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Indiana Law Journal

Volume 27 | Issue 1

Article 2

Fall 1951

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## Recommended Citation

Dykstra, Daniel J. (1951) "Legislative Favoritism Before the Court," *Indiana Law Journal*: Vol. 27: Iss. 1, Article 2.  
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## LEGISLATIVE FAVORITISM BEFORE THE COURTS\*

DANIEL J. DYKSTRA†

It is an amusing, though not insignificant, fact of current political life that the most vigorous breast beaters against government regulation and interference are at the same time the most persistent seekers of government favor and protection. I refer to those collectively known as "business men." While their spokesmen fervently condemn with dire warnings the increasing governmental control over all phases of economic life, special units organized for this very purpose are constantly exerting pressure on lawmakers—local, state and national—seeking ordinances, statutes, regulations and favors which will enhance their position on the economic horizon.<sup>1</sup> It is small wonder that this fact has caused one experienced observer of the legislative process to conclude: "Business men say that they want less government in business, but that is what they say and not what they want."<sup>2</sup>

In most instances, of course, the organization requesting special treatment does so with much self-justification, for each group is convinced that what aids its own interests aids society in general.<sup>3</sup> What is overlooked is the fact that special treatment for one group leads to compensating demands from other groups. Also ignored is the fact that special treatment is not, generally speaking, a single-package affair, for in most instances government favors are of necessity accompanied or closely followed by government restrictions and regulations.<sup>4</sup>

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\* The writer gratefully acknowledges his indebtedness to Professor Monrad Paulsen, University of Minnesota, for motivating this study through his article entitled, *The Persistence of Substantive Due Process in the States*, published in 34 MINN. L. REV. 91 (1950).

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1. For comments concerning the number and effects of such measures see Isaacs, *Barrier Activities and the Courts: A Study in Anti-competitive Law*, 8 LAW & CONTEMP. PROB. 382 (1941); McIntire and Rhyne, *Municipal Legislative Barriers to a Free Market*, 8 LAW & CONTEMP. PROB. 359 (1941); Silverman, Bennett, and Lechliter, *Control by Licensing Over Entry Into the Market*, 8 LAW & CONTEMP. PROB. 234 (1941); Graves, *Professional and Occupational Restrictions*, 13 TEMP. L.Q. 334 (1939); Hanf and Hamrick, *Haphazard Regimentation Under Licensing Statutes*, 17 N.C.L. REV. 1 (1938); Legis., 22 IOWA L. REV. 736 (1937); Note, 29 NEB. L. REV. 146 (1949); Comment, 48 YALE L.J. 847 (1939); Note, 25 VA. L. REV. 219 (1938).

2. MCKEAN, PRESSURES ON THE LEGISLATURE OF NEW JERSEY 56 (1938).

3. The testimony taken by the Buchanan Committee in 1950 amply supports this observation. See *Hearings Before the House Select Committee on Lobbying Activities*, 81st Cong., 2d Sess. (1950).

4. George Feldman in an article entitled *Legislative Opposition to Chain Stores and Its Minimization*, 8 LAW & CONTEMP. PROB. 334 (1941) observed:

Whereas group demands for tariffs, oil rights, support prices, and other concessions involving obviously broad economic implications have received considerable publicity, the less spectacular but more numerous demands promulgated and effectuated by various economic units have received in comparison little attention and analysis.<sup>5</sup> These demands are reflected in the licensing laws, the fair trade acts, the itinerant peddler prohibitions, the inspection ordinances, and the occupational revenue measures which are constantly turned out at all levels of government. Admittedly, these enactments taken individually seem insignificant, but when viewed in toto their impact cannot be ignored. Until comprehensive and specialized studies are made, any appraisal of the over-all effects of these measures on the economy represent mere guesswork, but certainly it may be said that their influence on the price structure, on the availability of goods and services, on the entrance of new competitors into a given field, and above all on the extent of government in business, is not inconsequential.

Broadly speaking, the enactments in question may be classified into two general categories.<sup>6</sup> In one group are found the measures primarily produced at the state and national levels which seek to enable businessmen with limited means to compete on a greater degree of equality with those possessing more capital. Fair trade laws,<sup>7</sup> anti-price discrimination laws,

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"Pressure groups that are too successful usually end by going too far and destroying all that they have accomplished. The anti-chain store campaign seems well along this road. In an attempt to extend their gains, the wholesale and retail merchants who are behind the movement are alienating many of their own number—persons who formerly backed, or at least did not oppose, chain store legislation." *Id.* at 342-43. The author goes on to observe that Mr. Hector Lazo, head of the National Retailer Owned Grocers' Association once noted: "A law passed today to put your competitor out of business may whack you between the eyes tomorrow." *Id.* at 344.

5. While, as may be noted in note 1, this field of legislation has not been totally neglected there is still merit to the lament of the political scientist who in 1939 observed that with a few exceptions "practically nothing has been done by students of government and law, by way of analysis of the problems of legislation and administration which these laws create." Graves, *Professional and Occupational Restrictions*, 13 *TEMP. L.Q.* 334 (1939).

6. This classification is suggested by a comment published in 48 *YALE L.J.* 847 (1939).

7. In view of the fact that the fair trade laws had their birth in anti-chain store, anti-bigness sentiment, it is somewhat ironic to note the following observation made by the Federal Trade Commission in a publication entitled a *REPORT ON RESALE PRICE MAINTENANCE* (1945). In appraising the effects of such legislation, the report stated: "After resale price maintenance became effective, the price advances forced upon large distributors, especially for a number of brands handled by the drug trade, yielded larger gross margin percentages to large retail distributors than to individual drug stores as a class in the same market, although the latter, in general, sold the brands at higher prices than the former. Thus, it would seem that the large distributors had a real advantage in pricing their goods, possibly because they purchased in larger quantities directly from manufacturers whereas small retailers were purchasing in smaller quantities from wholesalers and paying higher prices." *Id.* at 258.

and anti-chain store legislation<sup>8</sup> are illustrative of this type. In the second group are found those measures enacted most frequently by local and state lawmakers which seek to regulate and control the entrance of competitors into prescribed areas. This is sought to be accomplished either by closely supervising the admittance of new members into a given trade or profession or by regulating those who seek to invade a given geographic-political unit, a city, town, or county, for purposes of soliciting business.

The anti-chain store, anti-bigness type of regulation, while inconsistent with traditional concepts of laissez-faireism, is none the less in keeping with the philosophy which resulted in the enactment of anti-trust laws. That philosophy is grounded on the theory that numerous competing independent units result in the most desirable economy. To some extent it may be argued that measures which seek to protect a given geographic unit also fall into this field of justification, for rapid means of transportation and distribution have enabled big corporations to exploit markets which at one time were the exclusive domain of the local independent retailers or producers.<sup>9</sup> Thus, for example, local dairies, bakeries, ice cream plants, and dry cleaning establishments which at one time had a small but settled market are today faced with the necessity of competing with outside enterprises whose agents and facilities are successfully canvassing "their territory."<sup>10</sup>

While it thus may be conceded that in some instances the impetus behind many of the measures in question stems from a desire to compete successfully with business units possessing greater productive and distributive capacity, it must also be recognized that many of these enactments result in closing the door of economic opportunity to individuals and business units of limited capital and experience. Laws which regulate access to a given geographic unit may interfere with the free and easy market desired by large corporations, but at the same time they also constitute barriers to the individual entrepreneurs, to the itinerant peddlers, and to other businessmen with restricted resources. Further, measures which prescribe courses, periods of training, license fees, and examinations for purposes of controlling entrance into a given trade or profession may frequently prove formidable obstacles to many who nor-

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8. For a comprehensive treatment of anti-chain store legislation see Feldman, *Legislative Opposition to Chain Stores and Its Minimization*, 8 LAW & CONTEMP. PROB. 334 (1941).

9. See Comment, 48 YALE L.J. 847, 848-49 (1939).

10. For a case illustrating a situation of this type, see *Real Silk Hosiery Mills v. City of Portland*, 268 U.S. 352 (1925).

mally would find their means of livelihood in one of these fields of enterprise.<sup>11</sup>

Admittedly, the reasons given for establishing restrictions to the traditionally easy entrance into a given trade or an established geographic area are many and not without merit. The local businessman who pays taxes, who supports with talents, time, and money the churches, schools, and charities of his community, quite naturally feels that competition from outsiders who are not required to make an equivalent contribution represents unfair competition.<sup>12</sup> Trades and professions contend, with some degree of logic, that the public must be assured competent services and reputable goods. This they maintain can only be achieved by regulations which not only serve to eliminate impostors but also seek to assure competency.<sup>13</sup> Therefore, to the extent that these measures are needed for and to the degree which they accomplish these objectives, even though the result of partly selfish motives, they are not without justification.

Although the economic consequences of these licensing and regulatory laws are in serious need of further study, the problem with which this discussion is immediately concerned is the attitude of the courts toward this legislation, particularly that category which seeks to regulate and control the entrance of competitors into a prescribed area. Of course, the number of such enactments is in itself evidence that the judiciary has frequently sustained such measures.<sup>14</sup> Nevertheless, the decisions handed down since 1935 reveal that on numerous occasions and for a variety of reasons courts have seen fit to declare certain of these enact-

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11. In an article entitled *Control by Licensing Over Entry Into the Market*, 8 LAW & CONTEMP. PROB. 234 (1941) by Silverman, Bennett, and Lechliter, the following observation was made in discussing various provisions frequently contained in licensing legislation: "These particular requirements, however, when applied to the ordinary trades of barbering, cosmetology, plumbing, building, watchmaking, or photography, frequently assume a more onerous aspect. At least a potential danger arises that many an honest, conscientious man or woman will be deprived of earning a livelihood. Such statutes may readily operate to restrict the number of persons who may engage in a particular occupation, and also lead, in some degree, to the control of competition and price. Whether this result is desirable or undesirable depends upon one's views with relation to our economic society." *Id.* at 238.

12. For a more extended discussion of this observation see Jensen, *Burdening Interstate Direct Selling Under Claims of State Police Power*, 12 ROCKY MT. L. REV. 257 (1940).

13. See Graves, *Professional and Occupational Restrictions*, 13 TEMP. L.Q. 334 (1939).

14. In 1939, a study published by Professor Graves, *supra* note 13, listed over 100 professions, trades and occupations which are frequently subjected to licensing requirements. The average number in effect in each of the 48 states was, at that date, 43. *Id.* at 338.

ments invalid. The judicial obstacles thus created are worthy of close observation.

Before considering these obstacles in detail, however, an examination of the general attitude and approach taken by various courts to this area of the law will be profitable. Many opinions, taking their cue from pronouncements of the United States Supreme Court in such cases as *Powell v. Pennsylvania*,<sup>15</sup> *O'Gorman and Young v. Hartford Fire Insurance Co.*,<sup>16</sup> *Nebbia v. New York*,<sup>17</sup> and *Olsen v. Nebraska*,<sup>18</sup> reiterate the observation that every presumption is in favor of the validity of the statute under consideration. This observation is usually supplemented by the comment that the court is not concerned with the wisdom of the enactment, for its task is simply to review the sufficiency of the evidence upon which constitutionality is rested.<sup>19</sup> "If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory,"<sup>20</sup> that is sufficient. Further, many courts, when confronted by arguments advanced by counsel to the effect that an enactment under consideration is but the selfish product of a particular pressure group, have seen fit to observe that they cannot be concerned with the source from which a law originated or with the motives of those instrumental in securing its passage.<sup>21</sup> For example, Mr. Justice Murphy, in considering a South Carolina statute which provided that undertakers could not serve as life insurance agents,<sup>22</sup> remarked:

It is said that the "insurance lobby" obtained this statute from the South Carolina legislature. But a judiciary must judge by results, not by the varied factors which may have determined legislators' votes. We cannot undertake a search for motive in testing constitutionality.<sup>23</sup>

15. 127 U.S. 678 (1888).

16. 282 U.S. 251 (1931).

17. 291 U.S. 502 (1934).

18. 313 U.S. 236 (1941).

19. For examples of opinions which express these concepts see *Kress and Co. v. Johnson*, 16 F. Supp. 5 (D. Colo. 1936); *Buehman v. Bechtel*, 57 Ariz. 363, 114 P.2d 227 (1941); *Auston v. Wilson*, 27 Cal.App.2d 124, 80 P.2d 503 (1938); *Liquor Store, Inc. v. Continental Distilling Corp.*, 40 So.2d, 371 (Fla. 1949); *Moore v. Grillis*, 205 Miss. 865, 39 So.2d 505 (1949); *Nelsen v. Tilley*, 137 Neb. 327, 289 N.W. 388 (1939).

20. *Nebbia v. New York*, 291 U.S. 502, 537 (1934).

21. *E.g.*, *Daniel v. Family Security Life Insurance Co.*, 336 U.S. 220 (1949); *Eddy v. Morgan*, 216 Ill. 437, 75 N.E. 174 (1905); *State v. Bushfield*, 69 S.D. 172, 8 N.W.2d 1 (1943).

22. *Daniel v. Family Security Life Insurance Co.*, *supra* note 21.

23. *Id.* at 224.

He further added:

We cannot say that South Carolina is not entitled to call the funeral insurance business an evil. Nor can we say that the statute has no relation to the elimination of those evils. There our inquiry must stop.<sup>24</sup>

Despite such frequent assertions of judicial restraint, it is impossible to escape the conclusion that in this area of the law many courts merely pay lip service to such language, for in many instances their conclusions as to constitutionality seem to be determined by the personal predilection of individual judges to the specific measure before them.<sup>25</sup> Here again, lower courts take their lead from the Supreme Court, for its performance in the social-economic field and in the interstate commerce area<sup>26</sup> reflects that it has left itself open to follow a variety of paths depending upon its attitude towards the challenged legislation. While frequently the Court has talked the presumption language and has reached a conclusion in accord with such an approach,<sup>27</sup> it has on other occasions substituted its own impressions as to existing social-economic facts for purposes of reaching desired conclusions. Thus, in *Burns Baking Co. v. Bryan*,<sup>28</sup> a case concerned with the constitutionality of a statute prescribing standardized sizes for loaves of bread, the majority, speaking through Justice Butler, said:

There is no evidence in support of the thought that purchasers have been or are likely to be induced to take a 9½ or a 10 ounce loaf for a pound (16 ounce) loaf . . . and it is contrary to common experience and unreasonable to assume that there could be any danger of such deception.<sup>29</sup>

This remark not only reflects a judicial indifference to the presumption of constitutionality but it is also in error, for as the dissent by Justice Brandeis so aptly disclosed, with specific facts drawn from a variety of sources, purchasers had been deceived when buying loaves of bread.<sup>30</sup>

24. *Ibid.*

25. This impression seems especially apparent in *Liquor Store, Inc. v. Continental Distilling Corp.*, 40 So.2d 371 (Fla. 1949); *Moore v. Grillis*, 205 Miss. 865, 39 So.2d 505 (1949); *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540, 38 N.E.2d 70 (1941); *Hertz Drivurself Stations, Inc. v. Siggins*, 359 Pa. 25, 58 A.2d 464 (1948).

26. For a comprehensive discussion of recent decisions concerned with interstate commerce questions, see Barrett, *State Taxation of Interstate Commerce: "Direct Burdens," "Multiple Burdens" or What Have You?* 4 VAND. L. REV. 496 (1951).

27. See, e.g., *Nebbia v. New York*, 291 U.S. 502 (1934); *Olsen v. Nebraska*, 313 U.S. 236 (1941).

28. 264 U.S. 504 (1924).

29. *Id.* at 517.

30. For an excellent discussion of the *Burns Baking Co.* case and other cases reflecting the Courts' approach to facts, see DAVIS, ADMINISTRATIVE LAW § 153 (1951).

While it may be that the Supreme Court has come to exercise greater caution than is evidenced by Mr. Justice Butler's remark, it is none the less true that certain recent cases, as has been noted in dissenting opinions, have been decided upon assumed but disputable facts.<sup>31</sup>

Because the comment by Mr. Justice Murphy to the effect that courts should not determine the validity of a statute by the "varied factors which may determine legislators' votes" is at best an artificial and unsatisfactory rule, it is not surprising that it too has not been a constant guide to judicial action. In fact the good Justice himself could not help but observe in his separate concurring opinion in the *Takahashi* case<sup>32</sup> that the statute under consideration, one which prohibited the issuances of a commercial fishing license to any "alien Japanese," was but the result of the "anti-Japanese fever which has been evident in California in varying degrees since the turn of the century."<sup>33</sup> He further added:

That fever, of course, is traceable to the refusal or the inability of certain groups to adjust themselves economically and socially relative to residents of Japanese ancestry.<sup>34</sup>

In a similar vein, other courts have noted and have been influenced by the fact that measures whose validity were being attacked had their origins in the desires of limited groups to gain economic advantage. The Court of Appeals of Kentucky, for example, observed that it was revealed at trial that a city ordinance, which sought to place an annual tax of \$200 on all non-resident launderers soliciting business in the city, was drawn because "the Weed Laundry (a local concern) was objecting to appellant's carrying on business 'without a license.'"<sup>35</sup> It was also noted that the Weed Laundry had agreed to pay the expenses of testing the validity of an ordinance if the license fee for the service business was fixed at \$600.<sup>36</sup> These facts aided the court in concluding that the ordinance was passed to prohibit, not to regulate, and that as a consequence it could not be said to serve a public purpose. The Supreme

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31. For example, in his dissent in *Dean Milk Co. v. Madison*, 71 Sup.Ct. 295 (1951), Mr. Justice Black pointed out that the majority, in suggesting that reasonable alternatives existed which would accomplish what the ordinance intended, were in effect assuming that such was the case. He adds, "I do not think that the Court can so satisfy itself on the basis of its judicial knowledge." *Id.* at 300. See also the dissents by Mr. Justice Douglas in *Dennis v. United States*, 71 Sup.Ct. 857, 903 (1951) and in *Nippert v. Richmond*, 327 U.S. 416, 435 (1946).

32. *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948).

33. *Id.* at 422, 423.

34. *Id.* at 423.

35. *Southern Lines Linen Supply Co. v. City of Corbin*, 272 Ky. 787, 790, 115 S.W.2d 321, 323 (1938).

36. *Ibid.*



Court of Michigan, in considering an ordinance providing for the licensing of those engaged in the florist business, was impressed by testimony of various witnesses to the effect that the measure was lobbied through by a florist association for the purpose of "getting rid of those people who sold on the streets."<sup>37</sup> This fact, the court commented, demonstrated that:

The object of the present ordinance was not to protect the citizens of Detroit in their public health, safety, morals or general welfare, but was for the financial benefit of a few.<sup>38</sup>

The Pennsylvania Supreme Court in determining the constitutionality of a statute which prescribed that those desiring to engage in the business of renting motor vehicles without drivers must secure a certificate of public convenience from the Public Utility Commission and *must charge rates not lower than the rates charged by common carriers* was disturbed by the fact that this measure was prepared and introduced by an affiliate of the Yellow Cab Company. This act, the justices concluded, was nothing but an "attempt to regulate and control a private business and it does that simply in the interest of common or contract carriers by motor vehicles and not for any discernible public purpose."<sup>39</sup>

The preceding examples are sufficient to illustrate that many courts openly take note of the origins and motives which prompt certain enactments. While, as observed, this approach has on occasion been condemned by the courts themselves,<sup>40</sup> it is nevertheless one which takes stock of the facts of political life. Furthermore, it may be argued with considerable justification that knowledge as to the inspiration behind and the forces instrumental in securing the introduction and enactment of a given measure will shed valuable light on the question of whether it is, for example, an abuse of the police power in that it is unreasonable and arbitrary.<sup>41</sup>

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37. *Kresge Co. v. Mayor of Detroit*, 290 Mich. 185, 191, 287 N.W. 427, 429, 430 (1939).

38. *Id.* at 192, 387 N.W. at 430.

39. *Hertz Drivurself Stations, Inc. v. Siggins*, 359 Pa. 25, 41, 58 A.2d 464, 478 (1948).

40. For illustrative cases, see note 21, *supra*.

41. In this connection the following observation of Mr. Justice Day, speaking for the Supreme Court in *Dobbins v. Los Angeles*, 195 U.S. 223 (1904), is of more than passing interest. After noting the ordinance in question was passed under rather peculiar circumstances, he continued: "It is urged that, where the exercise of legislative or municipal power is clearly within constitutional limits, the courts will not inquire into the motives which may have actuated the legislative body in passing the law or ordinance in question. Whether, when it appears that the facts would authorize the exercise of the power, the courts will restrain its exercise because of alleged wrongful motives inducing the passing of an ordinance, is not a question necessary

A further factor which should be mentioned in appraising the general attitude and approach of various courts in this field of activity is the frequency with which they have seen fit to ground their decisions, either in part or in entirety, upon state constitutional provisions rather than upon the Federal Constitution.<sup>42</sup> This is true even though sections of the Federal Constitution have been pleaded and were involved in the controversy. The significance of this approach lies in the fact that it permits state courts, when construing provisions in state constitutions, to reach results not entirely compatible with the interpretations placed by the Supreme Court upon similar clauses in the Federal Constitution. Thus, it has been noted that many state supreme courts have persisted in giving the due process clause contained in state constitutions a less elastic interpretation than that recently adopted by the Supreme Court in construing the due process limitations of the United States Constitution.<sup>43</sup> In fact, some state courts being cognizant of this development have asserted it in a somewhat belligerent vein. The Ohio court, for example, after observing that the people of Ohio have long relied both on the guarantees of the federal and state constitutions, added:

If in the midst of current trends towards regimentation of persons and property, this long history of parallelism [that is, between the interpretation of guarantees contained in the United States and state constitutions] seems threatened by a narrowing federal interpretation of federal guaranties, it is well to remember that Ohio is a sovereign state and that the fundamental guaranties of the Ohio Bill of Rights have undiminished vitality. Decision here may be and is bottomed on those guaranties.<sup>44</sup>

It would of course be a mistake to assume that all state courts feel equally free to ignore the interpretation by the Supreme Court of a constitutional guarantee. As Professor Paulsen pointed out in a recent

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to be determined in this case; but where the facts as to the situation and conditions are such as to establish the exercise of the police power in such manner as to oppress or discriminate against a class or an individual, the courts may consider and give weight to such purpose in considering the validity of the ordinance." *Id.* at 240.

42. *E.g.*, *Buehman v. Bechtel*, 57 Ariz. 363, 114 P.2d 227 (1941); *State Board of Barber Examiners v. Cloud*, 220 Ind. 552, 44 N.E.2d 972 (1942); *Moore v. Grillis*, 205 Miss. 865, 39 So.2d 505 (1949); *Nelsen v. Tilley*, 137 Neb. 327, 289 N.W. 388 (1939); *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 831 (1949); *State v. Cromwell*, 72 N.D. 565, 9 N.W.2d 914 (1943); *Direct Plumbing Supply Co. v. City of Dayton*, 138 Ohio St. 540, 38 N.E.2d 70 (1941); *Williams v. City of Richmond*, 177 Va. 477, 14 S.E.2d 387 (1941).

43. For ample evidence supporting this observation, see Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

44. *Direct Plumbing Supply Co. v. City of Dayton*, 138 Ohio St. 540, 545, 38 N.E.2d 70, 73 (1941).

article, many state courts have expressly followed analogous federal cases in construing their similar state provisions. "Indeed," he adds, "to follow similar federal cases in the absence of cogent reasons for departing therefrom has become in some states a doctrine of state constitutional construction."<sup>45</sup> This not being a universal practice, however, state court interpretation of state constitutional guarantees, which are opposed to interpretations under federal constitutional stipulations, demands recognition if one is to understand judicial action in the area with which this article is concerned.

Having noted the general factors relating to the judicial approach, an examination will be made of the specific pitfalls which have resulted in the invalidation of several measures concerned with limiting the entrance of competitors into a given trade or area. In doing so, it should of course be repeated that the majority of enactments in this field have not fallen prey to constitutional limitations.<sup>46</sup> Those which have fallen before judicial scrutiny are, however, sufficiently numerous to warrant analysis.

One of the barriers which municipal ordinances of this nature have occasionally found insurmountable is that created by the narrow interpretation of the authority delegated to municipalities by the legislature or in some instances by the applicable state constitution.<sup>47</sup> This approach suggests a lack of judicial sympathy for the enactments involved. In *Ex parte Holmes*,<sup>48</sup> the Oklahoma Supreme Court refused to sustain a tax on itinerant photographers on the rather doubtful assertion that the power to tax was not included in the power to "license and regulate." At an earlier date the Iowa court, taking a similarly narrow position, held that an itinerant optician who tested eyes and solicited orders for glasses was not subject to a statute which authorized cities to regulate, license, and tax "transient merchants."<sup>49</sup> In Texas the Court of Criminal Appeals, although recognizing that it was acting *contra* to the decisions of a majority of courts, held that an ordinance prohibiting door to door solicitation of private residences without having been requested to do so by their occupants was invalid, for such authority was not included in

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45. Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620, 621-622 (1951). As the author notes, this is a principal enunciated by the Oregon court in *City of Portland v. Thornton*, 174 Ore. 508, 149 P.2d 972 (1944).

46. This fact is amply demonstrated by the materials cited in note 1 *supra*.

47. *E.g.*, *Bryan v. Malvern*, 122 Ark. 379, 183 S.W. 957 (1916); *City of Waukon v. Fish*, 124 Iowa 464, 100 N.W. 475 (1904); *City of Mankato v. Fowler*, 32 Minn. 364, 20 N.W. 361 (1884); *Ex parte Holmes*, 162 Okla. 30, 18 P.2d 1053 (1933); *Ex parte Falkner*, 143 Tex. Cr. 272, 158 S.W.2d 525 (1942).

48. See note 47 *supra*.

49. *City of Waukon v. Fish*, 124 Iowa 464, 100 N.W. 475 (1904).

the normal police powers possessed by municipalities nor was that right delegated by the legislature.<sup>50</sup>

A second and more formidable hurdle to the constitutionality of these measures is Article I, Section 8, the interstate commerce clause of the Federal Constitution. While it is beyond the scope of this article to review the present confused state of the commerce cases,<sup>51</sup> it should be observed that in numerous instances the federal and state courts have invalidated ordinances and statutes imposing franchise, licensing, or privilege taxes and requirements upon those seeking to do business in a given territory, on the grounds that they represent undue or discriminating burdens on interstate commerce.

The Supreme Court decision of this nature which has recently had great influence on the state courts is that of *Nippert v. Richmond*,<sup>52</sup> decided in 1945. This action was concerned with a municipal ordinance enacted in Richmond, Virginia, which required from all agents, solicitors, persons, firms, or corporations "engaged in business as solicitors" an annual license tax of "\$50.00 and one-half of one per centum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of \$1,000.00." Counsel for the City of Richmond recognized that similar enactments had been declared unconstitutional, but argued that recent judicial developments had impaired the efficacy of these so-called "drummer" decisions. Particular reliance was placed upon *McGoldrick v. Berwind-White Co.*<sup>53</sup> In that case the Court held that a sales tax imposed by the City of New York upon coal shipped in from Pennsylvania pursuant to contracts of sale previously made in New York was not an unconstitutional interference with interstate commerce. The City of Richmond insisted that the license tax which it sought to exact was fundamentally indistinguishable from the New York tax.

The majority of the Court, speaking through Mr. Justice Rutledge, refused to concede the validity of this argument. After repeating the

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50. *Ex parte Faulkner*, 143 Tex. Cr. 272, 158 S.W.2d 525 (1942). During the past term the United States Supreme Court ruled that an ordinance similar to the one involved in *Ex parte Faulkner* was a proper exercise of the police power. See *Breard v. City of Alexandria*, 71 Sup.Ct. 920 (1951). The validity of similar measures was also sustained in *McCormick v. City of Montrose*, 105 Colo. 493, 99 P.2d 969 (1939); *Shreveport v. Cunningham*, 190 La. 481, 182 So. 649 (1938); *City of Alexandria v. Jones*, 216 La. 923, 45 So.2d 79 (1950); *Green v. Gallup*, 46 N.M. 71, 120 P.2d 619 (1941); *People v. Bohnke*, 287 N.H. 154, 38 N.E.2d 478 (1941); *Green River v. Bunger*, 50 Wyo. 52, 58 P.2d 456 (1936).

51. See note 26 *supra*.

52. 327 U.S. 416 (1945). To note the substantial influence which this case has had on recent state court decisions, see *Nicholson v. Forrest City*, 216 Ark. 808, 228 S.W.2d 53 (1950); *Graves v. City of Gainesville*, 78 Ga. 186, 51 S.E.2d 58 (1948); *Warran Kay Vantine Studios, Inc. v. City of Portsmouth*, 95 N.H. 171, 59 A.2d 475 (1948).

53. 309 U.S. 33 (1940).

oft-noted observation that not all burdens on interstate commerce but only undue or discriminatory ones are forbidden, the Court stated that the New York City tax fell equally upon all—whether local or out-of-state—in direct proportion to the volume of business. On the other hand, the tax imposed by the City of Richmond presented an initial barrier of \$50.00, which sum had no relation to the extent or volume of business. This feature meant, Rutledge commented, that the “small operator particularly and more especially the casual or occasional one from out-of-state will find the tax not only burdensome but prohibitive, with the result that the commerce is stopped before it is begun.”<sup>54</sup> While it is true, the opinion goes on to observe, that the ordinance on its face applies to all solicitors, whether engaged in soliciting for local or for interstate business, none the less in actual operation, because of differences in location and means of doing business, it is likely to fall most heavily on non-local trade.

With these arguments based as they primarily were on an assessment of the manner in which the law probably operated in the world of commerce, the Court again revealed that it would scrutinize with care measures which attempted to regulate or exclude competition within or from a given area. If the effect of such enactments was to place upon interstate commerce burdens greater than those borne by strictly local transactions, they could not be sustained.

The approach thus noted was carried one step further during the most recent term of the Supreme Court. In *Dean Milk Co. v. Madison*,<sup>55</sup> the Justices were confronted with an ordinance passed in the name of public health by the City of Madison, Wisconsin. One section of this enactment made it unlawful to sell within the municipality any milk as pasteurized unless it was processed and bottled at an approved pasteurization plant within a radius of five miles from the central square of the city. This ordinance was challenged by an Illinois corporation whose two pasteurization plants were located 65 and 85 miles respectively from Madison. A reading of the Court's opinion, which concluded that the stipulated limitation imposed an undue burden on interstate commerce, makes it apparent that the majority, speaking through Mr. Justice Clark, was influenced by doubts concerning the bona fide nature of this enactment. In other words, the opinion reflects that the majority was convinced that this was a measure designed primarily to raise an economic barrier to protect a major local industry rather than to insure a sanitary

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54. *Nippert v. Richmond*, 327 U.S. 416, 420 (1945).

55. 71 Sup.Ct. 295 (1951).

milk supply.<sup>56</sup> Despite such skepticism, the precise holding does not directly challenge the claim that this ordinance is a health measure. Instead, the Court in effect concludes that even if this is a health measure it cannot be sustained provided "reasonable nondiscriminatory alternatives" are available. The majority then proceeds to point out "reasonable alternatives."

It is this approach which called forth from Mr. Justice Black a vigorous dissent, concurred in by Justices Douglas and Minton. Whereas the "reasonable alternative" concept has been invoked to protect First Amendment rights,<sup>57</sup> it has not, Black maintained, "heretofore been considered an appropriate weapon for striking down local health laws." He then added:

No case is cited, and I have found none, in which a bona fide health law was struck down on the ground that some other method of safeguarding health would be as good as, or better than, the one the Court was called on to review. In my view, to use this ground now elevates the right to traffic in commerce for profit above the power of the people to guard the purity of their daily diet of milk.<sup>58</sup>

If one fears, as Mr. Justice Black evidently does, that the test suggested in the majority opinion will lead to the indiscriminate substitution of judicial policy concepts for those of the legislature, then truly there is cause for alarm. Such fear, however, seems to be unwarranted. Even if the majority meant to suggest the "reasonable alternative approach" as a standard one for legislation of this nature, it is submitted that this is not as new nor as revolutionary as the dissent implies. While the words "reasonable alternative" may not have been used heretofore in this field, none the less it seems inevitable that a consideration of other available remedies must frequently have entered into the determination of whether a particular measure was a reasonable non-discriminatory approach to certain objectives. In fact, it would appear the Court is compelled to entertain this weighing of solutions if it is to fulfill the constitutional demands of equal protection and due process. Measures which impose heavy burdens that are unnecessary to accomplish desired objectives and which may easily be avoided by another avenue of approach fail to meet these requirements.

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56. For example, Mr. Justice Clark in referring to the ordinance said, "In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce." *Id.* at 298.

57. Citing *Schneider v. New Jersey*, 308 U.S. 147 (1939).

58. *Dean Milk Co. v. Madison*, 71 Sup.Ct. 295, 300 (1951).

Irrespective of these considerations, it is suggested that the dissent interpreted the majority opinion too literally. The key to Mr. Justice Clark's approach obviously rests on the observation already made, namely on the skepticism as to the bona fide nature of the enactment under consideration. While it is unfortunate that the majority did not directly give voice to this fact, it was none the less a significant element in the case and may in the future constitute a point of departure for those who do not approve of the directness of the suggested test. Be that as it may, the fact remains that the majority opinion reveals that the interstate commerce clause continues to be a judicial hurdle to measures which seek to protect, without sufficient justification, local areas of trade.<sup>59</sup>

An additional obstacle to this legislation, one to which reference has already been made, is that created by the equal protection provisions of federal and state constitutions. Repeatedly the courts have held that classifications between residents and non-residents,<sup>60</sup> citizens and non-citizens,<sup>61</sup> or between certain merchants<sup>62</sup> are not a sufficiently reasonable distinction to permit the exaction of burdensome licensing fees or the denial of certain economic rights and privileges. Thus, the Supreme Court declared invalid a California statute which prohibited the issuance of commercial fishing licenses to persons "ineligible to citizenship."<sup>63</sup> It also invalidated a South Carolina measure which required non-residents to pay a license fee of \$2,500 for each shrimp boat, while residents were required to pay only \$25.00.<sup>64</sup> For a similar reason the Kansas Supreme Court upset an ordinance which exacted \$1.00 a day or \$10.00 a year from those operating a bakery in the City of Humbolt but assessed those bakers not owning or operating their bakeries within the city \$1.50 a day or \$120.00 a year.<sup>65</sup> A Missouri court reacted similarly to an ordinance passed by the City of St. Joseph which required those who solicited laundry which was to be sent outside the city to file a bond of

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59. For examples of enactment invalidated by state courts on the basis that they constitute improper interference with interstate commerce, see *Nicholson v. Forrest City*, 216 Ark. 808, 228 S.W.2d 53 (1950); *Graves v. City of Gainesville*, 78 Ga. 186, 51 S.E.2d 28 (1948); *Warran Kay Vantine Studios, Inc. v. City of Portsmouth*, 95 N.H. 171, 59 A.2d 475 (1948).

60. *Toomer v. Witsell*, 334 U.S. 385 (1948); *Speier's Laundry Co. v. City of Wilber*, 131 Neb. 606, 269 N.W. 119 (1936); *N. J. Good Humor v. Bradley Beach*, 124 N.J.L. 162, 11 A.2d 113 (1940); *Ex parte Davis*, 72 Okla. Cr. 152, 114 P.2d 186 (1941); *State v. Yetter*, 192 S.C. 1, 5 S.E.2d 291 (1939).

61. *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1947).

62. *Brackman v. Kruse*, 122 Mont. 91, 199 P.2d 971 (1948).

63. *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1947).

64. *Toomer v. Witsell*, 334 U.S. 385 (1947).

65. *Hair v. City of Humbolt*, 133 Kan. 67, 299 Pac. 268 (1931).

\$2,000 with the city and to submit to the license inspector on each occasion a list of the articles which were to be removed from the city.<sup>66</sup>

While the courts in these and in the many other cases based on a similar rationalization have universally proclaimed the right of the legislature to enact licensing and regulatory measures for reasons properly within the scope of the police powers or revenue raising authority when based upon reasonable distinctions, the refrain which constantly asserts itself in the courts' analysis of these measures is that they are primarily enactments to promote the economic interests of a limited group. The Missouri court, for example, proclaimed that in its opinion the laundry ordinance, noted in the preceding paragraph, was passed for the "sole purpose of stifling competition for the benefit of local establishments."<sup>67</sup> The Nebraska Supreme Court in considering another measure designed to regulate launderers observed that the mayor frankly testified that the ordinance was "for the protection of home industry." "This ordinance," the court went on to state, "taxes the home industry only one-tenth of the tax levied against non-residents by the city although both classes performed the same type of service."<sup>68</sup> The New Jersey Court of Errors and Appeals spoke with equal directness in declaring invalid an ordinance designed to prohibit hawking and house-to-house peddling within the borough of Bradley Beach when it said:

It is . . . evident that the challenged municipal action was dictated by a purpose to shield the local shopkeepers from lawful competition, and thus to serve private interests in contravention of common rights; and so it must be condemned as an abuse of the police power, and therefore *ultra vires*. It does not purport to be a reasonable exercise of the police power—in the public interest by means reasonably necessary for the purpose.<sup>69</sup>

These illustrations may again be multiplied. They are sufficient, however, to demonstrate that in many instances the courts are guided in concluding certain measures are unreasonable and discriminatory and thus violative of equal protection requirements by the fact that the enactments are too patently designed, not to promote health and welfare or to raise revenue, but to aid limited economic groups. The judiciary, it is evident, has felt on many occasions that it must serve as arbiter in bal-

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66. *Ex parte Beckenstein*, 104 S.W.2d 404 (Mo. 1937).

67. *Id.* at 406.

68. *Speier's Laundry Co. v. City of Wilber*, 131 Neb. 606, 608, 269 N.W. 119, 120 (1936).

69. *N. J. Good Humor, Inc. v. Bradley Beach*, 124 N.J.L. 162, 171, 11 A.2d 113, 118 (1940).



ancing conflicting economic interests; that its intervention is warranted when measures for no "legitimate reasons" promote the welfare of the few at the expense of the many.<sup>70</sup>

Closely allied to the barriers raised by the equal protection clause are the obstacles created by due process requirements found in the federal and state constitutions. It is here particularly that certain state courts have felt free to deviate from recent interpretations and trends observable in Supreme Court decisions. As a consequence the due process requirements of various state constitutions continue to be significant weapons in the social-economic field.

While due process requirements have in certain instances proved fatal to legislation designed to protect a given geographic area,<sup>71</sup> they have been especially formidable obstacles to measures which seek to regulate specific trades or occupations and to enactments which prescribe and regulate the entrance of new participants into these means of livelihood. Statutes, for example, which require commercial photographers applying for licenses to submit to examinations, have been consistently invalidated on the basis that they deprive individuals of liberty and property without due process of law.<sup>72</sup> For this reason an ordinance enacted in Baltimore, Maryland, which sought to set up requirements for paper hangers who desired to operate in that city was declared invalid.<sup>73</sup> A similar fate was visited upon an Indiana statute which sought to delegate authority to an administrative board to prescribe prices and hours which might be maintained by barbers in designated areas.<sup>74</sup>

It is unfortunate that in reaching such results many courts frequently indulge in language packed with clichés and general conclusions rather than precise analytical arguments. In many instances measures of this nature are dismissed with the rather cryptic observation that they have

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70. For a similar conclusion see Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91, 117-118 (1950).

71. *E.g.*, *Southern Lines Linen Supply Co. v. City of Corbin*, 272 Ky. 787, 115 S.W.2d 321 (1938); *Woolf v. Fuller*, 87 N.H. 64, 174 Atl. 193 (1934).

72. See *Buehman v. Bechtel*, 57 Ariz. 363, 114 P.2d 227 (1941); *Sullivan v. De Cerb*, 156 Fla. 496, 23 So.2d 571 (1945); *Bramley v. State*, 187 Ga. 826, 2 S.E.2d 647 (1939); *State v. Ballance*, 229 N.C. 764, 513 S.E.2d 731 (1949); *State v. Cromwell*, 72 N.D. 565, 9 N.W.2d 914 (1943); *Moore v. Sutton*, 185 Va. 48, 39 S.E.2d 348 (1946).

73. *Dasch v. Jackson*, 170 Md. 251, 183 Atl. 534 (1936).

74. *State Board of Barber Examiners v. Cloud*, 220 Ind. 552, 44 N.E.2d 972 (1942). For similar holdings see *Noble v. Davis*, 204 Ark. 156, 161 S.W.2d 189 (1942); *Duncan v. Des Moines*, 222 Iowa 218, 268 N.W. 547 (1936); *State v. Greeson*, 174 Tenn. 178, 124 S.W.2d 253 (1939). *Contra*: *Board of Barber Examiners v. Parker*, 190 La. 214, 182 So. 485 (1938); *Herrin v. Arnold*, 183 Okla. 392, 82 P.2d 977 (1938); *State v. McMasters*, 204 Minn. 438, 283 N.W. 767 (1939); *Arnold v. Board of Barber Examiners*, 45 N.M. 57, 109 P.2d 779 (1941).

no relation to health, welfare or safety.<sup>75</sup> On other occasions invalidation of such enactments has been justified on the basis that the measures concerned seek to regulate "private business" or "common callings," or "business not affected with a public interest."<sup>76</sup> Obviously these pronouncements are not reasons but conclusions. Whether enactments regulating certain trades and occupations have any relation to health and welfare is a matter which in most instances requires the careful collecting, presentation, and analysis of many social-economic facts. To say a business is a "common calling" or a "private business" is to ignore the crucial point at issue, namely, whether the legislature could reasonably conclude that the general welfare warranted the enactment in question. In fact, this is now the test followed by the Supreme Court, at least in so far as the *Nebbia* case is controlling, for in that controversy, speaking for the Court, Mr. Justice Roberts stated:

The phrase "affected with a public interest" can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions "affected with a public interest," and "clothed with a public use," have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.<sup>77</sup>

Although the analytical merits of many of the opinions which conclude that various licensing and regulatory measures violate due process requirements are unsatisfactory, these judicial pronouncements, taken as a whole, leave no doubt as to one of the factors which aided in shaping the results reached. Again, we find the courts repeatedly revealing that in their opinion many of these measures are but the culmination of efforts

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75. *E.g.*, *Saidel v. Village of Tupper Lake*, 254 App.Div. 22, 4 N.Y.S.2d 814 (3d Dep't 1938).

76. This is especially true of the photography cases noted in footnote 72. See also *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1931); *Bessette v. People*, 193 Ill. 63, 62 N.E. 215 (1901); *Dasch v. Jackson*, 170 Md. 251, 183 Atl. 534 (1936).

77. *Nebbia v. New York*, 291 U.S. 502, 536-537 (1933). For an earlier expression of this position see the dissenting opinion by Mr. Justice Brandeis in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 302 (1931).

exerted by various pressure groups for the purposes of enhancing their economic position. While most such opinions reflect that the justices are aware that this fact alone should not serve to condemn the challenged legislation, (If it were, what laws would survive?) it seems quite obvious that often the consciousness of the source or the immediate effect of specific measures serves to guide and color the courts' reasoning. It is entirely understandable that justices find it easier to conclude that this ordinance or that statute has no relation to public health or welfare when they note that it was lobbied through by a certain group or when they observe that its immediate and direct benefits will fall on a narrow segment of the economy.

In concluding that measures of this nature cannot be sustained, courts have on occasion felt called upon to comment on the lawmaking processes. Their decisions, these spokesmen maintain, do not reflect on the integrity and good faith of the legislature, but simply recognize that legislators pressed by mountainous work loads crowded into short terms are frequently prevailed upon by various pressure groups who assert with much vigor that the measures they support are necessary for the welfare of the public.<sup>78</sup>

While some will criticize the attitude which is revealed by comments such as these on the basis that an approach actively shaped by this concept lends itself to the free use of the judicial veto, it is unfortunately true that these remarks reflect an all too accurate picture of the lawmaking processes. As long as legislators act irresponsibly, as long as they serve as pawns for given pressure groups, the judiciary will continue to step in to nullify certain enactments. In fact, the courts have no other choice if they are to perform their constitutional duty of protecting minorities against the indiscriminate acts of temporary majorities. Justices must carefully ascertain whether each measure that is challenged "was addressed to a legitimate end," that is, that it was not enacted "for the mere advantage of particular individuals but for the protection of a basic interest of society."<sup>79</sup> Light is shed on this question by observing the manner by which and the atmosphere in which a particular law was given birth.

In conclusion, it is obvious that despite occasional setbacks resulting from the narrow construction of delegated power or from judicially construed collisions with the interstate commerce clause, equal protection requirements, or the demands of due process, the number of profes-

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78. See especially *State v. Cromwell*, 72 N.D. 565, 9 N.W.2d 915 (1943); also see *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940).

79. *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 445 (1933).

sions, occupations, trades and economic-geographic areas subject to regulations, licensing requirements, and other restrictions continues to increase. Ironically enough this increase, as has been noted, is frequently the product of pressure brought by those who are most persistent in attacking the augmentation of government in business. It would seem that if these attackers are sincere in their condemnation, they more than any others possess the key to retarding such growth, for a reduction in their demands would automatically reduce the output of measures which lead to more governmental supervision and control.

Unfortunately, such a suggestion is not a palatable one. For one thing, economic groups are notoriously short-sighted. They usually owe their origin to the common desire to secure *immediate* favors and privileges, and their continued existence and, more significantly, the perpetuation of their leaders in office depends upon the degree of success with which their demands are met. In addition, many existing groups with considerable justice maintain their requests must be satisfied if they are to survive economically because on previous occasions governmental privileges were enacted which aided in giving their competitors undue advantage. The cycle is already in existence. To expect certain groups to refrain from making demands when other organizations have received valuable benefits is expecting too much of human nature.

What then is the solution to the problem posed by the increased and increasing number of haphazard restrictive measures ground out by the legislative mills? While the answer is not a simple one, the foregoing observations do suggest an avenue of approach. It should be obvious that whether we like it or not the era of governmental supervision of trade areas, of business practices, and of the entrance of new competitors into given occupations and professions is here to stay. Admittedly, this is a difficult reality for many to face, yet the truth is that economic groups and the public at large have too much at stake to make possible the renunciation by government of its current role on the economic scene. In view of this fact, it is recommended that intensive, yet comprehensive, studies be made by competent economists and political scientists to evaluate the economic effects of measures similar to those noted in this article. The immediate consequences of such a survey should be the equalization of obvious and indefensible inequities, existing because of such measures. Wide publicity concerning the impact of this legislation on the economy should force some pressure groups to temper their more extreme demands, and should make their more responsible leaders, who often are lawyers, take greater cognizance of the long-term consequences of their requests. Such publicity should further serve to increase legis-

lators' awareness of the cumulative results of their acts and should thus serve to make them somewhat less ready to acquiesce in the more flagrantly selfish demands of various groups. It should also result in writing into many of these proposals stipulations designed to extend greater consideration to the general public.

Cynics will, of course, dismiss the preceding recommendation with the comment that it places too much faith in public information and education. If they are correct, then we must expect a continuation of hit or miss special interest legislation with little immediate concern as to the consequences and a perpetuation of unpredictable judicial intervention, which is at best highly unsatisfactory to lawyers and to the groups immediately concerned. It may be, however, that the cynics are wrong, and because they may be wrong the suggested solution may well be worth the talents and expense necessary for its execution.

# INDIANA LAW JOURNAL

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Volume 27

FALL 1951

Number 1

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The Indiana Law Journal is published quarterly by

THE INDIANA UNIVERSITY SCHOOL OF LAW

Editorial and Publication Office: Indiana University School of Law

Bloomington, Indiana