend to correct them.” Brandeis, *op. cit. supra* note 59, at 12.

move the "more or less groundless idea on the part of the employers that there was something in incorporation which would put a union on an equality with the corporation itself".<sup>65</sup>

A blow to labor almost equal to the *Coronado* decision is *Dorchy v. Kansas*.<sup>66</sup> "Neither the common law nor the Fourteenth Amendment, confers the absolute right to strike." This is the authoritative declaration of the Supreme Court. And even more discouraging to labor, these are the words of Mr. Justice Brandeis and not of Mr. Justice Sutherland.<sup>67</sup>

Dorchy, a trade union officer, called a strike to compel payment of a disputed wage claim to an ex-employee. Convicted under sections seventeen and nineteen of the *Kansas Industrial Court Act*,<sup>68</sup> Dorchy brought the case before the Supreme Court on a writ of error, his chief contention being that these sections of the act, prohibiting as they do the right to strike, contravened the Fourteenth Amendment. Mr. Justice Brandeis disposed of the case in few words:

"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 who was formerly employed in 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."<sup>69</sup>

In this decision Mr. Justice Brandeis was invoking a rule he deemed applicable in considering the legality of trade union practices.<sup>70</sup> Nor is his opinion so far-reaching as may appear at first glance. Without the statute,

<sup>65</sup> Statement before the Commission on Industrial Relations, 64th Cong., 1st Sess. 26 SEN. Doc. 7671 (1915).

<sup>66</sup> 272 U. S. 306, 47 Sup. Ct. 86 (1926).

<sup>67</sup> The legal information bureau of the American Federation of Labor made this quite submissive comment on the decision:

"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." (1926) 33 AMERICAN FEDERATIONIST 1502. One finds little or nothing in the opinion to warrant any such prediction. The Court expressly pointed out that the decision was of limited scope—that the question requiring decision was not "the broad one whether the legislature has power to prohibit strikes".

<sup>68</sup> KAN. REV. STAT. ANN. (1923) § 44-617, § 44-619. Section 617 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 619 makes it a felony for an 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.

<sup>69</sup> *Dorchy v. Kansas*, *supra* note 66, at 311, 47 Sup. Ct. at 87.

<sup>70</sup> "If unions are lawless, restrain and punish their lawlessness; if they are arbitrary, repress their arbitrariness; if their demands are unreasonable and unjust, resist them; but do not oppose the unions as such." Brandeis, *loc. cit. supra* note 59. From a speech entitled "The Incorporation of Trade Unions", delivered before a meeting of the Economic Club of Boston on December 4, 1902.



the strike might well have been condemned as illegal, as a conspiracy at common law.<sup>71</sup> And lest erroneous implications be drawn, Mr. Justice Brandeis adds that "the question requiring decision is not . . . the broad one whether the legislature has power to prohibit strikes".<sup>72</sup>

Holding, as he does, that trade unions have accomplished much, that "their fundamental principle is noble",<sup>73</sup> Mr. Justice Brandeis' labor decisions naturally incline toward increasing the power of unions and toward limiting the use of injunctions in industrial disputes. He believes in trade unions even more strongly because he understands that higher wages, reasonable hours of work and better working conditions, benefit society as a whole.<sup>74</sup>

But despite an evident desire to protect workers from the tyranny and oppression of their employers, his decisions evince no purpose to exchange the tyranny of capital for that of labor. He still insists that the lawless methods of trade unions, whether violence or intimidation or less warlike infringements of legal rights, "must be put down at once and at any cost".<sup>75</sup>

### *Public Utility Economics*

The Supreme Court has long since ceased to be merely a legal tribunal; today it passes upon great social and economic issues. This has not always been the case. In *Munn v. Illinois*,<sup>76</sup> decided in 1876, the Court adopted a position of non-interference in rate-making, claiming that fixing public utility rates was a legislative matter which should remain free from judicial interference. Ten years later the Court changed its position.<sup>77</sup> It was then recognized that this power of the legislature was not without limit; that utility rates must yield a fair return upon a fair valuation of the property devoted to such a public service. Although the Court two years later<sup>78</sup> retreated somewhat from this position, when it suddenly recognized that it was without a basis upon which to question legislative control over public utility prices, all misgivings on the latter score had vanished by the year 1890, when the Court held judicial review applicable in public utility cases, and maintained that due process of law requires the rate to be reasonable, and that of this the Court is final judge.<sup>79</sup> The right of judicial review in

<sup>71</sup> See, in this connection, Mason, *The Right to Strike* (1928) 77 U. OF PA. L. REV. 52.

<sup>72</sup> *Dorchy v. Kansas*, *supra* note 66, at 309, 47 Sup. Ct. at 86.

<sup>73</sup> Brandeis, *loc. cit. supra* note 59.

<sup>74</sup> "The conditions under which so large a part of our fellow citizens work and live will determine, in great measure, the future of our country for good or for evil." *Ibid.*

<sup>75</sup> BRANDEIS, *op. cit. supra* note 12, at 26.

<sup>76</sup> 94 U. S. 113 (1876).

<sup>77</sup> Railroad Commission cases, 116 U. S. 307 at 331, 6 Sup. Ct. 334 at 344 (1886).

<sup>78</sup> *Dow v. Beidelman*, 125 U. S. 680 at 691, 8 Sup. Ct. 1028 at 1031 (1887).

<sup>79</sup> *Chicago, Milwaukee & St. Paul R. R. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462 (1890).

This same position had been adopted by Mr. Justice Harlan a few years earlier in *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273 (1887), which involved a state prohibition statute.

"The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things,

this field was more boldly stated in the classic case of *Smyth v. Ames*.<sup>80</sup> This step was taken despite the prior protest of a minority which had held that judges are not equipped to decide social and economic issues.<sup>81</sup> Certainly judges, passing upon such questions, can find precious little guidance in the Constitution.

The interpretations of "due process of law", "just compensation", "deprivation of liberty and property" are susceptible of flexibility, to say the least. By such interpretation, the Supreme Court can give in large measure, its own definition of social and economic relationships.<sup>82</sup> What is there, for instance, in the "due process" clause of the Fourteenth Amendment that hints whether five, six or eight per cent. be a fair return on public utility property? What is there that sheds light on whether utilities should be valued for rate-making purposes at original cost, or at reproduction cost new? What indication is there of the measure of return needed for computing fair and reasonable rates? Absolutely none. These questions must be settled in court by applying highly controversial economic theories. Without enjoying rate-making power, as such, the courts have come to exercise power of tremendous importance in rate-making.

It was in *Smyth v. Ames*<sup>83</sup> that the Supreme Court constituted itself final judge of "fair return" within the meaning of the "due process" clause of the Fourteenth Amendment. The case is especially significant for its enumeration of the elements to be taken into account in determining the value of the property on which a fair return is guaranteed.

"We hold . . . that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its [the company's] bonds and stock, the present as compared with the

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whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." At 661, 8 Sup. Ct. at 297.

<sup>80</sup> 169 U. S. 466, 18 Sup. Ct. 418 (1898).

"The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation." At 527, 18 Sup. Ct. at 426.

<sup>81</sup> See the dissenting opinion of Mr. Justice Bradley with whom Justices Gray and Lamar concurred in *Chicago, &c. Ry. v. Minnesota*, *supra* note 79, at 461, 10 Sup. Ct. at 467.

<sup>82</sup> "The United States Supreme Court," writes Professor John R. Commons, "occupies the unique position of the first authoritative faculty of political economy in world history". COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* (1924) 7.

"Under the Fourteenth Amendment the Supreme Court of the United States, . . . becomes really the economic dictator." Words of Senator Borah, 72 CONG. REC. 3573 (1930).

<sup>83</sup> 169 U. S. 466, 18 Sup. Ct. 418 (1898).

original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case.”<sup>84</sup>

This judicial rule of rate-making embraces simultaneously three theories of valuation: (1) Historical cost of tangible property plus that of permanent improvements. (2) Capitalization and commercial value of the business, as determined by current market prices of the company's stocks and bonds. (3) Cost of reproduction new, less depreciation.

Mr. Justice Brandeis has denounced this rule as “legally and economically unsound”. His reasoning follows:

“The rule does not measure the present value either by what the utility cost to produce; or by what it should have cost; or by what it would cost to reproduce, or to replace, it. Under that rule the tribunal is directed, in forming its judgment, to take into consideration all those and also, other elements, called relevant facts.

“Obviously, ‘value’ cannot be a composite of all these elements. Nor can it be arrived at on all these bases. They are very different; and must, when applied in a particular case, lead to widely different results. The rule of *Smyth v. Ames*, as interpreted and applied, means merely that all must be considered. What, if any, weight shall be given to any one, must practically rest in the judicial discretion of the tribunal which makes the determination.”<sup>85</sup>

Furthermore, the court has divided since then in a long line of important decisions regarding the relative weight to be given various factors in rate base determination. The theory of reproduction cost is, in Mr. Justice Brandeis' opinion, particularly faulty. It is vague, delusive and leaves room for wide divergence of opinion.

This theory of valuation has had a varied and curious history. It was urged in 1893 in behalf of the community. William Jennings Bryan appeared in the *Smyth* case and argued in favor of present value based on reproduction cost, as protection against inflated claims based on past high prices. The long depression after the panic of 1893 had brought prices to the lowest level of the Nineteenth Century. Insistence upon reproduction cost was the shipper's protest against the burdens of watered stock, reckless financing, and racketeering contracts. During the rising prices of the World War, railroads and other public utilities adopted the position then taken by Bryan on behalf of the consumers. The foundations are now laid for another shift of position. The vagueness and uncertainty

<sup>84</sup> *Ibid.* at 546, 18 Sup. Ct. at 434.

<sup>85</sup> *Southwestern Bell Tel. Co. v. Public Serv. Comm.*, 262 U. S. 276 at 294, 43 Sup. Ct. 544 at 548 (1923).

of the existing rule has prompted Mr. Justice Brandeis to make a detailed study of public utility valuation. He proposes a substitute rule:

"The experience of the twenty-five years since [*Smyth v. Ames*] . . . was decided has demonstrated that the rule there enunciated is delusive. In the attempt to apply it insuperable obstacles have been encountered. It has failed to afford adequate protection either to capital or to the public. It leaves open the door to grave injustice . . ."<sup>86</sup>

"The rule of *Smyth v. Ames* sets the laborious and baffling task of finding the present value of the utility. It is impossible to find an exchange value for a utility, since utilities, unlike merchandise or land, are not commonly bought and sold in the market. Nor can the present value of the utility be determined by capitalizing its net earnings, since the earnings are determined, in large measure, by the rate which the company will be permitted to charge; and, thus, the vicious circle would be encountered."<sup>87</sup>

To give capital embarked in public utilities its due protection under the Constitution, Mr. Justice Brandeis insists "that the rate base be definite, stable and readily ascertainable; and that the percentage to be earned on the rate base be measured by the cost, or charge, of the capital employed in the enterprise".<sup>88</sup> The rule announced in the *Smyth* case, he insisted, was signally faulty on this very score. "Under it value for rate-making purposes must ever be an unstable factor." Mr. Justice Brandeis felt, moreover, that there was a widespread conviction regarding the inadequacy of the existing rule; a feeling that "actual value of a utility is not to be reached by a meticulous study of conflicting estimates of the cost of reproducing new the congeries of old machinery and equipment, called the plant, and the still more fanciful estimates concerning the value of the intangible elements of an established business".<sup>89</sup>

Mr. Justice Brandeis proceeded therefore to offer what he believed "a definite, stable and readily ascertainable" rate base, and also a measure of fair rate of return. As to the first, he sponsored a theory of valuation followed by many commissions, especially that of Massachusetts: "Capital honestly and prudently invested must, under normal conditions, be taken as the controlling factor in fixing the basis for computing fair and reasonable rates".<sup>90</sup> In support of this rule he argued as follows:

"The adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return would give definiteness to these two factors involved in rate controversies which are now shifting and treacherous, and which render the proceedings peculiarly burdensome and largely futile. Such

<sup>86</sup> *Ibid.* at 292, 43 Sup. Ct. at 548.

<sup>87</sup> *Ibid.* at 292, 43 Sup. Ct. at 548.

<sup>88</sup> *Ibid.* at 301, 43 Sup. Ct. at 551.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

measures offer a basis for decision which is certain and stable. The rate base would be ascertained as a fact, not determined as a matter of opinion. It would not fluctuate with the market price of labor, or materials, or money. It would not change with hard times or shifting populations. It would not be distorted by the fickle and varying judgments of appraisers, commissions, or courts. It would, when once made in respect to any utility, be fixed, for all time, subject only to increases to represent additions to plant, after allowance for the depreciation included in the annual operating charges. The wild uncertainties of the present method of fixing the rate base under the so-called rule of *Smyth v. Ames* would be avoided; and likewise the fluctuations which introduce into the enterprise unnecessary elements of speculation, create useless expense, and impose upon the public a heavy, unnecessary burden.”<sup>91</sup>

As to reasonable rate of return, he argued for “the cost to the utility of the capital, required to construct, equip and operate its plant”.<sup>92</sup> “Cost includes not only operating expenses, but also capital charges. Capital charges cover the allowance, by way of interest, for the use of the capital, whatever the nature of the security issued therefor; the allowance for risk incurred; and enough more to attract capital.”<sup>93</sup>

It is conceded that the actual prudent investment rule would have been difficult or impossible to apply when *Smyth v. Ames* was decided. It was then impossible to ascertain, Mr. Justice Brandeis admits, what it cost in money to establish the utility; or what the money cost with which the utility was established, or what income had been earned by it; or how the income had been expended. Now, the situation, he thinks, is fundamentally different: “These amounts are, now, readily ascertainable in respect to a large, and rapidly increasing, proportion of the utilities. . . . It is, therefore, feasible now to adopt as the measure of a compensatory rate—the annual cost, or charge, of the capital prudently invested in the utility. And, hence, it should be done.”<sup>94</sup>

Much *dicta* in the majority opinion in the *Southwestern Bell Telephone* case make strongly for the reproduction cost theory. But the rates there involved were so inadequate that they did not bring a fair return even on the actual cost of the properties, much less the reproduction cost. This explains why Mr. Justice Brandeis concurred in reversing the state court. He joined in declaring the rates confiscatory, but did so because they did not bring a fair return on the actual investment.

Much the same observations may be made with reference to the *Bluefield* case.<sup>95</sup> Here the rates were held to be confiscatory. Mr. Justice But-

<sup>91</sup> *Ibid.* at 306, 43 Sup. Ct. at 553.

<sup>92</sup> *Ibid.* at 306, 43 Sup. Ct. at 552.

<sup>93</sup> *Ibid.* at 291, 43 Sup. Ct. at 547.

<sup>94</sup> *Ibid.* at 309, 43 Sup. Ct. at 554.

<sup>95</sup> *Bluefield Water Works & Improvement Co. v. Public Serv. Comm.*, 262 U. S. 679, 43 Sup. Ct. 675 (1923).

ler, speaking for the Court used *dicta* which indicated the Court's leaning toward reproduction cost. Again Mr. Justice Brandeis concurred in holding that the rates were confiscatory. He considered the rates invalid because they did not yield a fair return on the actual investment. In both the *Southwestern Bell Telephone* and *Bluefield* cases Mr. Justice Brandeis concurred in the decisions but not in the *dicta* in favor of reproduction cost.

In the *Georgia Railway* case,<sup>96</sup> where Mr. Justice Brandeis spoke for the Court, the rates were sustained, because unlike the *Southwestern Bell Telephone* and *Bluefield* cases, the rates set by the commission did yield a fair return upon actual investment of about 7¼ per cent. though only 4 per cent. on reproduction value as shown by the company.

Considering these cases together, the conclusion is that although a majority of the court leans towards the reproduction theory of public utility valuation, the court will hesitate to declare specific rates confiscatory and unconstitutional if they bring a fair return on actual investment, notwithstanding a much higher reproduction cost.

The clearest indication, prior to the *Baltimore Street Railway* case, and the *O'Fallon* case, of the Court's preference for the reproduction theory of valuation, is Mr. Justice Butler's opinion in *McCardle v. Indianapolis Water Company*.<sup>97</sup> And the Court's opinion in that case evoked from Mr. Justice Brandeis a flat denial that any statement had been made by the Court to the effect "that value is tantamount to reproduction cost".<sup>98</sup>

One of the main points on which the Court divided in the *Baltimore Street Railways* case,<sup>99</sup> was depreciation. The Maryland Public Service Commission, in fixing a rate of fare, agreed that depreciation be reckoned on the cost of the thing depreciated and not on present value. The Maryland Court of Appeals held this erroneous; that depreciation should have been reckoned on present value. This decision, the Supreme Court, speaking through Mr. Justice Sutherland held was "plainly right"; that "It is the

<sup>96</sup> *Georgia Ry. & Power Co. v. Railroad Commission*, 262 U. S. 625, 43 Sup. Ct. 680 (1923).

<sup>97</sup> 272 U. S. 400, 47 Sup. Ct. 144 (1926).

<sup>98</sup> *Ibid.* at 423, 47 Sup. Ct. at 153.

"Nor do I find," Mr. Justice Brandeis continues, "in the decisions of this Court any support for the view that a peculiar sanction attaches to 'spot' reproduction cost, as distinguished from the amount that it would actually cost to reproduce the plant if that task were undertaken at the date of the hearing. 'Spot' reproduction would be impossible of accomplishment without the aid of Aladdin's lamp. The actual cost of a plant may conceivably indicate its actual value at the time of completion or at some time thereafter. Estimates of cost may conceivably approximate what the cost of reproduction would be at a given time. But where a plant would require years for completion, the estimate would be necessarily delusive if it were based on 'spot' prices of labor, materials and money. The estimate, to be in any way worthy of trust, must be based on a consideration of the varying costs of labor, materials, and money for a period at least as long as would be required to construct the plant and put it into operation. Moreover, the estimate must be made in the light of a longer experience and with due allowances for the hazards which attend all prophesies in respect to prices. The search for value can hardly be aided by a hypothetical estimate of the cost of replacing the plant at a particular moment, when actual reproduction would require a period that must be measured by years." *Ibid.*

<sup>99</sup> *United Railways & Elec. Co. v. West*, 280 U. S. 234, 50 Sup. Ct. 123 (1930).

settled rule of this Court that the rate base is present value, and it would be wholly illogical to adopt a different rule for depreciation.”<sup>100</sup>

To this ruling Mr. Justice Brandeis made vigorous dissent. He thought “A net return of 6.26 per cent. upon the present value of the property of a street railway enjoying a monopoly in one of the oldest, largest and richest cities on the Atlantic Seaboard would seem to be compensatory.”<sup>101</sup> The difference between the depreciation charges originally allowed by the Commission and those computed on the basis of present value, amounted to \$755,166 annually, and if this item were eliminated from the operating costs of the company and applied against the rate base of \$70,000,000 it would add 1.08 per cent. to the estimated return. He insisted that this should have been done.

“ . . . acceptance of the doctrine of *Smyth v. Ames* does not require that the depreciation charge be based on present value of plant. For, an annual depreciation charge is not a measure of the actual consumption of plant during the year. No such measure has yet been invented. There is no regularity in the development of depreciation. It does not proceed in accordance with any mathematical law. There is nothing in business experience, or in the training of experts, which enables man to say to what extent service life will be impaired by the operations of a single year, or of a series of years less than the service life.”<sup>102</sup>

Mr. Justice Brandeis' study of the economics of insurance had shown him how legal science could solve this intricate economic problem of depreciation:

“The depreciation charge is frequently likened to the annual premium in legal reserve life insurance. The life insurance premium is calculated on an agreed value of the human life—comparable to the known cost of plant—not on a fluctuating value, unknown and unknowable. The field of life insurance presented a problem comparable to that here involved. Despite the large experience embodied in the standard mortality tables and the relative simplicity of the problem there presented, the actual mortality was found to vary so widely from that for which the premiums had provided, that their rates was found to work serious injustice either to the insurer or to the insured. The transaction resulted sometimes in bankruptcy of the insurer; sometimes in his securing profits which were extortionate; and rarely, in his receiving only the intended fair compensation for the service rendered. Because every attempt to approximate more nearly the amount of premium required proved futile, justice was sought and found in the system of strictly mutual insurance. Under that system the premium charged is made clearly ample; and the part which proves not to have been needed enures in some form of benefit to him who paid it.

<sup>100</sup> *Ibid.* at 254, 50 Sup. Ct. at 126.

<sup>101</sup> *Ibid.* at 255, 50 Sup. Ct. at 127.

<sup>102</sup> *Ibid.* at 262, 50 Sup. Ct. at 129.

"Similarly, if, instead of applying the rule of *Smyth v. Ames*, the rate base of a utility were fixed at the amount prudently invested, the inevitable errors incident to estimating service life and net expense in plant consumption could never result in injustice either to the utility or to the community. For, if the amount set aside for depreciation proved inadequate and investment of new capital became necessary, the utility would be permitted to earn a return on the new capital. And if the amount set aside for depreciation proved to be excessive, the income from the surplus reserve would operate as a credit to reduce the capital charge which the rates must earn. If the Railways should ever suffer injustice from adopting cost of plant as the basis for calculating the depreciation charge, it will be an unavoidable incident of applying in valuation the rule of *Smyth v. Ames*."<sup>103</sup>

Nor does his claim that the depreciation charge should be based upon the cost of the property, rather than upon present value, rest upon reason alone. This is the method adopted by the United States Chamber of Commerce;<sup>104</sup> it is the practice of public accountants;<sup>105</sup> it is supported by leading business institutions;<sup>106</sup> it conforms to the policy of utility commissions.<sup>107</sup>

On all these points Mr. Justice Brandeis had ample support. He cites many authorities, but not court decisions and legal treatises. Footnotes, covering several pages, include references to hundreds of authorities—studies in economics and in political science, studies of the practices of administrative bodies, of trade associations and private corporations, works on accountancy, and more.

<sup>103</sup> *Ibid.* at 278, 50 Sup. Ct. at 135. See also his dissenting opinion in *Pacific Gas & Elec. Co. v. San Francisco*, 265 U. S. 403, 44 Sup. Ct. 537 (1924).

<sup>104</sup> "The business device known as the depreciation charge appears not to have been widely adopted in America until after the beginning of this century. Its use is still stoutly resisted by many concerns. Wherever adopted, the depreciation charge is based on the original cost of the plant to the owner. When the great changes in price levels incident to the World War led some to question the wisdom of the practice of basing the charge on original cost, the Chamber of Commerce of the United States warned business men against the fallacy of departing from the accepted basis. And that warning has been recently repeated." *United Railways & Elec. Co. v. West*, *supra* note 90, at 265, 50 Sup. Ct. at 130.

<sup>105</sup> "Such is today, and ever has been, the practice of public accountants. Their statements are prepared in accordance with principles of accounting which are well established, generally accepted and uniformly applied. By those accustomed to read the language of accounting a depreciation charge is understood as meaning the appropriate contribution for that year to the amount required to make good the cost of the plant which ultimately must be retired." *Ibid.* at 267, 50 Sup. Ct. at 131.

<sup>106</sup> "Business men naturally took the plant at cost, as that is how they treat other articles consumed in operation. The plant, undepreciated, is commonly carried on the books at cost; and it is retired at cost. . . . they realized also that to attempt to make the depreciation account reflect economic conditions and changes would entail entry upon new fields of conjecture and prophecy which would defeat its purposes. For there is no basis in experience which can justify predicting whether a replacement, renewal or substitution falling in some future year will cost more or less than it would at present, or more or less than the unit cost when it was acquired. . . . In 1927 the business men's practice of basing the depreciation charge on cost was applied by this Court in *United States v. Ludey*, 274 U. S. 295, 300-301." *Ibid.* at 269, 270, 274, 50 Sup. Ct. at 132, 134.

<sup>107</sup> "A depreciation charge based on original cost has been uniformly applied by the public utility commissions of the several States when determining net income, past or expected, for rate-making purposes." *Ibid.* at 273, 50 Sup. Ct. at 133.



It is now established that the rule for determining the rate base is present value; that original cost is not present value or an approximation thereof; that substantial weight must be given to present costs of labor and materials and therefore to increased reproduction cost. Mr. Justice Brandeis has never been willing to admit that the rule enunciated in the *Smyth* case justifies any such conclusion. He still insists that if the court allowed actual cost as the rate base much of the difficulty with reference to the determination of reasonable rates and depreciation allowances would be avoided. He urges this rule because he understands that the use of either reproduction cost or present value is quite as likely, through the fluctuation of values, to operate at one period against the public and in favor of the utilities at another period against the utilities and in favor of the public.<sup>108</sup> He sees in the adoption of original cost the only means of securing a stable and practicable base for steady use in rate case adjudications.

### *Political and Industrial Liberty*

It is evident from the preceding pages that Mr. Justice Brandeis values human rights as more basically important to society than property rights. It necessarily follows, as to the political aspect, that the State exists for man. Man does not exist for the State. The worth of the State is in what it wins for man:

“Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.”<sup>109</sup>

“The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”<sup>110</sup>

Nevertheless, Mr. Justice Brandeis’ principles exhibit an element of collectivism so strong as somewhat to embarrass those who heartily endorse

<sup>108</sup> For illustrations of the effect of using reproduction cost among the “relevant facts” to be taken into account in determining fair value, see GLAESER, *OUTLINES OF PUBLIC UTILITY ECONOMICS* (1927) 462 *et seq.* and authorities cited. For an able discussion of the public utility cases, see Bauer, *Decisions on Valuation and Rate Making*, *AMERICAN ECONOMIC REV.*, June, 1924.

<sup>109</sup> *Whitney v. California*, 274 U. S. 357 at 375, 47 Sup. Ct. 641 at 648 (1927).

<sup>110</sup> *Olmstead v. United States*, 277 U. S. 438 at 478, 48 Sup. Ct. 564 at 572 (1928).

his libertarian doctrines. The political system, as well as the industrial and social, should be directed, he contends, not so much toward material progress as for the development of men. "Our business is not to make goods, but to make men."<sup>111</sup> "I cannot believe", Mr. Justice Brandeis observed, "that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and enjoy property."<sup>112</sup> The reason he feels "such an interest in scientific management, is that it does tend to make men".<sup>113</sup> He opposes long hours of labor and big industrial combinations,<sup>114</sup> restrictions on freedom of speech and assembly, because these dwarf the individual. He favors trade unions, the minimum wage, the *Volstead Act*, workmen's compensation and unemployment insurance chiefly on the score of their tendency to favor individual development. His implicit faith in democracy,<sup>115</sup> industrial and political, is rooted in the belief that it alone affords the conditions under which an individual is free to develop his powers:

"We must bear in mind all the time that however much we may desire material improvement and must desire it for the comfort of the individual, the United States is a democracy, and that we must have, above all things, men. It is the development of manhood to which any industrial and social system should be directed. We Americans are committed not only to social justice in the sense of avoiding things which bring suffering and harm, like unjust distribution of wealth; but we are committed primarily to democracy. The social justice for which we are striving is an incident of our democracy, not the main end. It is rather the result of democracy—perhaps its finest expression—but it rests upon democracy, which implies the rule by the people . . . . And that involves industrial democracy as well as political democracy."<sup>116</sup>

<sup>111</sup> Testimony before Commission on Industrial Relations. 64th Cong., 1st Sess. 19 SEN. Doc. 1003 (1915).

<sup>112</sup> *Gilbert v. Minnesota*, 254 U. S. 325 at 343, 41 Sup. Ct. 125 at 131 (1920) (dissent).

<sup>113</sup> Brandeis, *Organized Labor and Efficiency*, *supra* note 7, at 149. "Conserving human effort, and the man, is the fundamental tenet of scientific management."

"To my mind the best game that there is is the game of work, and I want to see men in it for all the joys that come with working effectively". Testimony before Commission on Industrial Relations, *loc. cit. supra* note 111.

<sup>114</sup> For a discussion of the incompatibility between big business and industrial democracy see Statement before the Commission on Industrial Relations, *supra* note 65, at 7659.

"We cannot maintain democratic conditions in America if we allow organizations to arise in our midst with the power of the Steel Corporation. Liberty of the American citizen can not endure against such organizations." Hearings before the Committee on Investigation of United States Steel Corporation (1912) 2862. Mr. Brandeis compares the condition of the worker under the present industrial system with that under the servile system of a century ago. *Ibid.* 2842 *et seq.*

<sup>115</sup> "I have such a faith in democracy and such a distrust of the absence of it that I have felt a grave apprehension as to what might ultimately be the effect of these foundations [Rockefeller and Russell Sage] when the control shall have passed out of the hands of those who at present are administering them to those who may not be governed by the excellent intent of the creators." Statement before the Committee on Industrial Relations, *supra* note 65, at 7664.

"I think we need democracy at all times no matter what the system is under which we work." Testimony before Commission on Industrial Relations, *supra* note 111, at 999.

<sup>116</sup> Statement before the Commission on Industrial Relations, *supra* note 65, at 7659-7660.

Like John Stuart Mill, Mr. Justice Brandeis feels sure that unless men are allowed to speak and write freely they will cease to develop at all. He accordingly held that a state is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence: "To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one."<sup>117</sup> Thus for Brandeis, as for Mill, the rights of others alone can place justifiable restrictions upon liberty: "All rights are derived from the purposes of society in which they exist, above all rights rises duty to the community."<sup>118</sup>

An exponent of *laissez faire* in the sphere of politics, he is an ardent advocate of government regulation in the sphere of industry. Both liberty and democracy are seriously threatened by the growth of big business. Today the need is not so much for freedom from physical restraint as for freedom from economic oppression:

"Already the displacement of the small independent business man by the huge corporation with its myriad of employees, its absentee ownership, and its financier control, presents a grave danger to our democracy. The social loss is great; and there is no economic gain."<sup>119</sup>

"Politically, the American workman is free—so far as law can make him. But is he really free? Can any man be really free who is constantly in danger of becoming dependant for mere subsistence upon somebody and something else than his own exertion and conduct? Men are not free while financially dependent upon the will of other individuals. Financial dependence is consistent with freedom only where claim to support rests upon right, and not upon favor."<sup>120</sup>

Political liberty, then, is not enough; it must be attended by economic and industrial liberty. Trade unions have done much, but Mr. Justice Brandeis insists that if the individual is to be really free from all modern forms of economic oppression, government itself must intervene,<sup>121</sup> regu-

<sup>117</sup> *Whitney v. California*, *supra* note 109, at 376, 47 Sup. Ct. 648.

<sup>118</sup> *Duplex Printing Co. v. Deering*, *supra* note 22.

"The liberty of each individual must be limited in such a way that it leaves others the possibility of individual liberty; the right to develop must be subject to that limitation which gives everybody else the right to develop; the restriction is merely an adjustment of the relations of one individual to another." Testimony before New York State Factory Investigating Commission, January 22, 1915.

<sup>119</sup> *Cutthroat Prices*, HARPER'S WEEKLY, Nov. 15, 1913, at 12.

<sup>120</sup> Brandeis, *The Road to Social Efficiency*, *supra* note 7.

<sup>121</sup> Various observations by him as to industrial democracy suggest that Mr. Brandeis would sympathize with certain aspects of guild socialist theory:

"The end for which we must strive is the attainment of rule by the people, and that involves industrial democracy as well as political democracy. That means that the problems of a trade should no longer be the problems of the employer alone. The problems of his business, and it is not the employer's business alone, are the problems of all in it. The union

lating large business combinations and maintaining rational competition between small units.

If the common man is to secure even approximately equal bargaining power with capital, he must cooperate with his fellows. Every legal and practical encouragement should be given to develop cooperatives among farmers and industrial workers. So when the Oklahoma Act of 1919 for organizing cooperatives among farmers was found wanting as a denial of equal protection of the laws, Mr. Justice Brandeis dissented. He saw in the statute the purpose to secure economic democracy:

"The assertion is that co-operatives organized under the law of 1919, being stock companies, do business with the general public for the sole purpose of making money, as do individual or other corporate competitors; whereas co-operatives organized under the law of 1917 are 'for mutual help, without capital stock, not conducted for profit, and restricted to the business of their own members.' The fact is that these two types of co-operative corporations—the stock and the non-stock—differ from one another only in a few details, which are without significance in this connection; that both are instrumentalities commonly employed to promote and effect co-operation among farmers; that the two serve the same purpose; and that both differ vitally from commercial corporations. The farmers seek through both to secure a more efficient system of production and distribution and a more equitable allocation of benefits. But this is not their only purpose. Besides promoting the financial advantage of the participating farmers, they seek through co-operation to socialize their interests—to require an equitable assumption of responsibilities while assuring an equitable distribution of benefits. Their aim is economic democracy on lines of liberty, equality and fraternity. To accomplish these objectives, both types of co-operative corporations provide for excluding capitalist control. As means to this end, both provide for restriction of voting privileges, for curtailment of return on capital and for distribution of gains or savings through patronage dividends or equivalent devices."<sup>122</sup>

In this modern industrial era property may, as is well known, be used in such a way as to interfere "with that fundamental freedom of life for which property is only a means". Where such interference occurs Mr. Jus-

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cannot shift upon the employer the responsibility for conditions, nor can the employer insist upon determining, according to his will, the conditions which shall exist. The problems which exist are the problems of the trade; they are the problems of the employer and the employee. . . . There must be a division, not only of profits, but a division also of responsibilities. The employees must have the opportunity of participating in the decision as to what shall be their condition and how the business shall be run. . . . And if the situation is such that a voluntary organization like a labor union is powerless to bring about the democratization of a business, I think we have in this fact some proof that the employing organization is larger than is consistent with the public interest. . . . And the state must in some way come to the aid of the workmen if democratization is to be secured." Statement before the Commission on Industrial Relations, *supra* note 65, at 7662 *et seq.*

<sup>122</sup>Frost v. Corporation Commission, 278 U. S. 515 at 536, 49 Sup. Ct. 235 at 243 (1929). In Corporation Commission of Okla. v. Lowe, 281 U. S. 431, 50 Sup. Ct. 397 (1930), a case involving facts very similar to those in the Frost case, a unanimous court reached a decision in conformity to the views of Mr. Justice Brandeis.

tice Brandeis, ever watchful of human rights, insists that it should be controlled: "Regulation of railroads and public utilities, trusts and all big industries that control the necessities of life, far from being infringements on liberty, are in reality protections against infringements on liberty."<sup>123</sup>

His appreciation of government regulation as guarding against the dangers inherent in trusts and monopolies, did not, however, commit him to such strict interpretation of the anti-trust laws as would render it legally impossible for business to rationalize its methods of competition. "The Sherman Law", he argued, "does not prohibit every lessening of competition; and it certainly does not command that competition shall be pursued blindly, that business rivals shall remain ignorant of trade facts or be denied aid in weighing their significance."<sup>124</sup> Just as the trade union is a necessary instrument for securing among workers higher wages, better hours and proper working conditions, so the trade association represents a "commendable effort by concerns engaged in a chaotic industry to make possible its intelligent conduct under competitive conditions".<sup>125</sup> So when the *Sherman Act* (originally intended to secure free competition) becomes the instrument by which the small competitor is destroyed, Mr. Justice Brandeis feels called upon to dissent:

"The coöperation which is incident to this Plan [open competition] does not suppress competition. On the contrary it tends to promote all in competition which is desirable. By substituting knowledge for ignorance, rumor, guess and suspicion, it tends also to substitute research and reasoning for gambling and piracy, without closing the door to adventure or lessening the value of prophetic wisdom. In making such knowledge available to the smallest concern it creates among producers equality of opportunity. In making it available also to purchasers and the general public, it does all that can actually be done to protect the community from extortion. . . .

"The refusal to permit a multitude of small rivals to co-operate, as they have done here, in order to protect themselves and the public from the chaos and havoc wrought in their trade by ignorance, may result in suppressing competition in the hardwood industry. These keen business rivals, who sought through coöperative exchange of trade information to create conditions under which alone rational competition is possible, produce in the aggregate about one-third of the hardwood lumber of the country. This court held in *United States v. U. S. Steel Corporation*, 251 U. S. 417, that it was not unlawful to vest in a single corporation control of 50 per cent. of the steel industry of the country; and in *United States v. United Shoe Machinery Co.*, 247 U. S. 32, the court held that it was not unlawful to vest in a single corporation control of practically the whole shoe machinery industry.

<sup>123</sup> Poole, *Brandeis* (1911) 71 AMERICAN MAGAZINE 481 at 492.

<sup>124</sup> *American Column & Lumber Co. v. United States*, 257 U. S. 377 at 415, 42 Sup. Ct. 114 at 122 (1921).

<sup>125</sup> *Ibid.* at 418, 42 Sup. Ct. at 123.

May not these hardwood lumber concerns, frustrated in their efforts to rationalize competition, be led to enter the inviting field of consolidation? And if they do, may not another huge trust with highly centralized control over vast resources, natural, manufacturing and financial, become so powerful as to dominate competitors, wholesalers, retailers, consumers, employees and, in large measure, the community?"<sup>126</sup>

The preference, already cited, for small business units as against the power of combined capital is illustrated also in Mr. Brandeis' dissenting opinion in the *Quaker City Cab* case. The Philadelphia cab corporations objected to a Pennsylvania taxing statute on the ground that competitive individuals and partnerships were not subject to the tax imposed. The Court in a six to three decision declared the statute unconstitutional under the "equal protection" clause. The classification, the Court held, to be legitimate, "must be based on a real and substantial difference having reasonable relation to the subject of the legislation". The Court felt there was no such difference. Mr. Justice Brandeis wrote in dissent:

"In Pennsylvania the practice of imposing heavier burdens upon corporations dates from a time when there, as elsewhere in America, the fear of growing corporate power was common. The present heavier imposition may be a survival of an early effort to discourage the resort to that form of organization. The apprehension is now less common. But there are still intelligent, informed, just-minded and civilized persons who believe that the rapidly growing aggregation of capital through corporations constitutes an insidious menace to the

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<sup>126</sup> *Ibid.* at 418, 42 Sup. Ct. at 123. See also *United States v. American Linseed Oil Co.*, 262 U. S. 371, 43 Sup. Ct. 607 (1922).

As a result of the court's decisions in these cases, the opinion gained currency among both lawyers and laymen that the mere collection and dissemination of statistical information is unlawful. But by the time the *Cement* (*Cement Mfrs Protective Ass'n v. United States*, 268 U. S. 588, 45 Sup. Ct. 586 (1925)) and *Maple Flooring* (*infra*) cases came on for decision, the personnel of the court had changed. The most significant addition was that of Mr. Justice Stone, an able lawyer and a trained economist. So in these cases we find Justices Brandeis and Holmes on the side of the majority with Justice McReynolds, who had spoken for the court in the *American Lumber* case, in the minority. Elaborating the economic viewpoint, so strongly insisted upon by Mr. Justice Brandeis in the *American Lumber* case, Mr. Justice Stone observed:

"It is not, we think, open to question that the dissemination of pertinent information concerning any trade or business tends to stabilize that trade or business and to produce uniformity of price and trade practice. Exchange of price quotations of market commodities tends to produce uniformity of prices in the markets of the world. Knowledge of the supplies of available merchandise tends to prevent over-production and to avoid the economic disturbances produced by business crises resulting from over-production. But the natural effect of the acquisition of wider and more scientific knowledge of business conditions, on the minds of the individuals engaged in commerce, and its consequent effect in stabilizing production and price, can hardly be deemed a restraint of commerce or if so it cannot, we think, be said to be an unreasonable restraint, or in any respect unlawful.

"It is the consensus of opinion of economists and of many of the most important agencies of government that the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to the production and distribution, cost and prices in actual sales, of market commodities, because the making available of such information tends to stabilize trade and industry, to produce fairer price levels and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise." *Maple Flooring Ass'n v. United States*, 268 U. S. 563 at 582, 45 Sup. Ct. 578 at 584 (1925).

liberty of the citizen; that it tends to increase the subjection of labor to capital; that, because of the guidance and control necessarily exercised by great corporations upon those engaged in business, individual initiative is being impaired and creative power will be lessened; that the absorption of capital by corporations, and their perpetual life, may bring evils similar to those which attended mortmain; that the evils incident to the accelerating absorption of business by corporations outweigh the benefits thereby secured; and that the process of absorption should be retarded."<sup>127</sup>

Himself an expert in accountancy, he understands that the courts are usually ill-equipped to deal with the technique of valuation, rate-fixing and monopoly. Therefore he generally defers to the findings of the Interstate Commerce Commission,<sup>128</sup> the Federal Trade Commission<sup>129</sup> and the vari-

<sup>127</sup> *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389 at 410, 48 Sup. Ct. 553 at 558 (1928).

<sup>128</sup> See *United States v. Los Angeles and Salt Lake R. R.*, 273 U. S. 299, 47 Sup. Ct. 713 (1927); *Great Northern Ry. v. Merchants Elevated Co.*, 259 U. S. 285, 42 Sup. Ct. 477 (1924).

The first case to come before the Court under the valuation clause of the Transportation Act of 1920 is *St. Louis & O'Fallon Ry. v. United States*, 279 U. S. 461, 49 Sup. Ct. 384 (1929). Under paragraph four, section 15a, Congress had directed the Interstate Commerce Commission to give due consideration to all the elements of value recognized by the law of the land for rate-making purposes. The Commission itself was divided as to the weight to be given to reproduction cost. Without following any particular rule of valuation, the majority of the Commission found that "the value of the property of railroads for rate-making purposes . . . approaches more nearly the reasonable and necessary investment in property than the cost of reproducing it at a particular time." The majority of the court speaking through Mr. Justice McReynolds sided with the minority of the Commission, on the score that insufficient weight had been given to the principle of reproduction cost.

Mr. Justice Brandeis voted to sustain the findings of the Commission. He argued that "the single-sum values found by the Commission do not coincide either with the estimated prudent investment or with the estimated reproduction cost. They are much nearer the estimated original cost of the property than they are to its estimated reproduction cost. But the values found do not conform to any formula"; that "the insertion in section 15a of the provision that the Commission 'shall give to the property investment account of the carrier only that consideration which under the law it is entitled to in establishing values for rate-making purposes' and the rejection of other proposed measures of value, show that Congress intended not to impose restrictions upon the discretion of the commission"; that "unless, therefore, Congress required the Commission, not only to consider evidence of reconstruction cost in ascertaining values for rate-making purposes under section 15a, but also to give in all cases and in respect to all property, some weight to evidence of enhanced reconstruction cost, even if that evidence was not inherently persuasive, the Commission was clearly authorized to determine for itself to what extent, if any, weight should be given to the evidence; and its findings should not be disturbed by the Court, unless it appears that there was an abuse of discretion." At 541, 49 Sup. Ct. at 407.

<sup>129</sup> In *Federal Trade Commission v. Gratz*, 253 U. S. 421, 40 Sup. Ct. 572 (1920), the Court affirmed the judgment of the Circuit Court annulling an order of the Commission that a company desist from the practice of imposing upon purchasers a so-called "tying clause". Arguing that the judgment of the Circuit Court should be overruled and that the order of the Commission be sustained, Mr. Justice Brandeis observed:

"The proceeding is . . . a novelty. It is a new device in administrative machinery, introduced by Congress in the year 1914, in the hope thereby of remedying conditions in business which a great majority of the American people regarded as menacing the general welfare, and which for more than a generation they had vainly attempted to remedy by the ordinary processes of law. . . . At 432, 40 Sup. Ct. at 576.

"Instead of undertaking to define what practices should be deemed unfair, as had been done in earlier legislation, the Act left the determination to the Commission. Experience with existing laws had taught that definition, being necessarily rigid, would prove embarrassing and, if rigorously applied, might involve great hardship. Methods of competition which would be unfair in one industry, under certain circumstances, might, when adopted in another

ous state public service commissions.<sup>130</sup> Nevertheless he holds that the courts must be responsible for adjudicating the relation of these problems to the general welfare.<sup>131</sup>

Since certain untoward events in 1929 many competent observers are disposed to agree with Mr. Justice Brandeis in the position he has held so long: that size, *per se*, is a threat to the well-being of the modern economic community against which government must ever be on its guard.

Strange as it may appear, Mr. Justice Brandeis' liberalism in matters of economics and of political rights, is conspicuously absent from his opinions having to do with "moral" issues. Indeed, he has proved himself an authoritarian, and even a paternalist as regards enforcement of the *National Prohibition Amendment* and the *Volstead Act*. When liquor interests attacked the validity of the "experiment noble in motive", the support he had given pacifists, socialists and other radical liberals, was not forthcoming. In the case which allowed the federal government to put breweries and distilleries out of business without any compensation whatever for the destruction of their property, he delivered the opinion of the court;<sup>132</sup> he also held that one conviction for possessing liquor and another conviction for selling the same liquor did not violate the constitutional protection against double jeopardy;<sup>133</sup> the year before he had upheld the government's right to confiscate the motor car of an innocent owner simply because a guest passenger had on his person a small flask of whiskey.<sup>134</sup> Later in the same year he had sustained that section of the *Volstead Act* which prohibits, *inter alia*, physicians from prescribing more than one pint of liquor to the same patient within a period of ten days.<sup>135</sup>

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industry, or even in the same industry under different circumstances, be entirely unobjectionable. Furthermore, an enumeration, however comprehensive, of existing methods of unfair competition must necessarily soon prove incomplete, as with new conditions constantly arising novel unfair methods would be devised and developed. In leaving to the Commission the determination of the question whether the method of competition pursued in a particular case was unfair, Congress followed the precedent which it had set a quarter of a century earlier, when by the Act to Regulate Commerce it conferred upon the Interstate Commerce Commission power to determine whether a preference or advantage given to a shipper or locality fell within the prohibition of an undue or unreasonable preference or advantage . . . Recognizing that the question whether a method of competitive practice was unfair would ordinarily depend upon special facts, Congress imposed upon the Commission the duty of finding the facts, and it declared that findings of fact so made (if duly supported by evidence) were to be taken as final." At 436, 40 Sup. Ct. at 578.

<sup>130</sup> *United Railways & Elec. Co. v. West*, *supra* note 99 (dissenting); *McCardle v. Indianapolis Water Co.*, *supra* note 97 (dissenting).

<sup>131</sup> Mr. Justice Brandeis' contribution to the law of railroad regulation has recently been ably treated by Henry Wolf Bickl  in *Mr. Justice Brandeis and the Regulation of Railroads* (1931) 45 HARV. L. REV. 4.

<sup>132</sup> *Ruppert v. Caffey*, 251 U. S. 264, 40 Sup. Ct. 141 (1920) (Justices McReynolds, Day and Van Devanter dissenting).

<sup>133</sup> *Albrecht v. United States*, 273 U. S. 1, 47 Sup. Ct. 250 (1927).

<sup>134</sup> *United States v. One Ford Coup *, 272 U. S. 321, 47 Sup. Ct. 154 (1926) (Justices Butler, McReynolds and Sutherland dissenting). See also *Van Oster v. Kansas*, 272 U. S. 465, 47 Sup. Ct. 133 (1926).

<sup>135</sup> *Lambert v. Yellowley*, 272 U. S. 581, 47 Sup. Ct. 210 (1926).



One observes in these cases so complete a breakdown of his individualism (perhaps also of his practice of fact finding) that one may wonder whether he had not forgotten for the moment his own words of warning:

“. . . in every extension of governmental functions lurks a new danger to civil liberty”.<sup>136</sup>

“Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”<sup>137</sup>

When it is remembered that these pregnant warnings were uttered, respectively, one year before and two years after the liquor cases cited above, the mystery deepens. For Brandeis, as for John Stuart Mill, liberty comprises freedom of thought and feeling. But that additional tenet in Mill’s individualism which held that each person “is the proper guardian of his own health, whether bodily *or* mental and spiritual”,<sup>138</sup> finds no support in Mr. Justice Brandeis’ political philosophy. He could not subscribe to the doctrine that “mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest”.<sup>139</sup> Rather he believes that no small part of the function of the law is to make men good. It may be said perhaps that in all these cases he was but following a rule of decision which in his opinion was calculated to procure the attainment of liberty through law;<sup>140</sup> he was following a principle voiced in earlier cases:

“In order to preserve the liberty and the property of the great majority of the citizens of a state, rights of property and the liberty of the individual must be remoulded, from time to time, to meet the changing needs of society.”<sup>141</sup>

Thus his zeal for social justice and his belief in the genuine worth of the individual, sometimes cause him to favor even drastic regulation of those very liberties which many consider it the primary purpose of the bill of rights to protect.

<sup>136</sup> United States *ex rel.* Democratic Pub. Co. v. Burleson, 255 U. S. 407 at 436, 41 Sup. Ct. 352 at 363 (1921).

<sup>137</sup> Olmstead v. United States, *supra* note 110, at 479, 48 Sup. Ct. at 572.

<sup>138</sup> MILL, ON LIBERTY AND OTHER ESSAYS (1926) 17. Even John Stuart Mill admits that “despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end.” (!) *Ibid.* at 14.

<sup>139</sup> *Ibid.*

<sup>140</sup> “The great achievement of the English-speaking people is the attainment of liberty through law.” BRANDEIS, *op. cit. supra* note 12, at 330.

<sup>141</sup> Dissenting in *Truax v. Corrigan*, *supra* note 48, at 376, 42 Sup. Ct. at 146.

### Conclusions

The views of Mr. Justice Brandeis, so long propounded in dissent, are now coming into general acceptance. A few illustrations may be cited:

With regard to the limits of the constitutional function of judicial review, particularly in due process cases, his theory has recently been pronounced by him as spokesman for the Court in the *New Jersey Insurance* case. Herein he held that the presumption of constitutionality in favor of legislation, clearly within the police power, must prevail "in the absence of some factual foundation of record for overthrowing the statute".<sup>142</sup> The burden of proof, therefore, is placed squarely on those who oppose the statute, not on the state that upholds it. This is reminiscent of the rule followed by the Court in the famous *Munn* case<sup>143</sup> more than fifty years earlier,—a rule, it may be added, from which the Court has departed in a number of important instances. By either placing the burden of proof upon the state<sup>144</sup> for the justification of social legislation, or by the Court's mak-

<sup>142</sup> *O'Gorman & Young v. Hartford Ins. Co.*, 282 U. S. 251 at 258, 51 Sup. Ct. 130 at 132 (1931).

The same position is taken by Chief Justice Hughes in *Corporation Commission of Okla. v. Lowe*, *supra* note 122, at 438, 50 Sup. Ct. at 399:

"It was incumbent upon the appellee in invoking the protection of the Fourteenth Amendment to show with convincing clarity that the law of the State created against him the discrimination of which he complained. An infraction of the constitutional provision is not to be assumed. On the contrary, it is to be presumed that the State in enforcing its local policies will conform its requirements to the Federal guarantees. Doubts on this point are to be resolved in favor of, and not against, the State." Compare with Mr. Justice Hughes' opinion in *Price v. Illinois*, 238 U. S. 446, 452, 35 Sup. Ct. 892, 895 (1915).

<sup>143</sup> "For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute under consideration was passed. For us the question is one of power, not of expediency." *Munn v. Illinois*, *supra* note 76, at 132. As to the reasonableness of the rate the court declared: "For protection against abuses by legislatures the people must resort to the polls, not to the courts." At 135.

"... as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions." Mr. Justice Harlan in *Powell v. Pennsylvania*, 127 U. S. 678, 685, 8 Sup. Ct. 992 at 996 (1888). See also *Atkin v. Kansas*, 191 U. S. 207, 222, 24 Sup. Ct. 124, 128 (1903).

<sup>144</sup> As Mr. Justice Sutherland held in *Adkins v. Children's Hospital*, 261 U. S. 525, 43 Sup. Ct. 394 (1923): "... freedom of contract is ... the general rule and restraint the exception, and the exercise of legislative authority ... can be justified only by the existence of exceptional circumstances. Whether these circumstances exist in the present case constitutes the question to be answered." At 546, 43 Sup. Ct. at 397.

Continuing he wrote:

"The feature of this statute which, perhaps more than any others, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose upon a basis having no casual connection with his business, or the contract, or the work the employee engages to do." At 558, 43 Sup. Ct. at 401.

Thus such facts as Mr. Frankfurter presented were, in Mr. Justice Sutherland's opinion, entirely irrelevant. He said of them: "A mass of reports, opinions of special observers and students of the subject, and the like, has been brought before us in support of this statement, [that great benefit had resulted from the operation of minimum wage legislation] all of which we have found interesting but only mildly persuasive. . . .

"These are all proper enough for the consideration of law-making bodies, since their tendency is to establish the desirability or undesirability of the legislation; but they reflect no legitimate light upon the question of its validity; and that is what we are called upon to decide. The elucidation of that question cannot be aided by counting heads." At 560, 43 Sup. Ct. at 402.

ing an investigation of facts such as is proper only for the legislature and substituting its own findings for those of the legislature (as is the custom of the more conservative judges),<sup>145</sup> the Court has hitherto found it possible to set aside legislation of great social and economic significance.

In the *Railway Clerks'* case<sup>146</sup> the Supreme Court went far toward accepting Mr. Justice Brandeis' view that a labor union is entitled to extend its operations beyond the bounds of a single enterprise. The Railway Clerks' Union, to preserve its integrity, had secured an injunction against the formation of a company union. A unanimous Court sustained that order. The case is also especially noteworthy in that it demonstrated for the first time, in a Supreme Court decision, the effectiveness with which the injunction can be used by labor *against* employers.

In the recent decision in the *Chain Store* case,<sup>147</sup> the claims of industrial liberty, the right of the independent merchant and manufacturer against the oppression of monopolistic combinations, triumphed and did so on the basis of the principles insisted upon by Mr. Justice Brandeis in the *Quaker City Cab* case.<sup>148</sup>

During the same term of Court, his conclusion, that "in frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril",<sup>149</sup> prevailed in the *California Red Flag* case.<sup>150</sup>

In the public utility field, economic events have already confirmed the merit of his actual prudent investment theory of valuation, as against reproduction cost, which the Court has usually shown a tendency to favor. With characteristic insight into economic cause and effect Mr. Justice Brandeis wrote in 1923: "The present price level may fall to that of 1914 within a decade; and that, later, it may fall much lower."<sup>151</sup> With the fulfillment of this prophecy, another shift of position between the protagonists is in

<sup>145</sup> As in Mr. Justice Butler's opinion in *Jay Burns Baking Co. v. Bryan*, *supra* note 8.

<sup>146</sup> *Texas and N. O. Ry. v. Brotherhood of Railway & Steamship Clerks*, *supra* note 17.

<sup>147</sup> *State Board of Tax Commissioners v. Jackson*, 283 U. S. 527, 51 Sup. Ct. 540 (1931).

<sup>148</sup> *Quaker City Cab Co. v. Pennsylvania*, *supra* note 127.

<sup>149</sup> *Gilbert v. Minnesota*, *supra* note 112, at 338, 41 Sup. Ct. at 129.

<sup>150</sup> *Stromberg v. California*, 283 U. S. 359, 51 Sup. Ct. 532 (1931). Delivering the opinion of the Court, Chief Justice Hughes wrote:

"The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. At 369, 51 Sup. Ct. at 536.

Ten years earlier Mr. Justice Brandeis had used much the same language in dissent:

"Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril." *Gilbert v. Minnesota*, *supra* note 112, at 338, 41 Sup. Ct. at 129.

<sup>151</sup> *Southwestern & Bell Tel. Co. v. Public Serv. Co.*, *supra* note 85, at 303, 43 Sup. Ct. 551, n. 16.

See also *Near v. Minnesota*, 283 U. S. 697, 51 Sup. Ct. 625 (1931) where the Court in a five to four decision held unconstitutional the Minnesota "Gag Law" which made possible the enjoining of any publication which, in the opinion of a single judge, was contrary to public morals.

order, if the rule in the *Smyth* case is maintained, with the railroads and public utilities on the side of investment cost and the consumer favoring reproduction cost.<sup>152</sup>

Although usually coupled with Mr. Justice Holmes in any discussion of Supreme Court personnel, Mr. Justice Brandeis differs singularly in judicial technique and in approach to questions of social policy. Mr. Justice Holmes is generally called a liberal; although he himself has never, so far as I know, pretended to be anything other than a constitutional skeptic.

Put in terms of political theory, Mr. Justice Holmes believes that the sovereign people, speaking through their authorized agent—the legislature—can, in general, embody their opinions in law; that there is nothing in the Constitution to prevent their doing so. Therein he follows Hobbes.<sup>153</sup> Mr. Justice Brandeis, however, believes that the legislature can embody popular opinion in law only when such enactments conform with certain standards of social justice. This recalls the “higher law” doctrine, and is somewhat reminiscent of the views of Sir Edward Coke, who antedates Hobbes. Therefore, to Mr. Justice Brandeis, judicial review of legislation involves “weighing public needs as against private desires”; and also “weighing relative social values”. Consequently he claims for the judiciary a larger share in the exercise of sovereignty than Holmes seems disposed to allow. This, roughly, is the main divergence of their lines of thought.

It follows that Mr. Justice Holmes’ brand of liberalism differs fundamentally from that of Mr. Justice Brandeis.<sup>154</sup> The latter becomes deeply

<sup>152</sup> Such a change of front is already in evidence. At the recent hearings in Washington before the House Committee on Interstate and Foreign Commerce, there were intimations that some of the railway managers may once more look with favor on the theory of “original investment”. *New York Times*, Feb. 28, 1932.

<sup>153</sup> For evidence of Hobbes’ influence, see Mr. Justice Holmes’ references to *THE LEVIATHAN* in *Heard v. Sturgis*, 146 Mass. 545, 548-549, 16 N. E. 437, 441 (1888); *In re Opinion of the Justices*, 160 Mass. 586 at 595, 36 N. E. 488 at 492 (1894); *Kawanahakoa v. Polyblank*, 205 U. S. 349 at 353, 27 Sup. Ct. 526 at 527 (1907). See also the very pertinent observations of Elizabeth S. Sargeant, *Justice Touched with Fire*, reprinted in *FRANKFURTER, MR. JUSTICE HOLMES* (1931) 186.

<sup>154</sup> A good illustration of the divergent viewpoints of the two justices is the case of *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 43 Sup. Ct. 158 (1922) where Mr. Justice Holmes delivered the opinion of the Court and Mr. Justice Brandeis wrote a dissenting opinion.

When the legislatures of Nebraska and Iowa prohibited teaching German in the public schools, Holmes’ brand of liberalism, his willingness to allow the state to experiment even though he did not agree, prompted him to uphold the legislation; Brandeis, on the other hand, believing in liberty as an end as well as a means of achieving that which is most valuable in human life, voted with the Court to overthrow the statute. *Meyer v. Nebraska*, 262 U. S. 390, 43 Sup. Ct. 625 (1923); *Bartels v. Iowa*, 262 U. S. 404, 43 Sup. Ct. 628 (1923). In the Nebraska case Holmes’ dissenting opinion was concurred in by Mr. Justice Sutherland—a strange judicial bedfellow for one reputed to be a genuine liberal! Perhaps the best illustration of the dissimilar methods and viewpoints of the two justices is *Truax v. Corrigan*, *supra* note 48. After reviewing at considerable length the application of the common law to the struggle between employers and employees in England and the United States, and after full “consideration of the contemporary conditions, social, industrial and political, of the community to be affected”, Mr. Justice Brandeis reaches the conclusion that the Arizona statute limiting the remedy of injunction in disputes between capital and labor, is necessary and expedient as well as constitutional.

Mr. Justice Holmes, in a much briefer opinion, and with no consideration of the points stressed by Mr. Justice Brandeis, stated his reaction to the ruling of the Court by saying:

concerned with economic and social maladjustments and the means of correction by legislative action, while Mr. Justice Holmes is likely to remain cold and unmoved toward legislative and other panaceas.<sup>155</sup> Mr. Justice Brandeis has demonstrated, both on and off the Bench, that he is a genuine liberal. He is an avowed partisan of the common man; his special concern is for those who are economically and financially dependent upon others for a livelihood; he prefers human welfare to property rights.<sup>156</sup> Highly sensitive to present-day economic and social ills, he could never remain aloof and indifferent as is the habit of Mr. Justice Holmes; he seeks the cause of abuses and examines the merit of proposed remedies.

Counsel frequently fail to make such presentation of the case as satisfies him. So as a member of the Supreme Court, Mr. Justice Brandeis re-

"There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect." At 344, 42 Sup. Ct. at 134.

<sup>155</sup> The following is a typical statement of Holmes' position: "I am far from saying that I think this particular law a wise and rational provision. That is not my affair. But if the people of the State of New York speaking by their authorized voice say that they want it, I see nothing in the Constitution of the United States to prevent their having their will." Mr. Justice Holmes dissenting in *Tyson & Brothers v. Banton*, 272 U. S. 418 at 447, 47 Sup. Ct. 426 at 434 (1927). Dissenting in *Lochner v. New York*, 198 U. S. 45 at 76, 25 Sup. Ct. 539 at 546 (1905) Mr. Justice Holmes wrote: "I strongly believe that my agreement or disagreement [with any particular economic theory] has nothing to do with the right of a majority to embody their opinions in law."

For similar utterances, see his opinion in *Noble Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186 (1911); *Missouri, Kans. & Tex. Ry. v. May*, 194 U. S. 267 at 270, 24 Sup. Ct. 638 at 639 (1904); *Block v. Hirsch*, 256 U. S. 135 at 155, 41 Sup. Ct. 458 at 459 (1921); *Otis v. Parker*, 187 U. S. 606 at 609, 23 Sup. Ct. 168 at 169 (1903); *Louisville & Nashville R. R. v. Barber Asphalt Paving Co.*, 197 U. S. 430 at 435, 25 Sup. Ct. 466 at 467 (1905).

The position taken by Justice Holmes in these cases, regarding the leeway that should be allowed the legislature, is entirely in accord with his earlier views:

"The first requirement of a sound body of law is that it should correspond with actual feelings and demands of the community, whether right or wrong." HOLMES, *THE COMMON LAW* (1881) 41.

"What proximate test of excellence [of good government] can be found except correspondence to the actual equilibrium of force in the community—that is, conformity to the wishes of the dominant power? Of course, such conformity may lead to destruction, and it is desirable that the dominant power should be wise. But wise or not, the proximate test of a good government is that the dominant power have its way." HOLMES, *COLLECTED LEGAL PAPERS* (1920) 258.

His position is further elaborated in the following: "I do not expect or think it desirable that the judges should undertake to renovate the law . . . But I think it most important to remember whenever a doubtful case arises, that what is really before us is a conflict between two social desires, . . . the . . . question is which desire is strongest at the point of conflict. . . . Where there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious, the judges are called on to exercise the sovereign prerogative of choice." *Law in Science and Science in Law* (1899) 12 HARV. L. REV. 443, 460-461. Reprinted in HOLMES, *COLLECTED LEGAL PAPERS* 210.

<sup>156</sup> His protest against the tendency of the Court to accord property greater protection than liberty is pithily expressed as follows: "I have difficulty in believing that the liberty guaranteed by the Constitution, which has been held to protect against state denial, the right of an employer to discriminate against a workman because he is a member of a trade union [*Coppage v. Kansas*, *supra* note 16]; the right of a business man to conduct a private employment agency [*Adams v. Tanner*, *supra* note 1]; or to contract outside the state for insurance of his property [*Allgeyer v. Louisiana*, 165 U. S. 578, 589, 17 Sup. Ct. 427, 430 (1897)], although the legislature deems it inimical to the public welfare, does not include liberty to teach, either in the privacy of the home or publicly, the doctrine of pacifism; so long, at least, as Congress has not declared that public safety demands its suppression." *Gilbert v. Minnesota*, *supra* note 112. See also his dissenting opinion in the *Bedford Cut Stone* case, *supra* note 30.

sorts to fact-finding agencies on his own account. He feels called upon to make such investigation of the facts as enable him to decide whether the provision in question is "so clearly arbitrary or capricious that legislators acting reasonably could not have believed it to be necessary or appropriate for the public welfare".<sup>157</sup> Mr. Justice Holmes feels no such responsibility.<sup>158</sup> Not being addicted to the study of social and economic problems,<sup>159</sup> Mr. Justice Holmes is likely to be rather skeptical of social projects.<sup>160</sup> Exactly the reverse is true of Mr. Justice Brandeis. Whether he happens to be writing a brief or a judicial opinion, he is at heart a crusader.<sup>161</sup> Never has he seen social and economic life as logical fictions carefully built up by jurists. His reason for supporting any particular social enactment may be and usually is, as he himself admits "partly legal, partly sentimental and partly a recognition of economic rights and sound social policy".<sup>162</sup>

<sup>157</sup> *Jay Burns Baking Co. v. Bryan*, *supra* note 8, at 520, 44 Sup. Ct. at 416.

<sup>158</sup> "It may or may not be that if facts were called to our attention in a proper way the objection would prove to be real. But even if, when called to our attention, the facts should be taken notice of judicially, whether because they are only the premise for a general proposition of law [citing cases] or for any other reason, still there are many things that courts would notice if brought before them that beforehand they do not know. *It rests with counsel to take the proper steps, and if they deliberately omit them, we do not feel called upon to institute inquiries on our own account.*" Mr. Justice Holmes, speaking for the Court in *Quong Wing v. Kirkendall*, 223 U. S. 59 at 64, 32 Sup. Ct. 192 at 193 (1912). The italics are the writer's. Yet in 1899, Mr. Holmes himself had written: "The true science of the law does not consist mainly in a theological working out of dogma or a logical development as in mathematics, or only in a study of it as an anthropological document from the outside; an even more important part consists in the establishment of its postulates from within upon accurately measured social desires instead of tradition." HOLMES, COLLECTED LEGAL PAPERS 225-226.

A point of view more in keeping with the earlier statement of Mr. Holmes is illustrated in the following quotation from a dissenting opinion of Mr. Justice Brandeis: "Much evidence referred to by me is not in the record. Nor could it have been included. It is the history of the experience gained under similar legislation, and the result of scientific experiments made, since the entry of the judgment below. Of such events in our history, whether occurring before or after the enactment of the statute or of the entry of the judgment, the Court should acquire knowledge, and must, in my opinion, take judicial notice, whenever required to perform the delicate judicial task here involved." *Jay Burns Baking Co. v. Bryan*, *supra* note 8, at 533, 44 Sup. Ct. at 421.

<sup>159</sup> Soon after taking his seat on the Supreme Court, Mr. Justice Brandeis impressed his new associate, Mr. Justice Holmes, with the idea that "a study of statistics would be good for him." Justice Holmes was then leaving for his summer home at Beverly Farms and so instructed Mr. Brandeis to "pick out the right books and send them up." The box of books arrived in due course. An examination of the titles revealed a formidable array of monographs and books on the eight-hour day, the textile industry, the employment of women, employers' liability and so on. Gazing at the box in unaffected dismay, Mr. Justice Holmes is said to have instructed a servant: "Nail it up and send it back to him." And then with a sigh of relief the Justice immersed himself in Plato. (Related by Silas Bent in his recent volume, JUSTICE OLIVER WENDELL HOLMES (1932) 280-281).

<sup>160</sup> "The social reformers of today seem to me so far to forget that we . . . can[not] get something for nothing by legislation. . . . Probably I am too skeptical as to our ability to do more than shift disagreeable burdens from the shoulders of the stronger to those of the weaker. . . . The notion that with socialized property we should have women free and a piano for everybody seems to me an empty humbug. . . . But it is a pleasure to see more faith and enthusiasm in the young men; and I thought that one of them made a good answer to some of my skeptical talk when he said, 'You would base legislation upon regrets rather than upon hopes.'" HOLMES, COLLECTED LEGAL PAPERS 305-307.

<sup>161</sup> After discussing informally with Mr. Justice Brandeis the constitutional issues involved in the California Criminal Syndicalism Statute of 1919, Mr. Justice Holmes is said to have remarked to his Secretary: "I am afraid Brandeis has the crusading spirit. He talks like one of those upward-and-onward fellows." Related by Bent, *loc. cit. supra* note 159.

<sup>162</sup> Statement before the Commission on Industrial Relations, *supra* note 65, at 7681.

Another noteworthy characteristic of the judicial thinking of Mr. Justice Brandeis is the respect he pays legislative law, and his slight regard for a "jurisprudence of concepts" which would keep both society and the law in rigid and unchangeable form. The idea that law can be found but not made, forms no part of his juristic philosophy. Although reordering the law to bring it into accord with the ever-changing facts of life, is partly the work of the Courts, it is more truly the function of the legislature.<sup>163</sup> This makes him slow to question the wisdom of the legislature's judgment. Unlike his more conservative brethren, he has insisted that the law must be made to look outside itself, if it is to cope adequately with problems raised by a rapidly changing civilization. Thus he brings to his consideration of the legislative product, not merely judicial precedents and decisions but committee reports, legislative debates and authoritative treatises of various sorts, all hitherto almost entirely neglected in judicial opinions.

It follows that law for Mr. Justice Brandeis is no mere embodiment of an arbitrary set of *a priori* abstractions existing in a vacuum; rather, law is essentially an instrument of social policy. Knowledge of it does not consist merely in the logical consistency of its rules. He emphasized time and again the truth of the old maxim of the civilians—*ex facto jus oritur*. "No law, written or unwritten, can be understood without a full knowledge of the facts out of which it arises, and to which it is to be applied."<sup>164</sup>

These words were written in 1916 shortly before he was appointed to the Supreme Court. It is not surprising, then, that as a member of the Court Mr. Justice Brandeis continues his investigations of underlying facts. His opinions are noteworthy and valuable if only for their references to secular literature.<sup>165</sup> No significant contribution, whether from a legal, social or economic point of view, escapes his attention. Elaborate docu-

<sup>163</sup> ". . . with the increasing complexity of society, the public interest tends to become omnipresent; and the problems presented by new demands for justice cease to be simple. Then the creation or recognition by courts of a new private right may work serious injury to the general public, unless the boundaries of the right are definitely established and wisely guarded. In order to reconcile the new private right with the public interest, it may be necessary to prescribe limitations and rules for its enjoyment; and also to provide administrative machinery for enforcing the rules. It is largely for this reason that, in the effort to meet the many new demands for justice incident to a rapidly changing civilization, resort to legislation has latterly been had with increasing frequency." *International News Serv. v. Associated Press*, 248 U. S. 215 at 262, 39 Sup. Ct. 68 at 81 (1918).

"The fundamental right of free men to strive for better conditions through new legislation and new institutions will not be preserved, if efforts to secure it by argument to fellow citizens may be construed as criminal incitement to disobey the existing law—merely because the argument presented seems to those exercising judicial power to be unfair in its portrayal of existing evils, mistaken in its assumptions, unsound in reasoning or intemperate in language." *Pierce v. United States*, 252 U. S. 239 at 273, 40 Sup. Ct. 205 at 217 (1920).

See, in this connection, the excellent article by J. M. Landis, *The Study of Legislation in the Law Schools*, THE HARVARD GRADUATE MAGAZINE, June, 1931.

<sup>164</sup> Brandeis, *The Living Law* (1916) 10 ILL. L. REV. 461 at 467.

<sup>165</sup> See especially his opinions in the following cases: *Adams v. Tanner*, *supra* note 1; *Truax v. Corrigan*, *supra* note 48; *Southwestern Bell Tel. Co. v. Public Serv. Comm.*, *supra* note 85; *New York Central R. R. v. Winfield*, 244 U. S. 147, 37 Sup. Ct. 546 (1917); *United Railways & Electric Co. v. West*, *supra* note 99; *Jay Burns Baking Co. v. Bryan*, *supra* note 8; *St. Louis & O'Fallon Ry. v. United States*, *supra* note 128.

mentation of all such material is made for the purpose of reaching a judicial solution of the problem in hand. His studies have exposed as fictions numerous "assumptions upon which many American judges and lawyers had rested comfortably".<sup>166</sup> His conviction that our individualistic philosophy of rights and property could no longer furnish an adequate basis for dealing with the problem of modern economic life has now become widespread. It is now generally recognized that society has to have protection against low wages, unemployment, industrial accidents, and other social and economic hardships, because society must ultimately bear the burden, financial and otherwise, which these entail. Thus out of the attempt to enforce individual justice, Mr. Brandeis lays the foundations of social justice.

Fundamentally Mr. Justice Brandeis is an idealist, not always entirely objective, seldom without liberal bias toward the social and economic questions that come before him. His vision is of an ideal state wherein tyranny, political and industrial, is abolished; <sup>167</sup> he longs "for a truer democracy".<sup>168</sup>

Although preëminently a factualist, a stickler for statistics, he never allows himself to be buried beneath the facts of modern industrial life. Particular emphasis should be given to the coherent and purposeful social-political philosophy which underlies his profound factual knowledge. Never is he forced "to improvise a theory, a philosophy, when confronted overnight by the exigencies of the case before him".<sup>169</sup> With keen insight into the "universal element" involved in the case before him, his decisions are invariably quickened "with the inspiration of a principle".<sup>170</sup>

Judicial interpretation cannot eliminate the personal bias of the interpreter. All men are more or less partisan. Emotions, great and small, compel the judge to choose his side. When once that choice is made, historical events, social and economic facts, judicial precedents and philosophy, are marshalled and emphasized in such a way as to bolster up his viewpoint.<sup>171</sup> These observations are, I think, as applicable to Mr. Justice Brandeis as to any other judge.<sup>172</sup> Many years of study and of close contact with social and economic affairs have developed in him certain emotional preferences.<sup>173</sup>

<sup>166</sup> *New York Central R. R. v. Winfield*, *supra* note 165 at 165, 37 Sup. Ct. at 547.

<sup>167</sup> These conclusions, in part, are confirmed in the recently published recollections of William G. McAdoo:

"Brandeis is a humanitarian; an idealist, but not a dreamer, for no man living has a firmer grasp of business or of economic actualities. He has an unusual capacity for looking at civilization objectively, as if he were not a part of it and reducing its activities and results to the common denominator of human welfare." McADOO, *CROWDED YEARS* (1931) 182.

<sup>168</sup> Brandeis, *loc. cit. supra* note 113.

<sup>169</sup> CARDOZO, *THE GROWTH OF THE LAW* (1924) 102.

<sup>170</sup> *Ibid.*

<sup>171</sup> "The scrutiny and dissection of social facts may supply us with the data upon which the creative spirit broods, but in the process of creation something is given out in excess of what is taken in." CARDOZO, *THE GROWTH OF THE LAW* (1924) 90.

<sup>172</sup> He has usually shown himself unable to regard constitutional-social issues with that cool detachment which is the unique characteristic of Mr. Justice Holmes.

<sup>173</sup> Nor is there any reason for concluding that this is not as it should be.

"Deep below consciousness are . . . the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the



Noting the continuity of Mr. Justice Brandeis' views before and after his appointment, one is apt to feel that an ideal picture of society predetermines his position as to many of the Court's decisions.<sup>174</sup>

And yet his contention that he has "no rigid social philosophy", is logical and natural enough because he is essentially a social scientist, for whom problems are never solved but always in process of solution. New inventions, great emergencies and the like, give rise to new difficulties; a rule of law once settled may have to yield later on to the impact of facts unforeseen. "Modification implies growth. It is the life of the law."<sup>175</sup>

The Constitution itself does not block that growth except when interpreted by minds too rigid and in an age of change.<sup>176</sup> Then only does our fundamental law prevent legislation from achieving the social and economic ideal. Mr. Justice Brandeis understands that the Constitution must be given liberal construction, if it is, as John Marshall once said, "to endure for all ages to come, and, consequently, to be adapted to the various crises in human affairs".<sup>177</sup>

"Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions."<sup>178</sup>

". . . our social and industrial welfare demands that ample scope should be given for social as well as mechanical invention. It is a condition not only of progress but of conserving that which we have. Nothing could be more revolutionary than to close the door to social experimentation. . . . And surely the federal Constitution—itself perhaps the greatest of human experiments—does not prohibit [legislation reconciling] the existing industrial system with our striving for social justice and the preservation of the race."<sup>179</sup>

man, whether he be litigant or judge. . . . The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by." CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1928) 167, and 167-180 generally.

<sup>174</sup> A striking illustration of Mr. Justice Brandeis' sympathy with the viewpoint of labor is the case of *Wolff Packing Co. v. Court of Industrial Relations*, 267 U. S. 552, 45 Sup. Ct. 441 (1925), wherein the court set aside certain sections of the Kansas Court of Industrial Relations Act. Strenuously opposed by labor, Mr. Justice Brandeis joined in the opinion of Chief Justice Taft in overturning the act—an opinion which embodies one of the most conservative utterances that has issued from the Court in recent years.

<sup>175</sup> *Washington v. Dawson & Co.*, *supra* note 47.

<sup>176</sup> Such obstacles as there are exist not in the Constitution, but in the minds of those who expound it:

"It [the Constitution] has not lost its capacity for expansion to meet new conditions, unless it be interpreted by rigid minds which have no such capacity." Poole, *op. cit. supra* note 123, at 493.

What Mr. Brandeis said in 1915 with particular reference to minimum wage legislation is applicable to social legislation generally. See Brandeis, *supra* note 9, at 524.

<sup>177</sup> *McCulloch v. Maryland*, 4 Wheat. 316 at 415 (U. S. 1819).

<sup>178</sup> *Olmstead v. United States*, *supra* note 110, at 472, 48 Sup. Ct. at 570 (quoted from *Weems v. United States*, 217 U. S. 349 at 373, 30 Sup. Ct. 544 at 551 (1910)).

<sup>179</sup> Brandeis, *loc. cit. supra* note 176. This point of view is reiterated in his most recent judicial utterance (*New State Ice Co. v. Liebman*, decided March 21, 1932).

Thus limitations "like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the states from meeting modern conditions by regulations which 'a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive'.<sup>180</sup> Clauses guaranteeing the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world."<sup>181</sup> "There must be power in the states, and in the nation to remould through experimentation our economic practises to meet changing social and economic needs."<sup>182</sup>

In considering Mr. Justice Brandeis' work on the Supreme Court, it is customary to lay special stress upon his mastery of figures and statistics.<sup>183</sup> But such analysis may lose sight of the fact that Mr. Justice Brandeis is a social and political philosopher as well as a technician. He sees, as have few of his generation, the social and economic perils of the industrial revolution; he understands that the development of the machine and of the business corporation, are threats to liberty and to the general welfare. To him this means that we have "passed to a subtler civilization"; and therefore he

The main point of his disagreement with the Court is on its construction of the Fourteenth Amendment so as to restrict the states in their efforts to deal with free competition and other problems of economics in "an emergency more serious than war".

"Economists are searching for the causes of this disorder and are re-examining the bases of our industrial structure. Businessmen are seeking possible remedies. Most of them realize that failure to distribute widely the profits of industry has been a prime cause of our present plight. But, rightly or wrongly, many persons think that one of the major contributing causes has been unbridled competition. Increasingly, doubt is expressed as to whether it is economically wise, or morally right, that men should be permitted to add to the producing facilities of an industry which is already suffering from overcapacity. . . .

"All agree that irregularity in employment—the greatest of our evils—cannot be overcome unless production and consumption are more nearly balanced. Many insist there must be some form of economic control. . . .

"I cannot believe that the framers of the Fourteenth Amendment, or the states which ratified it, intended to leave us helpless to correct the evils of technological unemployment and excess productive capacity, which the march of invention and discovery have entailed.

"To stay experimentation within the law in things social and economic is a grave responsibility. Denial of the right to such experimentation may be fraught with serious consequences to the nation. It is one of the happy incidents of the Federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country. This court has the power to stay such experimentation. We may strike down the statute embodying it on the ground that in our opinion, it is arbitrary, capricious or unreasonable; for the due process clause has been held applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this power, we should be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."

—*New York Herald-Tribune*, March 22, 1932.

<sup>180</sup> *Olmstead v. United States*, *supra* note 110, at 472, 48 Sup. Ct. at 570 (citing *Euclid v. Ambler Realty Co.*, 272 U. S. 365 at 387, 47 Sup. Ct. 114 at 118 (1926); *Buck v. Bell*, 274 U. S. 200, 47 Sup. Ct. 584 (1927)).

<sup>181</sup> *Ibid.*

<sup>182</sup> *New State Ice Co. v. Liebman*, *supra* note 179.

<sup>183</sup> One writer, for example, in appraising the work of the Justice, found the following observation of Mr. Justice Holmes especially applicable to Mr. Justice Brandeis: "For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics." *Biklé, op. cit. supra* note 131, at 32, quoting *HOLMES, COLLECTED LEGAL PAPERS* 187.

Norman Haggood, also, in his preface to *BRANDEIS, OTHER PEOPLE'S MONEY* (1914), attributes Mr. Brandeis' success in various fields largely to his mastery of figures and of the technical details of accounting.

urges "the law must still protect a man from things that rob him of his freedom, whether the oppressing force be physical or of a subtler kind".<sup>184</sup> The Justice emphasized the need for social intelligence. But he did more: he studied some of the outstanding social and economic ills from which society increasingly suffers. In these novel and creative activities Mr. Justice Brandeis has been dominated by a philosophy, an ideal, the vision of a social and political structure within which the individual may best develop a creative personality.

As a member of the Supreme Court, Mr. Justice Brandeis has been and is significant because certain preëminent qualities of mind enable him to bring the law into vital relationship with the social possibilities of industry in our own day. He sees beyond the daily facts of economics and statistics to their basic social and economic consequences, to their philosophic implication for the future.<sup>185</sup> Methods of legal technique are not idols but tools, tools serving the art of juristic philosophy and statesmanship. Vast learning in the social sciences and a well-nigh unique mastery of current data are used merely as instruments of juristic thought.<sup>186</sup> Thus it is that Mr. Justice Brandeis builds deep foundations for our law of days to come.

<sup>184</sup> Recorded by Ernest Poole in his interview with Mr. Brandeis, *supra* note 123, at 492.

<sup>185</sup> Mr. Justice Brandeis possessed to an unusual degree that peculiar quality of mind which, in the opinion of Justice Cardozo, judges so frequently lack:

"The judge is often left to improvise . . . a theory, a philosophy, when confronted over night by the exigencies of the case before him. Often he fumbles about, feeling in a vague way that some such problem is involved, but missing the universal element which would have quickened his decision with the inspiration of a principle. If he lacks an adequate philosophy, he either goes astray altogether, or at best does not rise above the empiricism that pronounces upon particulars." CARDOZO, *THE GROWTH OF THE LAW* (1925) 102. "An avalanche of decisions by tribunals great and small is producing a situation where citation of precedent is tending to count for less, and appeal to an informing principle is tending to count for more. . . . We shall be caught in the tentacles of the web, unless some superintending mind imparts the secret of the structure, lifting us to a height where the unity of the circle will be visible as it lies below." *Ibid.* 5-6. In an address on December 17, 1931, Judge Cardozo again made a strong plea for a "new philosophy in law that will guide the thought of our successors when those of us in place today shall have vanished from the scene." *New York Times*, Dec. 18, 1931.

Mr. Justice Holmes has emphasized the same point:

"Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house. The most important improvements of the last twenty-five years are improvements in theory. It is not to be feared as impracticable, for, to the competent it simply means going to the bottom of the subject." HOLMES, *COLLECTED LEGAL PAPERS* 200. See also Holmes' introduction to *THE CONTINENTAL LEGAL HISTORY SERIES* (1911) xlvii.

<sup>186</sup> "The man of science in the law is not merely a bookworm. To a microscopic eye for detail he must unite an insight which tells him what details are significant. Not every maker of exact investigation counts, but only he who directs his investigation to a crucial point." HOLMES, *COLLECTED LEGAL PAPERS* 224.