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THE JUDICIAL VETO
By Louis A. Warsoff*

INTRODUCTION

Sixty-five years ago a new amendment, intended mainly to secure to the Negro equality with his white brethren, was added to the Constitution. Today that same amendment, twisted and tortured beyond all recognition by a half century of legal manipulation, throws great doubt on the validity of a law attempting to relieve the hardship of the laboring class by setting up minimum wage standards. Viewed case by case this development presents no startling picture. Each extension is slow, gradual, and apparently supported by the authority of previous decisions. It is not until a case decided in 1873 is placed beside one decided in 1933 that the evolution during the sixty years of judicial interpretation assumes its true significance. To point out how the legal profession arrogated to itself the power to pass upon the validity of legislation, and to examine its methods in the exercise of this power and in the discharge of the duty which naturally flows from the possession of a public power, this paper was conceived.

PART ONE

In presenting the Fourteenth Amendment to the States for ratification, Congress had two purposes in mind, both of them products of the near-hysteria of the Reconstruction Era. To force the Negro on the Southern white as an equal was perhaps the primary intent of the framers of the amendment. Second in importance to the framers, but the more significant in ultimate effect, was the determination to strengthen the bonds which tied the States to the Federal government by putting in the hands of the latter the power to regulate the relationship of the citizen to the State.¹ Such doctrine was, to say the least, revolutionary. The first eight amendments were to become limitations on the

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¹ Flack, Adoption of the Fourteenth Amendment.
power of the States, the enforcement of these restrictions to be within the jurisdiction of the Federal courts and the legislature in Washington. The tenor of the contemporary protest against the amendment demonstrates clearly that the threatened revolution was not to come about without opposition. Vigorous excoriations branded it as "the institution of a solid sovereignty instead of a government of limited powers," "the transfer of a municipal control of the state governments over their internal affairs into the hands of Congress", the subordination of the "State judiciaries to Federal supervision and control", the annihilation of the "independence and sovereignty of the State courts in the administration of state laws", and "a deep and revolutionary change in the organic law and genesis of the government".2

Naturally enough the importance of any such tampering with the subtleties of the Constitutional framework was entirely lost on the average man, especially since his attention was rivetted namely on the second, third and fourth subdivisions of the amendment dealing with the disqualification for office of the leaders of the Rebellion, and with the reduction of representation in proportion to the number of disenfranchised Negroes. Thus it seemed that Congress was to accomplish the destruction of the Federal system of government without coping with any substantial popular disapproval.

The legislature in Washington lost no time in attempting to put the new regime into effective operation. Between 1870 and 1875, the Enforcement Act, the Ku Klux Act, and the Civil Rights Act followed each other in rapid succession. Underlying these enactments was the theory that embraced in the first section of the Fourteenth Amendment could be found protection for all the rights which the human being enjoys in his community. Logically, if the guarantee extended to acts of a commission on the part of the state and its agents, it should extend as well to acts of omission. Hence no valid reason could be seen for limiting the authority granted to Congress by the fifth section of the amendment to remedial measures rectifying adverse state legislation. Thus, to supply the inadequacies of state legislation, affirmative measures were passed directly impinging upon private individuals as well as upon official repre-

sentatives of the state. All of the enactments dealt with the Negro problem, but they had implicit in them the assertion of an authority on the part of Congress which was unthought of before the Civil War and which, once recognized, might invade any legislative field and eventually reduce the erstwhile sovereign states to mere geographical subdivisions. This then is an ever so brief sketch of the political background of the Slaughterhouse Cases.3

Through some whim of Providence, the first important case to come up under the new amendment had not the slightest connection with the negro question, and resulted in a decision which mercilessly destroyed the very props of the structure which had been so painstakingly planned in the halls of Congress. The foundation of the appeal to the Supreme Court was the privileges and immunities clause. A decision in favor of the petitioners would mean that Congress could, by the mere creation of privileges and immunities, manufacture rights in citizens upon which no state could ever infringe. The result would be authoritative sanction for the ambitious aims of Congress and the death blow to state sovereignty. With the court the issue was purely and simply one of state’s rights, and in that learned body the sovereignty of the states was still held sacrosanct. A government of limited central authority was regarded as the sine qua non of a true democracy.

To Mr. Justice Miller, high priest of the states’ rights dogma, fell the honor of penning the opinion which became the target for the most devastating bombardment ever levelled at any judicial utterance. In disposing of the arguments of the petitioners under the privileges and immunities clause, Miller pointed out that such a result “would constitute this court a perpetual censor upon all legislation of the states, on the civil rights of their own citizens with authority to nullify such as it did not approve as consistent with those rights as they existed at the time of the adoption of the amendment.”

The outcome would be “to fetter and degrade the state governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character” and to effect

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3 For a complete discussion of the Slaughterhouse Cases, 16 Wall. 36 (1873), see 2 Boudin, Government by Judiciary (1932) c. 23.
a most radical change in “the whole theory of the relations of the state and federal governments. . . . We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures which ratified them.”

Strangely enough, due process was practically ignored by counsel in their argument before the court. The weak contention which was made on that ground was suavely disposed of by the court. One remark by the author of the prevailing opinion will serve to illustrate clearly the doctrines which obtained in the Supreme Court during the first decade and a half of the history of the amendment, and to make the contrast with the later attitude all the more sharp. Due process, said Mr. Justice Miller,

“. . . has been in the Constitution since the adoption of the Fifth Amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the Constitutions of nearly all the states as a restraint upon the power of the states . . . We are not without judicial interpretation, therefore, both state and national of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have seen, or any that we deem admissible, can the restraint imposed by the state of Louisiana upon the exercise of their trade by the butchers of Louisiana be held to be a deprivation of property within the meaning of that provision.”

An analysis of the attitude revealed by this decision throws much light on the future course assumed by litigation under the Fourteenth Amendment. We start off with the court’s refusal to constitute itself “a perpetual censor upon all legislation of the states.” We approve such judicial self-abnegation on the ground that it is not the function of the judiciary to regulate legislative policy. On examining the bedrock on which the court builds its decision, however, we find that the tribunal has declined the right to veto state legislation only because it has seized for itself, by main strength, the right to preserve inviolate “the whole theory of the relations of the state and federal governments”. Granted that the Fourteenth Amendment might have been intended to upset the federal system of government, it is nevertheless part of the Constitution, presumably the will of the people, and hence the supreme law of the land. The issue is patently political and not judicial, yet with one decision the question is settled and the views of a handful of lawyers prevail over the expressed will of the elected representatives of the people.

Many there are who regard the Slaughterhouse Cases and the decisions immediately following as expressions of the proper
policy which should prevail in the treatment of cases under the Fourteenth Amendment. True, the state legislatures should be given a very free hand in dealing with local problems. But if that freedom is to be achieved merely because it happens to follow from a decision settling the state's rights question, the victory is indeed a hollow one.

Whatever the basis for the decision, it was of little comfort to the vast business interests which began to grow up during this period. The manner in which the due process clause was ignored by court and counsel, as well as by Mr. Justice Field in his vigorous dissenting opinion, has remained a never ceasing source of wonderment to Constitutional authorities. In subsequent cases, when the Slaughterhouse Cases were cited as decisive of the extent of the restrictions imposed by the due process clause, Field maintained that the question had not been there decided because of inadequate presentation. Nor is he alone in this contention. In 1922 Charles Warren made the following statement:

"In view of later decisions of the court relative to the extent of the state police power over liberty and property, it may well be doubted whether the decision might not have been otherwise, had the case been argued more fully on the point of due process and had the facts been more clearly stressed."

If there is any merit in this argument, it would tend to weaken the conclusion that the decision in the case was the outcome of a political issue. The court's shift to the Field view in the late '80s could not then be explained on the ground that the states' rights issue was no longer omnipresent so that the attention of the judges was then focused completely on the protection of private property. We would be forced to attribute the cases decided between 1873 and 1889 to the effects of an inadequately argued case, and to assume that the true doctrine was first enunciated in 1889. Hence the Field-Warren position must be examined.

It would seem that if the court had erred because insufficient argument had been presented, the very first opportunity to rectify that error would be welcomed cordially. That opportunity was offered in Munn v. Illinois.5 Due process was argued strenuously and at great length. If the views of Justice Miller

43 Warren, Supreme Court in United States History (1922) 271.
5 94 U. S. 113 (1876).
were not acceptable to the court, it could ask no better means for their repudiation. Nevertheless the case clearly reaffirms the law of the Slaughterhouse Cases. After adverting to the fact that the 1870 revision of the Constitution of Illinois expressly provided for the regulation of the grain industry, Chief Justice Waite went on to say:

“This indicates very clearly that during the twenty years in which this peculiar business has been assuming its present ‘immense proportions’, something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here. For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us, the question is one of power, not of expediency. If no state of facts could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.”

Thus it can be seen that the Slaughterhouse Cases cannot be explained away as an isolated opinion expressed without the benefit of extensive preparation and complete argument. No matter what form the argument might have taken, the all-important issue as far as the court was concerned was not whether a man’s liberty or property was being wrongfully taken, but whether the sovereign power of a state over its subjects could be limited in the manner attempted.6 Urging the salutary effect of a statute on the welfare of the community at large would be arguing on irrelevant grounds. The eye of the court was on the rights of the state, not on the conflict between private property and community interest.

Startling though the thought may seem, it is submitted that between Justice Miller and the dissenting Justice Field, there was fundamentally no conflict. The shift in the late '80s is generally characterized as the victory of the Field doctrines over the Miller view, but in truth the triumph was achieved on another issue entirely. Field was not overly concerned with the balance

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6 An important part of the court’s battle against national supremacy was its hostility to the Congressional intent to make the Fourteenth Amendment transform the first eight amendments into limitations on the powers of the states. This factor lends great clarity to the Court’s insistence, in Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 111 (1884), on the principle of constitutional construction that no two phrases in the same document can be construed to cover the same ground. This prevented the inclusion of any of the guarantees of the Bill of Rights into the due process clause of the Fourteenth Amendment.
of power between the states and the federal government. As he saw the question, it narrowed itself down to the power of the state to regulate individual enterprise. Of course, in some sense of the word this might be said to be a states’ rights issue, but it is not the same issue that Miller had in mind. The latter may or may not have been in favor of paternalism. He may have been just as ardent a believer in laissez faire as was Field. But if laissez faire necessitated the supremacy of the central power over that of the states, laissez faire must go by the board. With Field, on the other hand, if laissez faire meant national supremacy, then the rights of the states had to go. But on one or the other issue, Field and Miller never came to grips.

Steeped in the doctrines of independence and rugged individualism which had become a part of his creed in his frontier days, Field looked upon state regulation of private enterprise as obnoxious to the extreme. His dissents during Miller’s ascendancy were vigorous expositions of the individualistic philosophy. Relentless and convincing, they exercised an influence in several very important directions, each of which deserves brief exploration.

Mention has previously been made of the hostility with which the large business interests received the decision in the Slaughterhouse Cases. The era was one of great commercial expansion. Vast enterprises were being developed in all parts of the country. With this growth came a corresponding increase in state legislation aimed at the regulation and control of trade. Regarding this legislation as an unwarranted interference with their freedom, and an unreasoned impediment to the commercial progress of the country, the propertied classes turned to the Fourteenth Amendment as the Constitutional barrier to State meddling. The Slaughterhouse Cases were a severe disappointment, therefore, and ordinarily would have discouraged any further onslaught on state action. But Field dissented, and carried with him Chief Justice Chase, and Justices Bradley and Swayne. And Field continued to dissent, serving repeated notices on attorneys for the business interests that all was not yet lost. The notice did not fall on deaf ears.

From the day the opinion was handed down until the day it was finally thrown into the discard, the Slaughterhouse decision
was the target for a merciless, unrelenting, and vigorous bombardment. Case after case was thrust at the court by untiring attorneys complaining of a multitude of State statutes which had evoked the displeasure of the interests. The proportions assumed by this barrage can be detected from the language of Mr. Justice Miller's petulant complaint, as early as 1877 in Davidson v. New Orleans.\(^7\)

"It is not a little remarkable, that while this provision has been in the Constitution of the United States as a restraint upon the authority of the Federal government, for nearly a century, and while during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the states, only a very few years, the docket of the court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, and property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of the provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."

Pointed though this protest was, it failed to stem the tide. The onslaught continued. The pressure was strong and unceasing, and eventually the court yielded to it. One is led to wonder whether these lawyers, in pressing their claims, realized that their activities were, by main strength, shaping the social and economic policies of the government. It is an oft-quoted truth that a bench is only as good as the bar practicing before it. There is no doubt that the litigating lawyer makes law just as much as the judge and the legislature. But one doubts whether Counsel arguing their cases before Supreme Court in the '80s were conscious of the far reaching effect of their contentions, and, if they were cognizant of the implications of their arguments, whether they felt enough responsibility to the community to weigh the benefits and disadvantages to society which would result from the acceptance of their views by the court.

Though a substantial number of the state courts were little

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\(^7\) 96 U. S. 97 (1877).
disposed to assume the role of legislative overseers, there were many who regarded such activity as an integral part of the judicial function. To the latter, Field's dissents expressed the law of the land. Thus when in Butcher's Union etc. Co. v. Crescent City Field succeeded in injecting his views into what was technically a concurring opinion, the mantle of a dubious authority was thrown about the exposition of doctrine which theretofore had in the main been confined to dissents. In the same case, Mr. Justice Bradley, joined by Justices Harlan and Woods, rendered a separate opinion, formally concurring but actually dissenting, which added new fuel to the fire which was rapidly consuming the legislative freedom of the states. This opinion, restricted in terms to a condemnation of monopolies, was destined to be accepted by the state courts and to be expanded by them into a broad generalization which put them into a position to act as perpetual censors of the efforts of the legislature. Thus the state courts were supplied with a plethora of dicta to serve as an authoritative basis for their censorious proclivities. In re Jacobs, 98 N. Y. 98 (1885); Ritchie v. People, 155 Ill. 98, 40 N. E. 454 (1896); Johnson v. Goodyear Mining Co., 137 Cal. 4, 59 Pac. 394 (1899); People v. Williams, 139 N. Y. 151, 31 N. E. 778 (1907).

Some of the language in these cases is extremely interesting. In the Jacobs case, the court said: "When a health law is challenged as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has, at least in fact, some relation to public health, and that the public health is the end actually aimed at, and that it is appropriate and adapted to that end. . . . It cannot be perceived how the cigar maker is to be improved in his health or morals by forcing him from his home and its hallowed associations, and beneficent influences to ply his trade elsewhere."

The court in Ritchie v. People announced: "There is no reasonable ground—at least none which has been made manifest to us in arguments of counsel—for fixing upon eight hours in one day as the limit within which women can work without injury to her physique, and beyond which, if she work, injury will necessarily follow."

In the Johnson case, the California court took up the cudgels for the misunderstood working man: "The working man of intelligence is treated as an imbecile. Being over twenty-one years of age, and not a lunatic or insane, he is deprived of the right to make a contract as to the time when his wages shall become due. Being of sound mind, and knowing the value of a horse, he is not allowed to make an agreement with the corporation that he will work sixty days and take the horse in payment."

The following statement from People v. Williams comes at the peak of the period of ruthlessness: "When it is sought under the guise of a
It is of course impossible to determine to a nicety just how much the other members of the Supreme Court bench were swayed by the dissents of Field and his disciples, but they undoubtedly constituted no insignificant factor in bringing about the change in attitude which subsequently came. It will be noted that besides the direct influence which the minority opinions might have exerted, they also had a very great indirect effect in that, in addition to inviting the tremendous pressure which was brought to bear on the court by counsel for commercial interests, they served to build up a body of law in the State courts opposed to the views being promulgated by the prevailing opinions in the Supreme Court. While State court decisions cannot be regarded as precedents on such questions for the United States Supreme Court, there is no doubt that they can be highly persuasive in the proceedings before the high tribunal.

At this point an inquiry into some of the other forces which operated to shift the course of judicial decision becomes relevant. Between 1875 and 1885 five new justices were appointed—Harlan, Woods, Mathews, Grey and Blatchford. By 1883 the last of the Congressional acts designed to enforce the Fourteenth Amendment had been held unconstitutional.\(^\text{10}\) The court was thus relieved of its self-imposed duty of preventing the substitution of the will of Congress for the will of the States. The hates and fears of Reconstruction Era had been replaced by a spirit of commercial expansion. The states' rights issue was no longer a burning one. The fundamental basis of the Slaughterhouse Cases had disappeared. Of necessity the court had to focus its attention on some other point in arriving at its decisions. Aided by the diminution in importance of the states' rights question, the advocates of the laissez faire dogma were able to concentrate their attack on the most pregnable spot in the armor of the Miller school,—the propriety of governmental interference with private enterprise. Before embarking on a search for the theories

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\(^{10}\) Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18 (1883).
which guided the court on this new issue which it had created for itself, it might be well to indicate the process by which such theories are introduced into decisions under the Fourteenth Amendment. Professor Frankfurter's statement of the matter cannot be improved upon.

"Words like . . . 'due process of law', and 'equal protection of the laws' are the foundation for judgment upon the whole appalling domain of social and economic facts. But, as the late Judge Hough reminded us, phrases like 'due process of law' are of 'convenient vagueness.' There content is derived from without, not revealed within the constitution. Because of them the court is compelled to put meaning into the Constitution, not take it out. For such features of the Constitution a favorite quotation of John Chipman Gray is peculiarly pertinent: 'Whoever hath the absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver to all intents and purposes, and not the person who first wrote or spoke them.' The scope for interpretation of the Constitution is here relatively unrestricted, and the room for exercise of individual notions of policy correspondingly wide. The judges are cartographers who give temporary definiteness but not definitiveness to the undefined and ever-shifting boundaries between state and nation, between freedom and authority. This is, therefore, the most active and most controversial sphere of Supreme Court litigation."

It will be remembered that during this period when the court was faced with the problem of infusing content into this vague and indefinite concept of due process, the fundamental notion of the judicial function was that the judges "find" the law; they do not make it. In deciding a case the judge merely applied principles, unyielding and immutable. In their application the judge assumed no responsibility but that of pertinency. This mode of thinking had two results. First, it permitted the court to reach any conclusion which it thought was compelled by the relevant principles without bowing to any duty to consider the social justification for the decision. The judges did not ponder over the implications of their position,—did not realize, or did not choose to realize, that they were shaping the economic and social policies of the nation,—and so were not subject to any pricks of conscience when they permitted themselves to be governed by doctrines which were personal to them and represented merely their

\[\text{Hough, Due Process of Law—Today (1919) 32 Harv. L. Rev. 218.}\]

\[\text{From sermon by Bishop Hoadley, quoted in Gray, Nature and Sources of the Law (2d ed. 1921) 102, 125, 172.}\]

\[\text{Frankfurter, Mr. Justice Holmes (1931) 50.}\]

\[\text{Goebel, Cases and Materials on the Development of Legal Institutions (1931) c. 1.}\]
own individual notions about the organization and administration of the ideal society.

That this feeling of freedom from responsibility must have been conscious rationalization on the part of the court is indicated by the fact that there undoubtedly were no principles of law which could apply to cases under the Fourteenth Amendment. At the time the Slaughterhouse Cases were decided, the court was able to get some aid from the words of the amendment itself. Due process of law and the equal protection of the laws were regarded as separate guarantees. Due process had been defined to some extent before the Civil War. Equal protection was regarded by the court as the equivalent of "the protection of equal laws." Although this distinction was not of very great service to the court, at least it narrowed the problem somewhat. If a statute did not fall within either of the two prohibitions, it was not a violation of the Fourteenth Amendment. But in the course of the next fifteen years, the distinction, because of lack of emphasis, began to lose its clarity. Due process and equal protection tended to merge. In Chicago, St. Paul & Milwaukee Railroad v. Minnesota, the case which marks the complete annihilation of the Miller school, Justice Blatchford, speaking for the majority, used language which wholly and definitely destroyed the differentiation between the two phrases in the amendment.

"... it is deprived of the lawful use of its property and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States, and inso-far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

Thus the two concepts assumed substantial identity and the last vestige of content that the amendment might have had was lost. It became incumbent on the judges then, to discover immutable principles to govern them in deciding cases under the amendment. It is in this search that we notice the second result of the mode of thinking mentioned before. In seeking for general principles where obviously there were none, the court, consciously or unconsciously, had resort to theories and doctrines not of law but of philosophy, sociology, and economics. The influence of laissez faire on Field has already been mentioned. Adam Smith's

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134 U. S. 418, 10 Sup. Ct. 702 (1890).
Theories enjoyed widespread popularity in Europe at the end of the 18th century and at the beginning of the 19th, and when the judges cast about for a rationale to support their efforts under the Fourteenth Amendment, the idea of complete freedom for private enterprise invited adoption.

Another notion which was being read into the cases at the close of the 19th century was that of "freedom of contract." At first laboriously squeezed into the word "liberty" in the due process clause, freedom of contract came to rest finally as an established right of property. This concept rests upon another very interesting basis. In 1861, Sir Henry Maine in his Ancient Law advanced a famous dogma whose effect on judicial thinking was profound.

"The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency, and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take account. The advance has been accomplished at varying rates of celerity, and there are societies not absolutely stationary in which the collapse of the ancient organization can only be perceived by careful study of the phenomena they present. But, whatever its pace, the change has not been subject to reaction or recoil, and apparent retardations will be found to have been occasioned through the absorption of archaic ideas and customs from some entirely foreign source. Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origins in the Family. It is Contract. Starting, as from one terminous in history, from a condition of society on which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals."

"The movement of the progressive societies has hitherto been a movement from status to contract." In 1861 when this doctrine was first enunciated it was regarded as radical. In 1890, therefore, when the court adopted it to aid in the decision of cases under the Fourteenth Amendment, they felt they were expounding a most liberal creed.

The word "reasonable" began to appear in the decisions. "... the element of reasonableness ... is eminently a question for judicial investigation ...", declared Justice Blatchford in the Minnesota Rate case. What is "reasonable"? It means no more to the average mind than due process of law. But to the

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Supra Note 15.
legal mind the word is the open sesame to the application of any theories which might be part of the intellectual makeup of the person applying the test. This matter has been the subject of so much discussion by specialists in the study of natural law concepts and the law of reason that any further inquiry here would be futile. If reasonableness was to be the test, and only the court could apply the test, that is the end of the discussion. It remains only to sketch briefly the few cases in which the Slaughterhouse Cases were laid to rest, and the history of the rise of the judiciary can come to a close.

In 1886 it was definitely stated that a corporation was a "person" within the meaning of the word in the Fourteenth Amendment. This was equivalent to a complete surrender to the contention that business interests were intended to be protected by the framers, and indeed, is regarded by some as the turning point in the development of the amendment. In the same year, in the Railroad Commission Cases, a decision upholding the right of the legislature to regulate railroad charges, Chief Justice Waite let fall the remark which virtually cast the die.

"From what has thus been said it is not to be inferred that this form of limitation or regulation is itself without limitation. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. . . . That state cannot . . . do that which in law amounts to taking of private property for public use without just compensation or without due process of law."

In Dow v. Beidelman Waite's dictum was accepted in a dictum by Justice Gray as the "general rule of law". As to what is "just" compensation within the meaning of this "general rule of law" we have the benefit of an interpretation by Judge

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22 But cf. Davidson v. New Orleans, supra note 7, in which it was held that eminent domain was not encompassed in the due process clause of the Fourteenth Amendment. Compare discussion in note 6 supra.
23 125 U. S. 680, 8 Sup. Ct. 1028 (1888).
Brewer in the Circuit Court in Chicago & Northwestern Ry. v. Dey\textsuperscript{24} where he declared:

"Counsel for complainant urge that the lowest rates the legislature may establish must be such as will secure to the owners of the railroad property a profit on their investment at least equal to the lowest current rate of interest, say three per cent. Decisions of the Supreme Court seem to forbid such a limit to the power of the legislature in respect to that which they apparently recognize as the right of the owners of the railroad property to some reward; and the right of judicial interference exists only when the schedule of rates established will fail to secure to the owners of the property some compensation or income from their investment. As to the amount of such income, if some compensation or reward is in fact secured, the legislature is the sole judge."

But note this statement by Justice Gray in Dow v. Beidelman.

"Without proof of the sum invested . . . the Court has no means, if it would under any circumstances have the power, of determining that the rate fixed by the legislature is unreasonable."

The "if" clause in the Dow case did not fall on deaf ears. Counsel were active. Counsel were persuasive. The Court yielded completely and decisively in the Minnesota Rate case,\textsuperscript{25} Justice Blatchford speaking for the majority:

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property and thus, in substance and effect, of the property itself, without due process of law. . . ."

Note the conscious or unconscious straining to fit the language to the old procedural due process by the inclusion of the phrase "and such deprivation takes place in the absence of an investigation by judicial machinery". But this deceived no one. The Slaughterhouse cases had at last been silently and unostentatiously deposited in an obscure grave from which there could be no return.

In 1887 a dictum in Mugler v. Kansas\textsuperscript{26} showed very clearly that the court's reaction to regulatory measures was destined to

\textsuperscript{24}35 Fed. 886 (C. C. S. D. Iowa 1888).
\textsuperscript{25}123 U. S. 623, 8 Sup. Ct. 273 (1887).
\textsuperscript{26}Supra note 15.
follow the same pattern as that in the rate cases. After adverting to the scope of the police power of the state, the court continued:

"It does not follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of course, limits beyond which legislation cannot rightly go. . . If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those subjects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Thus the court takes upon its shoulders the duty of deciding whether or not each statute has a "real or substantial relationship" to the protection of the public health, morals or safety, or whether it is a "palpable invasion of rights secured by the fundamental law". No incisive analysts is necessary to realize that the person who decides these questions exercises a more potent veto power than the executive of the state. The veto of the President of the United States can be overridden, generally, by a two-thirds vote of Congress. It would take a very clear Constitutional Amendment to override the veto of the Supreme Court.

**PART TWO**

We have now arrived at the stage where it is no longer pertinent to criticize the court for arrogating to itself the power to supervise state legislation. The flaws in the court's position, the logical and legal inconsistencies, we have attempted to indicate in the first part of this work. We now assume the existence of the veto power and embark on an analysis of its implications, to determine just what consequences should flow from the possession of such a power, and to contrast what the result should be with what the result actually was. This article does not pretend to be an exhaustive study of due process. Its main purpose is to indicate in one particular the relationship of the activities of the legal profession to the society in which it operates. It might be best to clarify this idea at this point.

By the words legal profession we do not necessarily mean only the practicing lawyer. The words are used in their broader sense to include all men engaged in the application of a system of thought to the regulation of the relationship of human beings to each other. This system of thought in its pristine form was self-
generating, founding itself in the inarticulate will of society. As time went on, as the society in which the law operated became dissatisfied with one or another of its rules and the judges showed no inclination to yield, statutes were passed which by force effected changes. Under a democratic system of government the will of society in promulgating rules governing its organization, is supreme. This will is presumably manifested through the acts of the legislature which it elects. The judges, charged with the interpretation of the legislative expressions as well as the inarticulate will of society known as the common law, are but agents of the society in which they operate. Their primary duty is to interpret to the individual litigant the voice of the community.

In 1890 there came a radical departure from this arrangement. Because of a poorly worded amendment to the constitution the court was able to put itself into a position which enabled it to deny to the people the right to adopt certain regulations for themselves. Certain elements of the population regarded such a situation as highly desirable since they felt that the judiciary could best serve as a protector of private property and commercial enterprise against the regulating hand of the legislature. Whether the court should have this power or not we do not now discuss. We assume the existence of the power without passing upon its justification. We merely keep in mind the fact that nine lawyers, elevated to the highest bench in the land, have in their hands a tool with which they can cut off the right of society to pass certain regulations impinging upon certain individuals.

But despite the power to frustrate the will of society, the judges are none the less its agents. In all they do, their one purpose should be the improvement of the community. That this is fundamentally the function of all members of the legal profession, judges and lawyers, cannot be gainsaid. In exercising the power to nullify the will of the majority, which under our system of government is the expression of the will of society as a whole, the court never for one moment rids itself of its duty to strive for the improvement of the community in which it rules. Whether or not the court has carried out this duty is the problem on which we now focus our attention.

One more aspect of the situation must be adverted to before embarking on a survey of the cases. The contention is often made
that the court serves as a check on irresponsible legislatures which do not really express the will of their constituents, so that the judges do not really oppose the will of the community when they invalidate legislation. In answer to this argument, it may first be pointed out that the question of whether or not legislative policy conforms to the will of the community is not one for the judiciary to decide. That issue is settled at the polls. Secondly, the bicameral system of government, supplemented by the veto power in the executive, is sufficient guarantee against thoughtless and hasty legislation. We must assume, therefore, that when a bill becomes law in any state in the union it is the best expression that can be found of the desires of the people constituting the electorate of that state, and is the result of a mature and deliberate attempt to remedy an evil prevalent in that community.

The period between 1890 and 1910 is named by Professor Cushman, *Period of Judicial Ruthlessness—Mechanical and Legalistic Interpretation of the Fourteenth Amendment*. Whether or not the epithet “ruthless” is deserved, is not absolutely clear. Undoubtedly, in its pronouncements the court was merciless. It fairly thundered its intention to keep a very watchful eye on exuberant state legislatures. But that its bark may have been worse than its bite is indicated by a set of figures compiled for the period from 1872 to 1910. During these thirty-eight years, six hundred and four cases were presented to the Supreme Court under the Fourteenth Amendment. Some of these were also based on some other constitutional guarantee as well. During this period the court intervened only fifty-five times, and of these, twenty-one involved the interpretation of some other clause of the Constitution, so that in those cases the intervention might have gone off on another ground. Six of the successful litigants prevailed in cases involving the negro question. In thirty-nine cases, the principal party was a private corporation. The remaining ten were individuals of other than the negro race. The total number of negroes carrying their suits to the Supreme Court was twenty-eight, the number of corporations three hundred and twelve, the number of individuals two hundred and sixty-four.

28 The statistics are from Collins, *The Fourteenth Amendment and the States* (1912). The figures are not too reliable, nor has their accuracy been confirmed, but they serve to present an approximate picture.
Thus about 21 per cent of the negroes, 12 per cent of the corporations and 4 per cent of the individuals other than negroes, were successful in their attacks on state legislation.

Thus it will be seen that though the court loudly proclaimed its power to examine into the merits of every statute brought before it, it was not prodigal in employing that power. On the other side of the picture, however, we must notice the activity of the State courts which had fallen into line in the assertion of the veto power. Many cases were checked before they came to the Federal court by decisions adverse to the statute in the highest courts of the states.

What makes the period more distressing than any other in the history of the amendment is the type of reasoning employed by the court in reaching its decisions. Professor Cushman calls it "mechanical and legalistic interpretation." It had its origin in the then current notion that the judge finds the law and does not make it29. The court refused to admit, or failed to realize, that it was passing on questions of social justification and not on questions of law, and so each state regulation had to be justified as a matter of legal principles and strict legal reasoning. Legal precedents were used to decide whether legislation was necessary for the welfare of the people of the state.

The application of such a mode of reasoning to social legislation was bound to produce outlandish results. Cases involving statutes regulating the hours of labor serve as the best illustration of the operations of the court under the spell of what Professor M. R. Cohen has called the "phonograph theory" of the judicial process. In passing upon the validity of such legislation the court was faced with the problem of deciding what basis of classification it was going to use to determine what sort of employees needed protection from their employers, and what sort did not. Legal principles obviously were of no help. In seeming desperation, resort was had to the common law, and triumphantly the court emerged from its search with the sine qua non of any effective classification between persons,—the great distinction between persons sui juris and those non sui juris. The absurdity of such a standard is apparent, yet it was the guide and inspira-

2 Supra note 14 and text.
tion to state and federal courts until 1910, and even reappeared again in 1923.

These labor cases involved the courts in another difficulty,—one of logic,—when they found it necessary to hold a statute unconstitutional as against an employer. Reference has been made before to the complete lumping of the due process and equal protection clauses. All that the Fourteenth Amendment supplies is the power in the court to declare a statute “good” or “bad”. It furnishes no yardstick for the measurement of the validity of the statute. We take a typical case. The statute enjoins employers from hiring employees to work for more than a certain number of hours per day. The court is of the opinion, using the Fourteenth Amendment as a means of enforcing the opinion rather than as a foundation for the opinion, that the legislation is “bad”. It restricts the “freedom of contract.” Whose freedom? The employer’s freedom, in that in his contracts with certain people, he may act only in a certain way. But the court has many times affirmed the proposition that the due process clause does not affect a “valid” exercise of the police power. Hence an inquiry into the “validity” of the exercise of the police power, is in order. The statute says that with a certain class of people, the employer can contract only in a certain way. It discriminates between classes of people. It designates women, thereby exempting men. It designates people who work for others, thereby exempting people not so situated. Hence the

— See quotations from Johnson v. Goodyear Mining Co. and People v. Williams, supra note 9, and the following statement of the N. Y. Court of Appeals, in Ives v. South Buffalo Ry. Co., 201 N. Y. 271, 94 N. E. 431 (1911), decided after the United States Supreme Court had expressly approved the factual report method employed by counsel in this case.

“The report of the commission is based upon a most voluminous array of statistical tables, extracts from the works of philosophical writers and the industrial laws of many countries, all of which are designed to show that our own system of dealing with industrial accidents is economically, morally and legally unsound. Under our form of government, however, courts must regard all economic, philosophical and moral theories, attractive and desirable though they may be as subordinate to the primary question whether they can be molded into statute without infringing upon the letter or spirit of our written constitution. . . In a government like ours, theories of public good or necessity are often so plausible or sound as to command popular approval, but the courts are not permitted to forget that law is the only chart by which the ship of state is to be guided.”
people designated are denied the equal protection of the laws unless a reason for the classification can be seen. Since, as the quotations show most cases recognized only the sui juris, non sui juris classification, the discrimination was generally declared unjustified. Therefore the statute was invalidated because it deprived this petitioner, the employer, of due process and equal protection of the laws.

This difficulty was adverted in Holden v. Hardy\(^2\) when the court suggested:

"It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor, his defense is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employees, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class."

The famous bakeshop case, Lochner v. New York,\(^3\) has been the subject of so much discussion and adverse criticism, that any further comment here would be superfluous. The decision was written by Mr. Justice Peckham, who, while a member of the New York Court of Appeals has adopted Field's dissenting views as the Constitutional law of New York several years before they gained ascendancy in the Supreme Court. He distinguished Holden v. Hardy, decided but seven years before, in a thoroughly legal and completely absurd manner.\(^3\) A few quotations from the opinion will reveal the rationale of the decision.

"In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it: The one has as much right to purchase as the other to sell labor. . . .

"There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a

\(^1\) 169 U. S. 366, 18 Sup. Ct. 383 (1898).
\(^2\) 198 U. S. 45, 25 Sup. Ct. 539 (1905). See the magnificent dissent by Mr. Justice Holmes.
\(^3\) The statute in Holden v. Hardy permitted longer hours when necessary because of an emergency (it applied to mines), while the statute under discussion, applying to bakeries, contained no such exception.
class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and action. They are in no sense wards of the state. . .

"The act must have . . . direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor. . .

"Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere interferences with the rights of the individual. . .

"It seems to us that the real object and purpose were simply to regulate the hours of labor between master and his employees (all being men, sui juris). . ."

It will suffice to add the neat comment of Professor Cushman to sum up the matter without further discussion.

"These opinions breathe forth judicial tenderness and concern for the unfortunate workman, and with hearty enthusiasm the courts proceeded to rescue him from an attempted legislative oppression which, by subjecting him to all the legal requirements of reasonable hours and conditions of labor, infringed thus brutally upon his sacred right of free contract."34

It is hardly debatable that the shortcomings of such a technique in dealing with social legislation were evident to the court. Their adherence to it for over a decade may be due to their own refusal to recognize the implications of their new position or to the lack of imagination on the part of counsel arguing cases before them. It took the famous Brandeis brief in Muller v. Oregon35 to break through the morass of legalistic thinking which obfuscated the fundamental social and economic issues which lay at the root of the controversy. The approval of the Brandeis technique, hailed by authorities as a movement in the direction of liberality, is really a final step in the establishment of the court's position as the American House of Lords.36 Up to Muller v. Oregon the Supreme Court at least pretended to be a judicial body. With the Muller case the court dropped its pretensions and frankly admitted that the same sort of evidence presented to a committee of the legislature by the proponents of a bill would be admissible to sustain the law in the court. The confession is to be marvelled at as much for its candor as for its brazenness.

34 Op. Cit. supra note 27.
36 Boudin, Government by Judiciary (1932) c. 40.
At any rate the atmosphere was now cleared. If the court must exercise a veto power, it should be exercised in a sensible and appropriate manner, and Muller v. Oregon set the pattern. Justice Brewer announced the new modus operandi of the court.

"The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that women's physical structure and the functions she performs in consequence thereof justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations on legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long-continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."

With this new emphasis on the underlying fact situations there came the realization that the court was going through a process which differed in no way from that employed by the legislature in deciding upon the advisability of enacting a bill. The result was a new hesitancy in upsetting statutes and the according of more respect to the opinion of the legislature that an evil existed and could best be remedied in the manner adopted.

The effect of the new attitude could be detected in the state courts almost immediately. In New York, People v. Williams was overruled by People v. Schweinler Press, Hiscock, J., writing for the court.

"There is no reason why we should be reluctant to give effect to new and additional knowledge upon such a subject as this, even if it did lead us to take a different view of such a vastly important question as that of public health or disease than formerly prevailed. Particularly do I feel that we should give serious consideration and great weight to the fact that the present legislation is based upon and sustained by an investigation by the legislature deliberately and carefully made through an agency of its own creation, the present factory investigating commission."

In Illinois, Ritchie v. Wayman threw the old case of Ritchie v. People into the discard. That the state courts were

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37 Supra note 9.
39 244 Ill. 509, 91 N. E. 695 (1910).
40 Supra note 9.
not wholly satisfied with the legalistic sleight of hand to which they had been resorting for the past decade or more is evidenced by their whole-hearted adoption of the more rational devices suggested by the Supreme Court. The latter tribunal reaffirmed its stand in German Alliance Insurance Co. v. Lewis\textsuperscript{41}, Brewer again speaking for the court.

"These regulations exhibit it to be the conception of law making bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation. A conception so general cannot be without cause. The universal sense of the people cannot be accidental; its persistance saves it from the charge of unconsidered impulse, and its estimate of insurance certainly has substantial basis."

Noble State Bank v. Haskell\textsuperscript{42} (establishment of a general fund to guarantee bank deposits), Quing Wing v. Kirkendall\textsuperscript{43} (license tax on hand laundries), Patsone v. Pennsylvania\textsuperscript{44} (prohibiting the possession of firearms by aliens), and Bunting v. Oregon\textsuperscript{45} (hours of labor), are further illustrations of the use of the factual technique. That the new liberal attitude toward state legislation would not permit excesses is proved by the case of Truas v. Raich\textsuperscript{46} where a statute prohibiting the employment of less than eighty per cent citizens in any business hiring more than five workers, was held invalid.

But this era of enlightened social consciousness was short lived. With Bunting v. Oregon there came to a close a period which reflects credit on the nine lawyers in Washington and which justifies the court's position as the American House of Lords. The change in attitude might be blamed on the World War. Periods of conflict are generally followed by marked reaction. With the exception of the emergency rent cases\textsuperscript{47}, upholding statutes which owed their validity to the desperate conditions prevailing at the time they were passed and to the fact that they were limited in operation to the duration of the

\textsuperscript{41} 233 U. S. 389, 34 Sup. Ct. 612 (1914).
\textsuperscript{43} 223 U. S. 59, 32 Sup. Ct. 192 (1912).
\textsuperscript{44} 232 U. S. 138, 34 Sup. Ct. 281 (1914).
\textsuperscript{45} 243 U. S. 426, 37 Sup. Ct. 435 (1917).
\textsuperscript{46} 239 U. S. 33, 36 Sup. Ct. 7 (1914).
emergency, no case in the decade following the war exhibited an attitude even vaguely resembling that of Muller v. Oregon.

Truax v. Corrigan is a portent of what the next ten years were to produce. A considerable amount of the old legalistic language is found in the decision, and even the sui juris basis of classification, so definitely discarded but ten years before, crops up again to bolster the court's argument.

"... But we venture to think that not in any of the cases in this court has classification of persons of sound mind and full responsibility, having no special relation to each other, in respect of remedial procedure for an admitted tort been sustained."

Mr. Justice Holmes reverts once again to his position as dissenter.

"The dangers of a delusive exactness in the application of the Fourteenth Amendment have been adverted to before now... Legislation may begin where an evil begins. If, as many intelligent people believe, there is more danger that the injunction will be abused in labor cases than elsewhere I can feel no doubt of the power of the legislature to deny it in such cases."

Soon after Truax v. Corrigan came the most famous case in recent years, Adkins v. Children's Hospital. This case today stands as one of the main obstacles to the current movement toward minimum wage legislation. After a number of remarks in the true 1900 style, after an examination of precedents which the court maintains are the only "exceptions to the general rule forbidding legislative interference with freedom of contract", and after finding the statute unconstitutional because it does not fit into any previously decided case (a technique which died after Lochner v. New York in 1908), the court accords to the type of argument which was found persuasive in Muller v. Oregon this contemptuous reception:

"It is said that great benefits have resulted from the operation of such statutes, not alone in the District of Columbia, but in the several states, where they have been in force. A mass of reports, opinions of special observers and students of the subject, and the like, has been brought before us in support of this statement, all of which we have found interesting but only mildly persuasive."

In the same year the case of Chas. Wolff Packing Co. v. Court

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"Chastleton Corporation v. Sinclair, 264 U. S. 543, 44 Sup. Ct. 405 (1922), holding that a re-enactment of the laws could not be sustained because the emergency had ceased to exist.


*261 U. S. 525, 43 Sup. Ct. 394 (1923)."
of Industrial Relations was decided in which a new distinction woven out of whole cloth, makes its first appearance. There the court conceived the idea that there was a fundamental difference between price fixing, or rate regulation, and other types of regulation. Thus the court must be satisfied now, that the business is affected with a public interest and also that the public interest is such that price fixing is necessary.

It became apparent within a short time that the return to the legalistic thinking of 1900 was hardly an effective means for the curbing of socially minded legislatures. The conservative majority was made especially conscious of the shortcomings of the Adkins method in Jay Burns Baking Co. v. Bryan where Justice Brandeis stocked his dissenting opinion with such vast learning on the art of baking that the prevailing opinion was literally forced to justify itself by likewise resorting to culinary doctrine. With this case a new phenomenon arises. The reactionary majority has been shifted back to the factual basis which it deserted in the Adkins case, but it has not been dislodged from its hostility toward legislative meddling with commercial practices. The result is most curious. There came about the most remarkable extension of the concept of judicial notice that the law has ever known. If the opponents of the statute failed to present facts to show its invalidity, the court would blandly draw on its vast store of judicial knowledge to produce facts evidencing the statute's unconstitutionality. As examples of the inexhaustible fund of judicial learning on lay subjects, Tyson v. Banton and Ribnik v. McBride, have no equal.

Whether this practice is to be preferred over the early legalistic manipulation is debatable. Neither method permits, or requires, the judge to guide his actions by the current needs of society. If he is to approach each case with a preconceived notion as to the validity of the legislation involved, it matters little whether he bases his decision on "fundamental principles" of law or on facts which he "judicially knows". In both cases the result will be the same,—the substitution of individual beliefs for the articulated will of society and an utter disregard of the

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52 264 U. S. 504, 44 Sup. Ct. 412 (1924).
duty to promote the welfare of that society. Obvious it is that both techniques are nothing more than convenient media for transposing the particular judge’s inarticulate major premise into the traditional forms of judicial opinion. Criticism is generally heaped on the conservative element in the court for stooping to such methods. This attitude is due in the main to a fundamental disagreement with their reactionary views which interfere with sociological experimentation on the part of progressive communities. As will be demonstrated shortly, the so-called new liberal majority has recourse to the same sort of devices in upholding statutes that the old conservatives were wont to use in overthrowing them. The whole process reduces itself to a species of legal jugglery which masks the interplay of social, political and economic theory in the background.

On May 20, 1930 Mr. Justice Roberts was appointed to the Supreme Court Bench to fill the vacancy caused by the death of Mr. Justice Sanford on the March 8 preceding. On January 5, 1931 the new apparently liberal majority rode into power on the rejuvenated “presumption of constitutionality”. This presumption is as old as the amendment itself. Almost every decision since the Slaughterhouse cases had made obeisance to the presumption before proceeding to dispose of the case as if the presumption had never existed. Yet here it arises, potent and decisive under the deft manipulation of Mr. Justice Brandeis, to enable the court to uphold a New Jersey statute regulating the compensation of insurance agents. Whether there is any more sincerity in the “liberal” presumption than in the con-

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Kales, Due Process, The Inarticulate Major Premise and the Adamson Act (1917) 26 Yale L. J. 519.

An interesting sidelight on Mr. Justice Roberts is supplied by the following circumstances. In 1928 he was counsel for the taxicab company attacking a statute which imposed a tax on the gross receipts derived by corporations from the transportation business. Individuals doing the same business were not taxed by this statute. His attack on the statute was approved by the court in Quaker City Cab Co. v. Pennsylvania, 277 U. S. 383, 48 Sup. Ct. 553 (1928). In 1931, as a member of the court, he wrote the majority opinion in State Board of Tax Commissioners of Indiana v. Jackson, 283 U. S. 527, 51 Sup. Ct. 540 (1931), one of the leading “chain store cases”, which in effect overruled the Quaker City Case. Roberts did not cite the latter case, though the minority vigorously pointed out that it must control the instant decision.

servative "judicial notice" is to be gathered from a comparison of the O'Gorman case with the case of Near v. Minnesota, invalidating a statute infringing the freedom of the press. The five judges who voted for the validity of the O'Gorman statute, concurred in overthrowing the Minnesota "gag law". The implication is clear. Rights of person are regarded as more important than rights of property by the current majority in the Supreme Court. The presumption is no less a pretense than the other devices used in the past.

That the Supreme Court as now constituted has shown promising tendencies is not to be denied. The opinions indicate that the tribunal will not exert too much of a drag on the state legislative experimentation shown to be necessary by a prolonged period of economic stress. Indeed the existing court may act as a stimulus to new and more effective social and economic planning through the legislative bodies. Such phenomena have not been unknown in the past. The decision in Holden v. Hardy was followed by many statutes regulating hours of labor. Subsequent cases evidencing a judicial hostility to such legislation resulting in a temporary curtailment of the movement, but Bunting v. Oregon came along and paved the way for a veritable wave of regulatory enactments. Similar phenomena have been recorded in the fields of sterilization, minimum wages, and zoning and city planning. Thus a decision upholding a piece of legislation does not merely assert the validity of the statute up for consideration, but blazes the path for further effort in the same direction. This has great significance for our purposes. It indicates that the court not only possesses the veto power of

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Supra note 31.

Supra note 45.

Recent Social Trends in the United States—Report of the President's Research Committee on Social Trends (1933) c. 28—Law and Legal Institutions—Clark and Douglas.


Adkins v. Children's Hospital, supra note 50, and Clark & Douglas.

the executive, but shares with him the advisory power. Each opinion partakes to some extent of the nature of a governor’s message to the legislature. If the messages are sincere, unbiased expositions of the needs of the community, the legislation produced will be directed toward those needs. Note, for example, the history of minimum wage legislation in New York and its close adherence to the path blazed by the Supreme Court.66

But liberal as the present judges have shown themselves to be, scant comfort can be derived from the situation. The court is instilling into law its own conception of the ideal society. Fortunate it is that the current court has learned to be somewhat tolerant of governmental regulation of the economic structure. We applaud also the decisions attempting to check the forces of race hatred and political intolerance. There is no guarantee, however, that a change in personnel tomorrow will not bring back into power the present minority, and produce overnight a drastic curb on progressive legislation. That is the root of the problem.

It is inevitable, of course, that as the court changes its views will change. The point which should be stressed, the point to which all argument is sought to be addressed here, is the fact that it is the positive and unyielding duty of every member of the court to take stock of the position he occupies, to realize that he is clothed with a public power and hence burdened with a concomitant public trust, to recognize the fact that the public which he serves has almost no control over his appointment—and hence to become conscious of his inescapable obligation to re-examine his own first principles and to discard them in making his decision if he comes to the conclusion that his own views do not coincide with the legislative policy of some local community.

The judges are really statesmen in dealing with the Four-

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66 The minimum wage statute involved in Morehead vs. People ex rel Tipaldo, 298 U. S. 587 (1936) attempted to meet the bar of the Adkins case by setting up the standard of reasonable value of service performed in addition to the subsistence wage standard which the Adkins case had condemned. The court refused to recognize the distinction which the additional limitation of reasonable value seemed to present. Shortly thereafter West Coast Hotel Co. v. Parrish, 57 Sup. Ct. 578, 81 L. Ed. 455 (1937) validated a Washington minimum wage statute distinguished only in form from legislation previously frowned upon. The State of New York promptly molded a bill from the pattern supplied by the “Washington Act”.
teenth Amendment, statesmen appointed for life. Such a situation is an anomaly in a democracy, but it is with us as large as life. Our quarrel now is not with the existence of the anomaly; our quarrel is rather with the abuse of the situation by the gentlemen of the Supreme Court. It is to be hoped that the judges in the future will become increasingly cognizant of their functions and duties as statesmen and will learn to blend the jurist’s art with the statesman’s sensitive social consciousness. Professor Hamilton sums up the situation very neatly in the following words.

"He (the jurist) cannot speak until the appropriate case comes along, he can address himself to the larger issue only so far as a suit at law allows, he must express a partial opinion and wait for a suitable occasion to continue. Even when his concern is with constitutional issues, and in granting or withholding approval to statutes he is declaring public policy, his manner of speech cannot be that of the statesman. His place is in the institution of the judiciary; he is bound by its usages and procedures; he addresses himself, not directly to a social question, but to a matter of policy translated into the language of the law; he cannot escape the values, rules, and intellectual ways of the discipline he professes. On the frontier where a changing social necessity impinges upon the established law, the jurist must possess a double competence; he must employ alike legal rule and social fact, and where they clash, as inevitably they will in a developing culture, he must effect the best reconciliation that may lie between them. The judge must become the statesman without ceasing to be the jurist; the quality of his art lies in the skill, the intelligence, and the sincerity, with which he manages to serve two masters."\

--- Walton H. Hamilton, the Jurist's Art (1931) 31 Col. Law Rev. 1073.