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THE POLITICAL PHILOSOPHY OF MR. JUSTICE HOLMES

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I

JUDGES, as a rule, must approach political problems interstitially, for they do not choose the subjects upon which they are to pronounce. It is rare, therefore, for a judge to exhibit a philosophy of politics which implies more than a series of half-conscious assumptions from which the ingenious student may hope to extract inferences of a general kind. The judge, moreover, is rarely, either by nature or training, a systematic philosopher. His life has been passed in minute attention to the particular; his practical value to the community depends at least as much upon his deliberate avoidance of the universal as upon his search for its attainment. We can hazard a view about the way in which Chief Justice Marshall or Lord Eldon, Sir Edward Coke or Mansfield would have approached the political scheme of things entire; for the circumstances of their period bound them to diverse exposition in varied fields of effort. But, for the most part, the political philosophy of judges is a series of half-articulate hints which men like Montesquieu or Bentham or Savigny must mold into a system.

To this general rule, Mr. Justice Holmes is no exception. We know, in fairly rigorous outline, the manner of his approach to political problems; but fate has made the connection between philosophic background and detailed principle inevitably fragmentary in character. The things we might wish to know, his views, for instance, upon the merits and weaknesses of democratic government, his theory of the ultimate nature of the state, his attitude as to the proper limits, if any, of collectivist action, these are not issues susceptible of exhaustive analysis from the Bench. He has had to work within the framework of

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a constitution which shaped the permissive boundaries of his possible speculations, and upon the legitimacy of statutes of which the social desirability was, for the most part, beyond his competence as a judge. And the attempt to construct a general framework is, in his case, the more difficult because his work has been singularly free from the habit, not uncommon among his colleagues of the last half century, of erecting private prejudice into legal principle. His decisions probably contain fewer *obiter dicta* which seek a definite measure of the expediency of legislation than those of any judge of the Supreme Court in modern times. With a self-abnegation which is remarkable, he has used the principles of the American Constitution as a method of analysis and not a scale of judgment, a pathway to, not a barrier against, an end which must remain permanently undefined.

Nor is this all. It is an essential characteristic of Mr. Justice Holmes' judicial work that it is inherently sceptical and relativist in temper. In a sense, perhaps, the category of time has been for him the penumbra which gives validity to all exercise of judgment. Nothing in his decisions exhibits the confident dogmatism of Field or Brewer or Peckham. He has been much more concerned with the ways of attaining ends than with the ends themselves. Himself a consistent experimentalist in outlook, he has not conceived that the Constitution debars men from attempting experiments which he himself has obviously thought dubious or unwise. He has always had a profound sense of the possible varieties of social opinion, the uncertainty, accordingly, whether any or all of them are finally adequate; and this has meant, for him, a view of the judicial function which limits its competence to checking obvious infractions of fundamental rules, instead of so extending it as to make the judiciary the ultimate arbiter of the national destiny.

Yet, back of it all, there has lain a fairly consistent vision. The analyst cannot pin him down to a detailed code of beliefs; but he can at least exhibit the temper in which he has approached their making. He can see, above all, the influence upon him of that historical school of thought in which he has himself been so eminent a figure; with the interesting difference that whereas, with all save Maitland, historical learning has tended to make most lawyers conservative and averse from deliberate experiment, with Mr. Justice Holmes awareness of the inevitability of change has made him accept the innovation of others, even where he has doubted its wisdom, as part of the necessary social process. It has made him, in a word, the spectator of law in a sense that has enabled him to see, as few judges have seen, what Montesquieu really meant by his definition of its substance. There has thus entered into him something of that power to see things *sub specie aeternitatis* which mainly assures the power to

make a permanent contribution to the development of political thought.

II

The keynote of Mr. Justice Holmes' political outlook is a rejection of absolutist concepts. All principles are true in merely a relative way. The individual is not a subject of rights which the state is not entitled to invade. Men are social animals; and what they are entitled to do is a matter of degree, born of experience in some particular time and place. Man may be an end to himself; to society, he is but a means likely enough to be used for purposes he may passionately deny. We are not entitled to formulae of any kind for the simple reason that the things we cannot help believing to be true are not necessarily the inescapable laws of the universe. Our code of behavior, for him, is simply "a body of imperfect social generalizations expressed in terms of emotion," adequate only as they are capable of quantitative tactical confirmation.[1] There is never in any society a single body of agreed desires, but always conflicting purposes usually attainable only by inconsistent means. At the bottom of social life there lies always this inescapable battle of human wills; and the decision is reached by the power which one set of men uses to vindicate its superiority over another set. There is, in short, in Mr. Justice Holmes a Spinoza proclaiming that might gives to right its letters of credit; and that realism refuses the admission of ultimates as attainable in political philosophy.

So he rejects the idea of natural law.[2] It is no more than man's restless craving for the superlative, and, at bottom, it means no more than the system which has become so fully a part of our intellectual climate that we cannot work our institutions successfully except upon its assumptions. And with the idea of natural law there goes also the idea of rights which, a little scornfully perhaps, he has defined as the "hypostasis of a prophecy." Rights, for him, are claims of which the validity is proved by their capacity to realize themselves. They state our desires; they leave behind them no more than what he has called "the fighting will of the subject to maintain them."[3] He rejects, accordingly, any attempt at *a priorism*. Rights are not the postulates of a pre-existing framework within which law must work. They are the product of law, maintained as the possession of citizens because that part of the community which has the power to maintain them is prepared to fight to that end. Law, therefore, becomes the expression of the will of the strong-

[1] HOLMES, COLLECTED LEGAL PAPERS (1921) 306.
[2] *Ibid.* 310 ff.
[3] *Ibid.* 313.

er part of society; and the state is the organization of the institutions which give form and coherence to the expression so maintained.

It is, in part, the creed of a soldier, and, in part, also, the realism of one who feels intensely the limits of human knowledge. What he has called the cosmic plan of campaign remains for him unrevealed. All we can do in matters of social constitution is to seek the realization of our desires. If we are wise, we shall scrutinise the facts about us and seek so to adjust our will as to make it accord with the possible; "personally," he has written, "I like to know what the bill is going to be before I order a luxury."[4] To feel it possible that one may be wrong; to doubt the wisdom of all panaceas; to subject the claim of the individual to the inevitable criterion of social welfare; to recognize how inescapably one's ideals are bound up with a finite system of experience, how little, therefore, they are entitled to pose as universal; to interpret the historic process as the outcome, not of a victory for necessary truth, but as the record of what men were prepared to die for rather than surrender; these are the contours of Mr. Justice Holmes' political faith. It is, in a sense, a Stoic's philosophy, a refusal to accept optimistic illusion as against the sense of the facts that *die Weltgeschichte* has indeed been *das Weltgericht.* There is, too, a certain note of sadness in it, as in all Stoic philosophy. But, with him, as with Spinoza once more, the sadness is modified by its permeation with the sense that what men claim carries with it a contingent validity by the fact that it is already a claim. For those who become, by their demands, the plaintiffs against tradition may start as a minority. They yet work in the prospect that the force of the future may be on their side.

That attitude is the root of what has not seldom been interpreted as Mr. Justice Holmes' radicalism. In truth, the interpretation is a wholly mistaken one. A famous speech makes it evident that the basis of his economic faith would have been rejected neither by Adam Smith nor Ricardo; that, where property is concerned, he is satisfied to consider wise administration as the justification of ownership.[5] What has been called his radicalism is, in fact, no more than the inevitable result of his sceptical outlook. To regard tradition as invariably upon the defense is necessarily to allow the other man the maximum opportunity to discard its teaching. Within, therefore, the limits that the preservation of order permits, he has not been willing to deny effort of which he disapproved.

This explains his liberalism in relation to tenets which his more conservative colleagues have rejected. It explains, for ex-

[4] *Ibid.* 307.

[5] *Ibid.* 279 ff.

ample, the famous dissent in the *Abrams* case;[6] that is not, as has often been supposed, the consecration of freedom of speech, but the announcement that in his judgment for Mr. Abrams to differ from the government of the United States was not a direct incitement to immediate disorder. It explains, again, a view he has often taken, as in *Lochner v. New York*,[7] of the limits to social experiment. If, he says in effect, a body of my fellow-countrymen choose to take the view that certain legislation is wise, their failure to conform to previous canons of wisdom does not inherently upset their right to their opinion. The test of legitimate purpose in state-action is not the wisdom of our ancestors, but whether reasonable men could, upon the facts before them, have drawn the inferences which a particular legislature has chosen to draw. Here, once more, the very foundation of his outlook is the vivid sense of the relativity of tradition.

It is almost inherent in this philosophy that Mr. Justice Holmes should have been the forerunner of the sociological interpretation of law. He sees law, no doubt, as the sovereign's fiat, valid, in essence, because the authority of the state will go to its enforcement. He states it, also, in terms of an irresponsible and unlimited will such as Hobbes himself would have strongly approved.[8] But he sees always behind the act of sovereignty that mysterious congeries of impalpable forces which made John Chapman Gray say in despair that the real rulers of a society are undiscoverable.[9] It is this, also, which makes him separate with some sharpness law and morals.[10] Law is simply the body of rules of behavior which a particular society at a particular time is prepared to enforce. To say that they are right means for him only that the particular society is at that particular time prepared to enforce them. The content of its will is always born of a special experience which circumstances may change.

And this, again, has made him wary of exaggerating the place of logic in social arrangements. Many years before Professor Graham Wallas had written his epoch-making *Human Nature in Politics*, Mr. Justice Holmes, in a classic paper,[11] had written with brilliant insight into what he called "the fallacy of logical form." He had seen for how much tradition and imitation count in our acceptance of rules of which the substance has long since been obsolete. He had refused to agree that "a given system . . . can be worked out like mathematics from some gen-

[6] Abrams v. United States, 250 U. S. 616, 40 Sup. Ct. 17 (1919).
[7] 198 U. S. 45, 25 Sup. Ct. 539 (1905).
[8] Kawananakoa v. Polyblank, 205 U. S. 349, 27 Sup. Ct. 526 (1907).
[9] GRAY, THE NATURE AND SOURCES OF THE LAW (2d ed. 1921) 77.
[10] HOLMES, COLLECTED LEGAL PAPERS (1921) 179.
[11] *"The Path of the Law," ibid.* 167.

eral maxims of conduct." [12] The facts count; and the facts are aggregate experience and the relative power behind its different elements can alone determine which group of them will prevail. This, once more, has led him to see how much the driving power of emotion counts in the shaping of social forces; and I should not, I think, unduly misrepresent his view of social good if I defined it, in William James' phrase, as the response to demand on the largest possible scale. The Spinoza in him makes him admit that it is good for a man to get what he wants if, other things being equal, he is successful in its attainment. That is why he has described the justification of a statute as consisting "in some help which the law brings towards reaching a social end which the governing power of the community has made up its mind that it wants." [13]

That last sentence is, perhaps, the key to the whole political outlook of Mr. Justice Holmes. For him, as for Spinoza, the right of a government over its subjects is in reality its power to command their obedience. He does not postulate ideal rights; he infers actual rights from the empirical behavior of men. He states Spinoza's theory in fairly unqualified terms, and then, like Spinoza himself, sets out the grim qualifications of fact to which its actual exercise is subject in daily life.[14] He would, I think, echo Spinoza's famous remark that "freedom and strength of mind are virtues in private men, but the virtue of governments is safety." For that reason, also, the psychology which underlies his principles is, as is essential to the judge's task, a human nature as the courts encounter it in the system that he knows, rather than one as it might be upon different assumptions of social value. He has a profound sense both of the variety of human wants, and the scarcity which characterizes our power to satisfy them; from this is born his constant insistence upon conflict as the root of social change. And he infers from that conflict the need of law to regulate the expression of will in terms of principle—the impossibility, therefore, of more than a limited freedom for the citizen. He would add, I think, with Spinoza, that the reasonableness of a state is the measure of its strength, and that reasonableness is, for the most part, the outcome of a government's willingness to show in its activities a decent respect for the public opinion of its citizens.[15]

It is this latter attitude which forms the basis for much of his supposed radicalism. He may admit that, logically, the sovereign can do no wrong simply because it is the sovereign; but he

[12] *Ibid.* 180.

[13] *Ibid.* 225.

[14] Kawananakoa v. Polyblank, *supra* note 8. *Cf.* 3 SPINOZA, TRACTATUS POLITICUS 5-9.

[15] SPINOZA, *op. cit. supra* note 14, at 7.

is too impressed by the fallibility of its human agents not to acquiesce in limitations in practice upon its power. He has insisted therefore on the value of those safeguards which, collectively, we call freedom; and he has been at pains to magnify the prospect of their maintenance. A constant faith that the other man may be right has made him vigilant about autocratic pretension; and this has made him seek ways of attaining that maximum self-expression in the citizen which is consistent with the maintenance of order. Clearly enough, he dislikes extremism, partly because he distrusts all certitude, and partly because his sense of history makes him think it wise to acquiesce in any government which is tolerably well administered. Once more, I believe, it is the ideal Spinoza envisaged; and one can assume that he would echo the famous words of the fifth chapter of the *Tractatus* where the great Dutch thinker tells us that "a government is best under which men lead a peaceable life, by which I mean that life of man which consisteth not only in the circulation of the blood and other properties common to all animals, but whose chief part is reason and the true life and excellence of the mind." [16]

III

So much in general background. Upon the peculiar problems of American politics, a foreigner must summarize with trepidation; [17] nor can he venture to concern himself with niceties of technical detail. Any general survey of Mr. Justice Holmes' work upon the Supreme Court, I think, must begin by noting the realism of his approach. He has sought to interpret the Constitution not as a framework of immutable doctrine which scrutinizes with jealousy all social innovation, but as a system of limits capable of expansion in terms of new experience. It is, as I have noted, the outcome of a sense that, in politics, the category of time is all-important; "history," he has written, "sets us free and enables us to make up our minds dispassionately whether the survival we are enforcing answers any new purpose when it has ceased to answer the old." [18] Because of this, also, he has been what may be termed a liberal constructionist; whether it is congressional or state legislation that he is considering, his effort has been to find room for the expression of a power unless it runs decisively against the obvious intent of the supreme instrument. The result, for him, has been a

[16] *Cf.* HOLMES, COLLECTED LEGAL PAPERS (1921) 246, 251, 296, 305, etc.

[17] I draw attention to Professor Frankfurter's well-known article, *Mr. Justice Holmes and the Constitution* (1927) 41 HARV. L. REV. 121, for an admirable approach to this aspect.

[18] HOLMES, COLLECTED LEGAL PAPERS (1921) 225.

conscious effort to limit, where possible, the competence of the Bench to substitute judicial for legislative view of desirable policy. All experiment seems to him legitimate that is not clearly forbidden.

Illustrations of this attitude abound. The American Constitution is, for him, federal in that special sense which does not deny the luxury of dubious experiment to the constituent parts. *Noble State Bank v. Haskell* [19] is an admirable warning against the temptation to centralize control in the interests of superior knowledge. So, also, the classical dissents in the *Lochner* [20] and *Adair* [21] cases are a memorable insistence on the right of social experiment wherever the weight of evidence would justify the holding of a particular view by a reasonable man. Neither the Fifth nor the Fourteenth Amendment constitute for him the consecration of a particular economic theory; they are not a gate but a road. "A constitution," he wrote in the former case, " . . . is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." So liberty of contract cannot be held to exclude the establishment by congress of a minimum wage for women,[22] or of the regulation of the hours of labor,[23] or of the prohibition against dismissal of men because they are members of a labor union.[24] He has insisted that the Constitution is always perverted when it limits the victory of a dominant opinion for whose sanity a solid body of evidence may be arrayed in proof.

And as with the power of the states, so, also, with the authority of Congress. Granted that the Supreme Court was intended to pass upon the constitutionality of federal legislation, "I suppose that we all agree that to do so is the gravest and most delicate duty that this Court is called upon to perform." [25] It is legitimate, for example, for Congress to prohibit the movement in interstate commerce of goods manufactured by child labor; the power to regulate may reasonably include even an indirect power to prohibit that of which the direct control has been given to the states.[26] And he has so interpreted congressional power as to argue that it is the business of the Court, if it rea-

[19] 219 U. S. 104, 31 Sup. Ct. 186 (1911).

[20] Lochner v. New York, *supra* note 7.

[21] Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277 (1908).

[22] Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394 (1923).

[23] Lochner v. New York, *supra* note 7; and *cf.* Ellis v. United States, 206 U. S. 246, 27 Sup. Ct. 600 (1907).

[24] Coppage v. Kansas, 236 U. S. 1, 35 Sup. Ct. 240 (1915).

[25] Blodgett v. Holden, 275 U. S. 142, 147, 48 Sup. Ct. 105, 107 (1927).

[26] Hammer v. Dagenhart, 247 U. S. 251, 277, 38 Supt. Ct. 529, 533 (1918).

sonably can, so to interpret the statute as to save the Act, an attitude of which his dissent in the *Employers' Liability Cases* [27] is a good example. Nor is this all. He is not prepared to force upon Congress the duty of a mechanical uniformity in its legislation unless, as in the eighth section of the first Article of the Constitution, uniformity is specifically enjoined; "I cannot doubt," he has written, "that in matters with which Congress is empowered to deal it may make different arrangements for widely different localities with perhaps widely different needs." [28]

On all this, and its implication, I venture with temerity to make one comment. It seems to me that Mr. Justice Holmes way of approaching the nature of American federalism has enabled him to render to its interpretation a service comparable in magnitude with that of Marshall over a century ago. Exactly as the latter preserved the Constitution from the vice of a narrow particularism, so Mr. Justice Holmes has saved it from becoming the prisoner of a narrow individualism. He has done so by recognizing that what he has called the "inarticulate major premise" [29] of the judge is not entitled to set limits to possible and reasonable conceptions of social welfare. Again a foreigner must speak with hesitation; but I hazard the judgment that, in this regard, his opinions have been a major factor in the last generation in maintaining popular respect for the Supreme Court at a high level.

One foundation for this attitude lies, I think, in his conception of the nature of judicial power. American judges have too often taken the theory of the separation of powers as though by some divine prescription it enabled the Bench to declare the law without making it. Mr. Justice Holmes has seen deeper. "I recognize without hesitation," he has written, "that judges do and must legislate." [30] But, because the legislative aspect of their task is "confined from molar to molecular motions," they are not entitled to replace legislative decision by their own. The legislature is not to be hampered by judicial control unless the limitation proceeds from the plain words of the Constitution.[31] Indeed, so far is he prepared to go in this view that, as far as Congressional legislation is concerned, he has declared his doubt whether "the United States would come to an end" if the judicial

[27] 207 U. S. 463, 541, 28 Sup. Ct. 141, 163 (1908); *cf.* the explicit declaration of this view in Tyson v. Banton, 273 U. S. 418, 47 Sup. Ct. 426 (1927).

[28] Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 169, 40 Sup. Ct. 438, 443 (1920).

[29] In the Lochner case, *supra* note 7.

[30] Southern Pacific v. Jensen, 244 U. S. 205, 221, 37 Sup. Ct. 524, 530 (1917); *cf.* Springer v. Government of Philippines, 277 U. S. 189, 209, 48 Sup. Ct. 480, 485 (1928).

[31] Louisville & Nashville R. R. v. Barber Asphalt Paving Co., 197 U. S. 430, 25 Sup. Ct. 466 (1905).

veto were abolished.[32] He has been deeply concerned by legal ignorance of political economy, and the tendency of some courts to read into Constitutions "acceptance of the economic doctrines which prevailed about fifty years ago, and a wholesale prohibition of what a tribunal of lawyers does not think about right." [33] So he has preached to his judicial brethren what may perhaps be best termed the duty of intellectual humility, the obligation not to identify constitutionalism with social theories which happen to coincide with their own scheme of preferences. And it is worth while pointing out that this realist view of the judicial function is perhaps more true to what the theory of the separation of powers was in fact intended to secure than others which are less candid in their insight. For, the court whose prohibitions control the acts of a legislature accumulates in its hands those varied powers which Madison insisted became the very definition of tyranny.

What I have called his intellectual humility can be shown in many ways. It lies at the base of his conception of the police power, particularly in its relation to the Fourteenth Amendment. "There is nothing I more deprecate," he has said, "than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect." [34] It is seen, again, in his continuous effort towards a quantitative approach to the limitations imposed by the Constitution. We are not to search for mathematical precision in these matters; the lines of politics, as Burke said, are broad and deep as well as long.[35]

A word is necessary upon the manner in which Mr. Justice Holmes has approached the interpretation of the Bill of Rights under the Constitution. Again, his method of analysis has been quantitative in character. He has refused to regard it as a list of absolute prohibitions. Membership in the state, for him, involves the surrender of the absolute in politics. For, in the first place, extraordinary situations may demand extraordinary remedies; "when it comes," he has written, "to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution

[32] HOLMES, COLLECTED LEGAL PAPERS (1921) 295.

[33] *Ibid.* 184.

[34] Truax v. Corrigan, 257 U. S. 312, 344, 42 Sup. Ct. 124, 134 (1921).

[35] *Cf., e.g.*, Weaver v. Palmer Bros., 270 U. S. 402, 415, 46 Sup. Ct. 320, 323 (1926); Frost & Frost v. Railroad Commission of California, 271 U. S. 583, 600, 46 Sup. Ct. 605, 609 (1926). It is a constantly recurring idea.

of executive process for judicial process."[36] And, in the second, the exercise of any right is always subject to the limitation that it shall not provoke those circumstances out of which an immediate and direct threat to public safety may arise; "the most stringent protection of free speech," he has argued, "would not protect a man in falsely shouting fire in a theatre and causing a panic." [37] But, subject to such margins, Mr. Justice Holmes has always favored, as the very notable dissent in the *Abrams* case [38] makes plain, a narrow construction of safeguards intended to protect the interests of personality in their civic expression. For, as he has said, though persecution for opinion may be logical, "the best test of truth is the power of the thought to get itself accepted in the competition of the market." [39] So, also, he has argued against any broad interpretation of the Postmaster-General's authority to control the freedom of the press by the refusal of the mailing privilege.[40] So, once more, in the *Frank* case, he could not concur in the denial of a fair trial even when the forms of jury procedure had been superficially satisfied.[41]

In this realm, I think, there is a marked resemblance between the ideas of Bentham and those of Mr. Justice Holmes.[42] For both, the need for security is paramount; and the enjoyment of individual rights is secondary in every case to that major end. But, with him as with Bentham, once the major end is safe, the protection of the individual from arbitrary control is a sacred obligation. Rights may be born of the law; but their plain intent is to curb the authority of government, and it is therefore peculiarly incumbent upon the judiciary to watch with special care their active exercise.

One final aspect of his attitude may be noticed. I have already observed that in matters of economic constitution the leanings of Mr. Justice Holmes are towards the classic doctrines of the nineteenth century; some, indeed, of his pronouncements upon socialism have about them a note of acid scorn.[43] But that has not meant with him, as it has not seldom meant in decisions of the Supreme Court, an effort to exalt the rights of property into a place of special privilege in the state. So long as a government treats the owner of an acquired title with fairness, he

[36] Moyer v. Peabody, 212 U. S. 78, 85, 29 Sup. Ct. 235, 237 (1909).

[37] Schenck v. United States, 249 U. S. 47, 54, 39 Sup. Ct. 247, 249 (1919).

[38] Abrams v. United States, *supra* note 6.

[39] *Ibid.* 630, 40 Sup. Ct. at 22.

[40] United States v. Burleson, 255 U. S. 407, 436, 41 Sup. Ct. 352, 363 (1921).

[41] Frank v. Magnum, 237 U. S. 309, 345, 35 Sup. Ct. 582, 594 (1915).

[42] *Cf.* BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION (Oxford ed. 1907) 224 and n.1.

[43] HOLMES, COLLECTED LEGAL PAPERS (1921) 279, 306.

is "infected with the original weakness of dependence upon the will of the state."[44] It is impossible to hold that "all property owners in a State have a vested right that no general proposition of law shall be reversed, changed or modified by the courts if the consequence to them will be more or less pecuniary loss." [45] A state cannot be prevented from discouraging particular forms of economic activity by special methods of taxation.[46] Property may not be taken without compensation, "but with the help of a phrase, (the police power) some property may be taken or destroyed for public use without paying for it, if you do not take too much. When we come to the fundamental distinctions, it is still more obvious that they must be received with a certain latitude or our government could not go on." [47] He has protested on many occasions against an effort to make the Fourteenth Amendment a method for specially protecting the rights of property by reading into it a "delusive exactness" which is, in sober fact, contrary to its nature. "By calling a business 'property,' " he has urged, "you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed. . . . It is a course of conduct and like other conduct, is subject to substantial modification according to time and circumstances both in itself and in regard to what shall justify doing it a harm. . . . Legislation may begin where an evil begins." [48]

The last sentence is the key to the whole. The inherent power of the state to meet its problems as they may arise is, for him, the unassailable and primordial postulate of political science. To that end it possesses sovereignty; and the limitations upon the exercise of its power are, in his conception, what may be termed limitations of manner rather than of substance. Judicial prohibitions, therefore, must be aimed not at the object sought for, but at the way in which the object is sought. Admittedly, manner and substance shade off inextricably the one into the other; "the great ordinances of the Constitution do not establish and divide fields of black and white." [49] But it is in the recognition that mathematical exactitude is not attainable in social legislation, that, accordingly, unless the individual right is gravely invaded the social interest must prevail, that

[44] Western Union v. Kansas, 216 U. S. 1, 55 30 Sup. Ct. 190, 209 (1910).

[45] Muhlker v. New York & Harlem R. R., 197 U. S. 544, 574, 25 Sup. Ct. 522, 529 (1905).

[46] Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 403, 48 Sup. Ct. 553, 555 (1928).

[47] Springer v. Government of Philippine Islands, *supra* note 30, at 210, 48 Sup. Ct. at 485.

[48] Truax v. Corrigan, *supra* note 34, at 342, 42 Sup. Ct. at 133.

[49] Springer v. Government of Philippine Islands, *supra* note 30 at 209, 48 Sup. Ct. at 485.

the criterion of constitutionality must be found. It is difficult not to feel that Mr. Justice Holmes' long emphasis upon this attitude has humanized the jurisprudence of the United States.

IV

In the proud preface to Montesquieu's last work there are certain words than which none are more fitting to Mr. Justice Holmes' labors. "When I have seen," wrote Montesquieu, "what so many great men in France, England and Germany have written before me, I have been lost in admiration, but without losing my courage; I, too, am a painter, I have said with Correggio." That, as I think, has been the secret of Mr. Justice Holmes' preeminence in his time. It is not only that he has had the scholar's breadth of knowledge. It is not merely, either, that he has realized how the facts call the judge, and especially, perhaps, the American judge, to the tasks of statesmanship. Both these qualities he has had in full measure. But, above all, he has had the great artist's power of penetrating with the vision of genius to the essential, of making the bridge between the little fact of daily life and the sweeping generalization by which a state rises to the consciousness of its purpose. He has done it with singular felicity of expression, and with unvarying integrity of mind. We can only be humbly grateful in the presence of so rare and so distinguished an achievement.