



Volume 28 | Issue 3

Article 3

April 1922

The Menace of "Counter" Phrases: A Discussion of "Equal Protection of the Laws"

William A. Sutherland
Lamar College of Law, Emory University

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Jurisprudence Commons](#)

Recommended Citation

William A. Sutherland, *The Menace of "Counter" Phrases: A Discussion of "Equal Protection of the Laws"*, 28 W. Va. L. Rev. (1922).

Available at: <https://researchrepository.wvu.edu/wvlr/vol28/iss3/3>

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

THE MENACE OF "COUNTER" PHRASES
A DISCUSSION OF "EQUAL PROTECTION OF THE LAWS"

BY WILLIAM A. SUTHERLAND*

Words and phrases are so often used to avoid the necessity of analysis or thought that one must wonder at times whether the gift of language is an unmixed blessing. The great majority of us are all too prone to employ some high-sounding phrase—sometimes in Latin or Greek, though this phase of the evil is fast disappearing—and to consider that we have offered a statement of, and a simple solution for, problems that can be solved only by the most careful analysis of external facts and the motives and ideals of humanity. The aspirations of society cannot be expressed in a few words; or, if we attempt to express them in a few words, we must most carefully define our terms before making any application of them to particular facts. And least of all can we hope to express in a word or a phrase the many and the complex methods which society may find it necessary to employ to attain even a comparatively easily expressed ideal.

The law with its host of maxims and hordes of rules all of which are necessarily stated in general terms as if they expressed absolute truths in no way limited or qualified by counter-balancing considerations, affords by its very nature a most fertile field for the employment of words and phrases, the purpose or result of which is often to conceal rather than to express thoughts. And this is particularly true of constitutional law where originally at any rate an effort was made to express in small compass a few fundamental truths or beliefs and leave it for judicial interpretation to work out the application in particular cases. It is necessary that constitutions should be so framed if they are to live beyond a brief span.

There is no great danger in such general language, if the court, when it comes to interpret the provisions, recognizes as our great judges have done, that they are interpreting a constitution, and that they have not any solution ready made for the cases which

* Member of Atlanta, Ga., Bar, and Professor of Law in Lamar College of Law, Emory University, Atlanta, Ga.

they must decide, and that it is only through analysis and study of the real meaning of the rule and the situation calling for its application that the intention of the framers can be carried out. The courts have come—some of them too slowly—to a recognition of these facts. However, the public generally and some of the members of the bar are still laboring under the delusion that in a literal interpretation of the bald language of our constitutions lies the simple answer to all the questions concerning the validity of any proposed legislation, and that it is not necessary to analyze the conditions upon which the legislation is to operate or the motives underlying the constitutional provision in order to pass judgment upon the relation of the two.

This tendency on the part of the public to give consideration to words to the exclusion of thought is a source of so large a part of the confusion which exists today in the thoughts and discussions upon questions of social reform and constitutional law, as well as upon so many other questions of national and international importance which are crying for a solution, that we cannot remind ourselves too often that words are nothing unless we make them “the skin of a living thought,” and that it is that living thought to which we must direct our minds. So long as empty words are matched against empty words there is no hope for agreement; or, if agreement is reached it is upon a basis to which those who have been dealing with facts will be most unlikely to accede.

Justice Oliver Wendell Holmes, the most illustrious name that has adorned the annals of American jurisprudence for more than a generation, has recognized perhaps more clearly than most the necessity of careful definition and analysis in the concrete of the words we use and the rules we are to apply and the facts to which we apply them. In his untiring search for the truth and in his efforts to lead others to know the truth he has kept this ever in mind, and he is continually warning of the errors to which a contrary course must lead. Typical of his statements is the following:

“My object is not so much to point out what seem to me to be fallacies in particular cases as to enforce by various examples and in various applications the need of scrutinizing the reasons for the rules which we follow, and of not being contented with hollow forms of words merely because they have been used very often and have been repeated from one end of the Union to the other. We must think things, not

words, or at least we must constantly translate our words into the facts for which they stand if we are to keep to the real and the true."¹

The need for such admonitions is forcibly illustrated by an article, "The Menace of New Privilege," by Mr. George W. Alger, a New York attorney,² in which the distinctions which have been made, particularly in the Clayton Anti-Trust Act, between combinations of laborers and farmers and combinations of manufacturers and merchants, and the further exemption of farmers from the operation of the anti-trust acts proposed in bills then pending before Congress are attacked on the ground that such differentiation between the farmer and others makes of the farmer a privileged class, denies to others the equal protection of the laws, and threatens the very foundations upon which democratic governments must rest. Many other articles which have come to the attention of the reader might serve our purpose of illustration as well as the one by Mr. Alger. But it would be difficult to find one in which the errors of which we are complaining are more apparent. For Mr. Alger the case is quite simple. The farmer is to be exempted from certain laws which apply to certain other classes; he is, therefore, privileged, and the other classes are denied equal protection of the laws; and it is not necessary to consider any other facts.

My present interest lies not so much in the facts of the particular case as in the general method of approach of the writer, which is typical of so much of the wrong thinking of the day. The sacrifice of thoughts to words cannot but lead to error in consideration of other subjects as well as in the discussion of legislative recognition of the distinctions between classes and the application of such constitutional provisions as that guaranteeing equal protection of the laws. The "Atlantic Monthly" has itself printed several replies to Mr. Alger's paper but none of them seems to me to have given sufficient attention to the real fallacy in his method of approach to the subject, and one of them expressly says that his only error lies in his choice of illustrative material. Mr. Alger's article meets with a broader objection on the part of those who are interested in the use of right thinking in the solution of the complex social questions which now confront us, and in the development of constitutional law and the approach of the courts

¹ OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS, 238, "Law in Science—Science in Law."

² Published in the ATLANTIC MONTHLY, February, 1920.

and legislatures to the questions which will occupy us during the next decade.

II.

Mr. Alger quotes from the case of *Connally v. Union Sewer Pipe Co.*³ which decided that an exemption from an Illinois anti-trust act of "agricultural products and live stock in the hands of the producer or raiser" rendered the statute unconstitutional as in violation of that clause of the Fourteenth Amendment guaranteeing to all persons equal protection of the law. But he apparently recognizes that the case is not at present accepted as authority for his contentions; although he says only that it has not been directly questioned. It is clear that it is not authority now for the proposition that anti-trust legislation cannot distinguish between growers of agricultural products and manufacturers or merchants. It is not to be presumed at the present time that the Supreme Court would seriously consider declaring unconstitutional section 6 of the Clayton Act or any similar legislative distinctions between capital and labor or between farmers on the one hand and manufacturers and merchants on the other.

In *International Harvester Co. v. Missouri*,⁴ the Supreme Court, in discussing the constitutionality of a state anti-trust act which exempted vendors of labor and purchasers from its provisions, said:

"A classification is not invalid because of simple inequality. . . . Therefore, it may be there is restraint of competition in a combination of laborers and in a combination of purchasers, but that does not demonstrate that legislation which does not include either combination is illegal. Whether it would have been better policy to have made such classification it is not our province to decide. In other words, whether a combination of wage earners or purchasers of commodities called for repression by law under the conditions in the state was for the legislature of the state to determine."

In another case, the same court, in discussing a state statute which made it unlawful for any unnaturalized foreign-born resident to kill any wild bird or animal and which "to that end" made it unlawful for such foreign-born person to be possessed of a rifle or a shot gun, made the following statement:

"The discrimination undoubtedly presents a more difficult question. But we start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably

³ 184 U. S. 530 (1902).

⁴ 234 U. S. 199, 210 (1914).

might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to make the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named.⁷⁵

The courts have at times been induced to be rather narrow in their interpretation of the constitutional guarantee of equal protection because, largely through lack of imagination in dealing with facts with which they are not immediately in contact, they have failed to take into consideration many of the proper bases for classification which in recent years—with the increasing complexity of industrial life and the widening of the economic gulf between different classes and with the increasing social consciousness attendant upon the evils which have come in the wake of this development—have been coming more and more into evidence. But they are now taking into consideration these bases of difference. They also realize now that it is not necessary to have a difference of kind as a basis for classification, but that a difference of degree may be sufficient.⁸ And they have come to do in practice what they have always done in theory, and actually limit themselves to a consideration of whether there may have been a reasonable basis for the classification made by the legislature; and have ceased to consider whether they as legislators would have made the same classification.

"Equal protection of the laws" does not mean that everybody is to be governed by the same laws, regardless of the difference in their conditions. What it does mean is that everybody in the same class is to be treated alike and that in dividing persons into different classes there must be some distinction in fact with reference to which the distinction in treatment bears some reasonable and intelligent relation. No difference can exist between the treatment accorded A and that accorded B when A and B are in the same relation to the matter dealt with. But if there is any reasonable ground on which an intelligent person could distinguish between them with reference to that matter, it

⁷⁵ *Patsone v. Pennsylvania*, 233 U. S. 138, 144 (1914).

⁸ "A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise." *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 418 (1914).

is a question of policy for the legislature, and not a question of law for the courts, whether they should be treated differently.

The decision in the Union Sewer Pipe Case, *supra*, is to be attributed perhaps more to ignorance of the facts and lack of imagination in dealing with them than to any difference in abstract theory. With training, the imaginations of the courts have been developed and they have received specific aid in particular cases from careful and extended presentations, in briefs and arguments, of the facts and conditions out of which the laws in question have arisen and upon which they operate. The lawyers have come to devote less and less time to the repetition of rules to which all agree when they fit the facts, and have devoted more and more time to showing facts which make the rules applicable or inapplicable. The development may not be complete, but at least we have travelled on the road of right thinking far beyond the Union Sewer Pipe Case.⁷

III.

A much more difficult question than the question of constitutionality is the question of policy which the legislature—assuming that it has the power to make a suggested distinction—must consider in determining whether it is wise to do so. Here there is always the necessity for a balancing of interests, which becomes difficult in the extreme as the conditions of modern life become more and more complex. We are rarely, if ever, much assisted in the solution of these problems by the employment of such phrases as “equal protection of the laws” or “due process of law” or the like. When we have properly understood the meaning of such provisions as these in our constitutions, they do mark out the limits within which the legislative discretion may be exercised. But the problem which is left—the problem of balancing within these limits interests which are conflicting and of varying degrees of importance and some of which need very little protection, some very much—has little if anything to do with the question of “equal protection of the laws” or with “due process of law.” It is a question of the social ends to be attained and the generally more difficult problem of the means of attaining those ends. It is presuming a great deal upon the power of language to imagine that

⁷ *Supra*, note 3.

a phrase of three or four words can assist us materially in the solution of problems so complex and difficult.

A proper analysis of the facts surrounding the farming industry and the marketing of farm products not only shows how utterly fallacious is the argument that the exemption of farmers from the anti-trust laws conflicts with the constitutional guarantee of equal protection of the laws, but it evinces also the legislative wisdom of the distinction. While our present interest is not principally in the facts of the particular case, these facts are of importance in establishing our thesis and will be briefly considered. The result of Mr. Alger's treatment of, or rather his lack of consideration of, these facts makes most manifest the certainty that error will inevitably result from an effort to apply abstractly such constitutional provisions as that guaranteeing equal protection of the laws. No detailed statement of the differences between the farmer on the one hand and the manufacturer and merchant on the other, which justify and necessitate a different treatment of the two, can be attempted in the space of a short paper. But enough may be shown for our purposes.

"Agricultural products" includes a number of vastly different crops, everything from peaches to cotton and products which differ in their area of production as widely as corn, which can be and is produced almost everywhere in the United States, and raisins which are produced almost entirely in the little valley around Fresno, California. It is possible that widely different provisions should be made to govern the different sorts of products. There may come a time when legislation will be able to take into account these differences. But for the present at least we must be content to have a statute which groups together things which on the whole have characteristics distinguishing them from others, and not be led into a state of quiescence by the fact that the grouping may not be scientifically as accurate as we could desire. Legislation is not an exact science, and it is only by recognizing this fact that government can progress. It should be sufficient if our groupings are helpful practically, whether or not they be theoretically sound. It is important to remember also that legislation is an experimental and not an *a priori* science, and the only laboratory which it has is society itself. Hence it is in society that it must make use of its method of trial and error.

There are a number of differences between agriculture and the

manufacturers, some of them inherent in the nature of the industry itself; others which, while even if not inherent in the nature of the industry itself, have been found generally present in it in this country.

Crops are seasonal. Through many months of every year there is the investment of labor and capital with no return, all looking to the day when the harvest will come. When the harvest does come it all comes within a comparatively brief period. The buyer from the farmer, who is in most cases several steps removed from the ultimate consumer, purchases the crop for as little as possible. He or the immediate purchasers from him then hold the crop, or a large part of it, until the ultimate consumer demand has increased in proportion to the supply and then sell at a price determined by this demand. The product goes to the consumer at no lower price than that at which it would have gone to him if the farmer had been able himself to hold his crop for the consumer demand and had thus received considerably more for it than he actually received. The consumer gains nothing; the farmer loses. It would certainly be a great encouragement to farming if the farmer could be so organized that when this vast amount of produce, the consumption of which is distributed through a year, comes into his hands in the course of a few weeks he could hold it and so distribute it as to get for it what the equation of supply and the real consumption demand would give him.

There is no way price can ultimately be fixed except by supply and demand. But if there is any question as to the fact that prices at a particular time are not always or even generally determined by a free and untrammelled interplay of these forces, it is only necessary to consider for a moment the many and wide variations in the price of most staple products which are clearly not based upon any real variations in the supply or the fundamental demand, or what I have called the "consumer demand." The variations may be due to some extent to natural causes which cannot be eliminated. But it is the opinion of those who have studied the question most carefully that the trouble is due in large part to the unnecessary speculation which intervenes between the producer and the consumer, which is facilitated particularly by the fact that the whole crop does come in at one time, and by other conditions which will be mentioned below. It is well to remember always that the law of supply and demand as it is stated in the ordinary text books of economics assumes a set of simple condi-

tions which never exist in actual life. The theorems of the economic text books rarely express more than a tendency, which is often not even closely approximated by the working out of affairs in the commercial world, where forces often too numerous and complex to be considered, play their part, and where conscious manipulation is frequently a governing factor.

Even when the crops are not seasonal, or when they run over a comparatively long period of time, the position of the agriculturist is still such that he is apt not to be in a position to compete fairly. He is not able from his position to keep in very close touch with the market and he must therefore necessarily be to a great extent at the mercy of those to whom he ships his products for sale, men whom he does not know and with whom he never comes in personal contact, and who are for obvious reasons much more independent in their dealings with him than he is in his dealings with them. Under such circumstances his right to choose between the highest bidders is frequently if not usually no more than a theoretical one. As a practical matter he ships to one man, often in a very distant market, and within wide limits takes whatever that man gives him, and accepts without any chance of checking up their correctness any reports as to market conditions which he may make. And besides that, the farmer must generally accept the consignees' report as to the condition in which the goods arrive, and often, also, as to their grading and classification.

And this is not all. This ignorance of market conditions not only gives the middleman a chance to take unfair advantage of the farmer in many ways, but it causes the farmer to commit errors which of themselves necessarily involve loss to him and which prevent the greatest amount of social enjoyment being derived from the product. The farmer in his generally secluded position is as a rule necessarily ignorant of the conditions of demand and supply in a particular market at a particular time in comparison with the demand and supply in another market. He has no means of forecasting in any intelligent way or with any accuracy the probable conditions in the ensuing few days, and he has no instruments of measurement sufficiently accurate or sensitive to measure a change with any promptness after it has taken place. He, therefore, acts in such a way as to cause gluts in one market, shortages in another; prices too high—at least to the consumer—in one place, too low to the farmer in another. And the result is not only unreasonable and unnecessary fluctuations in the price

to the farmer, which tends to discourage farming, but also the failure of the product to satisfy as many and as strong social wants as it might satisfy. Cheapness of product may be a thing desired if it is evenly distributed, but the waste from a social point of view is clearly apparent when glut and cheapness in one place is purchased at the cost of scarcity and high prices in another.

We also have to consider among other things the fact that the farming industry is one which depends most essentially upon individual initiative, and large scale production is therefore not profitable or desirable. It is the comparatively small farmer who owns his own farm and operates it as he sees fit who gets the best results in agriculture on the production side. It follows from this that the farmer is unable to take advantage of the power which comes in the commercial world from large corporate organization, in the ordinary form. What he is asking is a chance to establish some other sort of organization comparable to these that will not destroy the efficiency in production of the smaller unit. Since he must meet these large organizations and depend for the sale of his product upon markets which they play a large part in making, he wants the right to form organizations which will have the economic power to compete. The right of labor to collective bargaining has been recognized on a similar theory. Is there any reason why the farmer should not have a corresponding right?

The manufacturer or merchant as compared with the farmer has constant production throughout the year. He has a much more intimate knowledge of market conditions. Within wide limits his output may be varied in a short time to meet market conditions. He has on the whole much better credit facilities than has the farmer. And in businesses where it is advantageous legal methods of combination are open to him.

Industrial combinations have proven themselves instruments of oppression when permitted to go unregulated. Experience proved it necessary that the government curb their activities in certain respects. But so far the cooperative movement among the farmers has shown little tendency to repeat the offences of its industrial predecessors, and there does not seem to be any immediate danger that it will involve the same evils.

It would be foolish to attribute to the farmer a conscience so much above that of the ordinary business man as to suppose that he would shrink from the benefits which come from well managed monopoly, and the evil practices generally attendant upon it. But

the conditions in the farming industry are such as to make the accomplishment of the usual evils of monopoly most difficult if not impossible in practice. The area of growth is so large and the diversity of conditions so marked, at least in the case of these commodities even approaching the category of necessities of life, that this alone would be sufficient to make it highly improbable that such combinations would ever become sufficiently compact or powerful to indulge successfully in the practices of the so-called trusts. And besides, in agriculture the supply is not nearly so elastic as in other industry, certainly not under the present plans of cooperation which contemplate the retention by the individual member of full control of his production. And it is control of supply that gives the monopolist his great power for evil.

Nevertheless when the cooperative movement comes into full swing it will probably be accompanied by abuses. Most human institutions are. When these evils appear they should be dealt with and will be. If a careful consideration of the possible evils which may arise out of the movement makes possible regulation in advance, there should be no objection on the part of anyone to such regulation. There will certainly not be any objection on the part of the sound thinkers of the cooperative movement to proper regulation before or after the evil has appeared, except perhaps the practical suggestion on the part of some that the evil can be better and more freely dealt with when its exact nature is manifest.

All that the farmer is asking is the right to cooperate in such a way that he may get for his product the price which is fixed by the actual demand of the consumer rather than be forced to accept a price fixed by manipulation that does not reflect the real consumer demand. It might be possible to assist in other ways than by the encouragement of the movement to establish cooperative marketing organizations. General credit reforms, marketing information bureaus, education of the farmers will do much to accomplish the results desired. But it is very improbable that they would eliminate the necessity for cooperation. And more important still, these remedies have not been generally applied and no one has proposed a very simple method for applying them. Cooperation is the one practical method which presents itself at the present time and which seems to offer an almost immediate solution for many difficulties. And it is the method, which seems to require as little government regulation and much less government assistance than any other method proposed.

IV.

Mr. Alger refers to proposed legislation then pending before Congress aimed to give to farmers further exemption from the anti-trust acts. An act similar to that objected to has since been enacted having as its purpose the strengthening of the position of the farmer for cooperative marketing by further exempting him from the prohibitions of the anti-trust acts or by making clear exemptions which already existed.⁸

It is abundantly clear from the committee reports and from the hearings before the committees which had this legislation under consideration that the matter of class privilege which Mr. Alger urges was carefully considered by Congress. It is very significant too that representatives from city districts and manufacturing districts spoke in favor of the legislation, quite as vigorously as did those representing constituencies of farmers.

The important testimony before the committees was exceedingly fair and frank.

Mr. Aaron Sapiro, organizer of and attorney for a number of the large associations in California, in testifying before the House Committee said very frankly that "from the standpoint of basic economic theory there is not any distinction between the production of one thing that is essential to life and the production of another thing that is essential to life." "But", he said, "from the stand-

⁸ The following is a copy of the act:

An Act To authorize association of producers of agricultural products, approved February 18, 1922.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided,* However, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.

Sec. 2. That if the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association

point of practice, and in many particulars from the standpoint of experience of this country, it has been shown that the farmer is the most helpless person commercially except with the aid of the government or a cooperative association, that this country has ever known."⁹

Mr. G. Carroll Todd, formerly Assistant to the Attorney General in charge of Anti-trust Cases and a man with perhaps more experience in the enforcement of the anti-trust acts than any one else in this country said before the Senate Committee¹⁰ that, while all associations of men are subject to abuse he had always considered that associations of farmers were not subject to the same abuses as associations of capital and that disappointing results would be attained if they were dealt with by the same laws.

The report of Mr. Volstead of the Judiciary Committee of the House, reporting H. R. 13931 states the whole matter so fairly and shows so clearly the spirit in which the legislation was recommended and passed and how ill-founded are the charges of class favoritism that I take the liberty of quoting from it at length. The report says:

"The farmers are not asking a chance to oppress the public, but insist that they should be given a fair opportunity to meet business conditions as they exist—a condition that is very unfair under the present law. Whenever a farmer seeks to sell his products he meets in the market place the representatives of vast aggregations of organized capital that largely

monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof. [Public, No. 146, 67th Congress, H. R. 2373.]

⁹ Hearing before the Committee in the Judiciary, House of Representatives, 66th Congress, 1st Sess., on H. R. 7783, Serial 7, page 39.

¹⁰ Hearing before a Subcommittee of the Committee in the Judiciary, United States Senate, 66th Congress, 2d Sess., on S. 4344, pages 47-48.

determine the price of his products. Personally he has very little if anything to say about the price. If he seeks to associate himself with his neighbors for the purpose of collectively negotiating for a fair price he is threatened with prosecution. Many of the corporations with which he is compelled to deal are each composed of from thirty to forty thousand members. These members collectively do business as one person. The officers of the corporation act as agents of these members. This bill, if it becomes a law, will allow farmers to form like associations, the officers of which will act as agents for their members.

“While this bill confers on farmers certain privileges, it cannot properly be said to be class legislation. Business corporations have under existing law all the powers and privileges sought to be conferred on farm organizations by this bill. Instead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to the ordinary business corporations so the farmers can take advantage of it. Instead of granting to farmers a special privilege, it aims to take from the business corporations a special privilege by conferring a like privilege on farm organizations. It is no answer that farmers may acquire the status and secure the rights of a business corporation by deeding their farms to a corporation. That is neither practical nor desirable from any standpoint. Without doing that they cannot associate themselves together for the mutual profit of the members without being threatened with prosecution.”¹¹

While it was felt that the farmers should have the right to combine, Congress recognized the fact that such combinations might sometimes prove instruments of oppression and it was therefore provided in the act that “if the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof” the Secretary of Agriculture shall take certain action to protect the public against the harmful prac-

¹¹ Report No. 939, House of Representatives, 66th Congress, 2d Sess. The report states further:

“New York, Pennsylvania, Illinois, Wisconsin, Minnesota, and a number of other States have granted the right to form associations such as those contemplated in this bill. But these States can not confer any right upon their organizations to engage in interstate or foreign commerce. This bill is designed to grant that right. Associations of this kind are common in European countries and have been in operation for many years. Their effect has not been to raise prices to the consumer. In many instances the effect has been the reverse. They have tended to prevent much of the gambling in food-stuffs and to eliminate many of the useless middlemen that stand between the producers, the retailers, and the consumers. It is one of the chief problems of these associations to reach the consumer with as little expense as possible. Farmers ought to be given a chance to do that.”

tices. This should make it clear that there was no intention to make the public the slave of the farmer.

The legislation which Mr. Alger condemns is not based upon any rabid class antipathies or indeed upon any class favoritism or a desire to permit one class any more than any other to impose upon the public. Rather it grew out of a recognition of the differences which in fact exist between industry and agriculture and a desire on the part of Congress to deal with these different situations by laws appropriate to each. It was considered that in the ordinary case the evils which are to be feared from trusts are not generally feared from combinations of farmers organized for the marketing of their product, and that therefore it is reasonable to make a *prima facie* presumption in favor of the farmers' organization which experience has proven or tended to prove unwarranted in the case of industrial trusts. When the farmers' organization proves itself detrimental to the public interest, there is no intention to exempt it from the restraints of the law.

Legislation of the sort complained of is, of course, aimed to put the farmer in a better position to carry on the economic struggle, to make him stronger and consequently more able to bargain advantageously with the groups he must meet. But it requires much more than this to establish a case of discrimination in favor of the farmer. There is no such thing as the untrammelled interplay of economic forces entirely apart from regulations by the government. Economic forces and laws always enter into the equation, of course; and they must always be reckoned with. But it is equally clear that society is continually strengthening one class or group and weakening another and changing the powers of another in order better to attain the ends of social justice. It is only when one group is permitted to remain unreasonably strong in comparison with the groups which it must meet that the necessary regulation by the government assumes an unpleasant aspect. The process of strengthening or weakening one of the contestants in the struggle and then permitting the struggle to proceed without interference, instead of involving the government in a mass of regulation and investing it with cumbersome and dangerous powers, gives to the government the easiest if not the smallest role it can play and at the same time the one in which it is most effective.

Mr. Alger suggests that legislation such as Section 6 of the Clayton Act and the legislation just enacted for the further clarification and strengthening of the farmer's position for co-

operative marketing evidences a sad decline from that high level of enthusiasm for democracy and equality which marked the foundation of our government and our fight for independence and freedom. This is an indictment of the founders of this government which they have done nothing to deserve. If any of them were so foolish or so blind to the future development of civilization as to believe that they had attained the ultimate end of society, fortunately they were not in the majority. Or if they were, posterity is to be congratulated upon having proved strong enough successfully to take issue with their claim.

Are we to presume that Thomas Jefferson would oppose minimum wage laws, laws limiting the hours of labor, graduated income taxes and the hosts of other similar acts which may seem to infringe technically many of the rights which he held most dear?

It is submitted rather that the moving spirit behind modern legislation which is attempting to place men upon an actual and not merely theoretical equality for the economic battles of life, which spirit is also manifested in the decisions of our courts, finds its real basis in a further working out and application of the principles for which the founders of our country risked their all. The people have refused blindly a meaningless generality, or rather they have refused to take a phrase which was coined for a particular purpose under a particular set of conditions¹² and give to it a universality of application which would defeat rather than effect its real object, although such universal application might be implied in the words alone. The real spirit which lies under the foundations of our institutions not only does not require but it actually forbids legislation which applies to all the same rules, regardless of differences of condition.

No citizen interested in the welfare of his country can be any less opposed than is Mr. Alger to class stratification as it existed in the feudal ages or as we are led to believe it now exists in Russia. But there is nothing in the present attitude toward the farmer which tends toward either. There, class stratification means the subordination of most classes to the interests of a few. What the present legislation in favor of the farmer attempts to do is

¹² There was of course no provision in the original Constitution guaranteeing "equal protection of the laws." This provision was added by the Fourteenth Amendment after the Civil War, and is applicable only to the states and not to the Federal government. But the "due process" provision of the Fifth Amendment probably in fact guaranteed equal protection.

to work out a proper adjustment between the classes to guarantee the justice of actual equality to all.

There is nothing in the existing or proposed legislation dealing with the farmer cooperative movement which justified a comparison with Sovietism. There is no sort of effort directed toward dictatorship of the proletariat or of the farmer class. There is no effort directed toward government ownership. There is no sort of desire to stamp out individual initiative and replace it by government operation. There is no denial of the worth of the labor of those who labor with their heads and not with their hands. It is true that there is implied in the whole movement a denial of the worth of those whose labor is directed not toward rendering any real service in production or distribution, but simply to taking something from both producer and consumer which their position of economic power or the farmers' position of economic weakness enables them to take. But the real object of the legislation, as stated above, is to put the farmer on an equality with the manufacturer and merchant and capitalist in the bargaining process, so that each can go ahead performing his functions under free competitive conditions and obtaining as nearly as may be his just share, and only his just share, of the products of society's labor.

The surest guarantee we in this country have against revolution lies in the fact that our system of government and law is sufficiently elastic to permit it to adapt itself to the accomplishment of the social ideals of the time and the working out of social justice between the classes, thereby making revolution unnecessary if not impossible.

In the balance in fact, and not in theory only, which it is at present seeking to establish between the different groups lies our greatest certainty of averting a catastrophe such as has just befallen Russia or such as came to France in 1789. Russia today is the product of inequalities so gross that they could not be longer endured. It is indeed the old Russia rather than the new which warns against class stratification. While nothing seems further removed from the realm of possibility than that we should ever at least in this generation find ourselves in a plight such as Russia is in; if we ever are so afflicted, it will be because we have permitted one class to share to excess in the goods of the society, not because through different treatment of different groups, we have established something closely resembling equality in fact at the

expense of some theoretical violations of the guarantee of "equal protection of the laws" literally interpreted.

Should the evil have been accomplished, it will avail very little that we may have adhered with the utmost strictness to a literal interpretation and application of "equal protection of the laws" or "freedom of contract" or any of that host of "counter" words and phrases which are used now quite as often to block the progress of society in its efforts to obtain social justice as to express something of the ideal which they were originally intended to express. Words are intended to be our servants. We can gain nothing by making them our masters; we may lose a great deal.