

## THE JURIST'S ART

*Ex facto jus oritur. That ancient rule must prevail in order that we may have a system of living law.*  
—Mr. Justice Brandeis<sup>1</sup>

### I

If jurists have the feelings of other men, Monday, the fifth of January, nineteen hundred and thirty-one, must have been a day of consequence in the life of Mr. Justice Brandeis. On that day he handed down the judgment of the United States Supreme Court in the *O'Gorman* case.<sup>2</sup> The cause was a simple suit in contract; the result depended upon the validity of a New Jersey statute regulating the commissions to be paid by insurance companies to their agents for securing business. The more general question was the tolerance to be accorded to legislative price-fixing under the Fourteenth Amendment. And, as the fortunes of litigation broke, the issue came to be the intellectual procedure by which the constitutionality of the acts which make up the public control of business are to be determined. Upon that day the views of Brandeis became "the opinion of the court," and a new chapter in judicial history began to be written.

The judgment was clearly an act of deliberation. In a test suit the statute had been found valid by the Court of Errors and Appeals of New Jersey.<sup>3</sup> It had been argued before the United States Supreme Court; restored to the docket for reargument, probably because a bench of eight had divided evenly;<sup>4</sup> and, after reargument, found valid by a bare majority of one. The dissent found an unique expression in "a separate opinion" which bears the names of four of the justices;<sup>5</sup> they insisted that the decision overlooked the established presumption in favor of freedom of contract, that it went against compelling precedents, that "the restrictions were novel" and lacked "the sanction of general assent and practical experience," and that the statute was "arbitrary, unreasonable, and beyond the power of the legislature." The language of

<sup>1</sup> Dissenting, in *Adams v. Tanner*, 244 U. S. 590, 600, 37 Sup. Ct. 662, 666 (1916).

<sup>2</sup> *O'Gorman and Young v. Hartford Insurance Co.*, 282 U. S. 251, 51 Sup. Ct. 130 (1931).

<sup>3</sup> 105 N. J. Law 642, 146 Atl. 370 (1929).

<sup>4</sup> At the time of the original argument, April 30, 1930, the vacancy caused by the death of Mr. Justice Sanford on March 8, had not yet been filled.

<sup>5</sup> The usual practice is for the dissenting justice to read his own opinion and to announce the names of the justices who concur. The unusual resort of the four dissenting justices to a joint opinion attests the keen appreciation of the importance of the constitutional principle at stake. It is of note that although Mr. Justice Van Devanter's name appears first, it was Mr. Justice McReynolds who in court announced the opinion of the dissenters.

the official opinion bears every evidence of a studied statement, subjected to close scrutiny, and carefully worded to express the views of the majority of the court.

In form "the opinion of the court" is a very simple and unpretentious document. It begins with a statement of the issue and a history of the case, continues with a brief summary of the reasons for the statute and a statement that "the business of insurance is so affected with a public interest that the state may regulate the rates," and concludes with a declaration of the test for validity. As "underlying questions of fact may condition the constitutionality of legislation of this character," it follows that "the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute." It did not appear "upon the face of the statute, or from any facts of which the court must take judicial notice" that in New Jersey "evils did not exist," for which the statute was "an appropriate remedy." Accordingly the court was compelled to declare the statute valid; in fact it was left with no alternative.

Yet the simple lines of a short opinion present a superb example of the jurist's art. The catalogue of precedents is left to the dissent; the technique of distinction would do no more than serve the current need. There is no attempt to make out a case; an elaborate argument, concerned with the insurance business, filled with citations, and buttressed in footnotes would save a single statute. The demand is to find an escape from the recent holdings<sup>6</sup> predicated upon "freedom of contract" as "the rule," from which a departure is to be allowed only in exceptional cases.<sup>7</sup> The occasion calls not for the deft use of tactics, but for a larger strategy. The device of presumption is almost as old as law; Brandeis revives the presumption that acts of a state legislature are valid and applies it to statutes regulating business activity. The factual brief has many times been employed to make a case for social legislation; Brandeis demands of the opponents of legislative acts a recitation of fact showing that the evil did not exist or that the remedy was inappropriate. He appeals from precedents to more venerable precedents;<sup>8</sup> reverses the rules of presumption and proof in cases involving

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<sup>6</sup> See especially *Tyson v. Banton*, 273 U. S. 418, 47 Sup. Ct. 426 (1927); *Ribnik v. McBride*, 277 U. S. 350, 48 Sup. Ct. 545 (1928); *Williams v. Standard Oil Co.*, 278 U. S. 235, 49 Sup. Ct. 115 (1929).

<sup>7</sup> *Adkins v. Children's Hospital*, 261 U. S. 525, 546, 43 Sup. Ct. 394, 397 (1923).

<sup>8</sup> Brandeis has, to serve judicial necessity, remade an old device. His presumption, rebuttable only by a recitation of fact, is a compound of the older presumption of constitutionality and Holmes' formula "It is not unconstitutional." The use of the double negative may logically add nothing; but it has a high rhetorical value, and has come to furnish a basis for an ingenious procedural device.

the control of industry; and sets up a realistic test of constitutionality. It is all done with such legal verisimilitude that a discussion of particular cases is unnecessary; it all seems obvious—once Brandeis has shown how the trick is done.<sup>9</sup> It is attended with so little of a fanfare of judicial trumpets that it might have passed almost unnoticed,<sup>10</sup> save for the dissenters, who usurp the office of the chorus in a Greek tragedy and comment upon the action.<sup>11</sup> Yet an argument which degrades "freedom of contract" to a constitutional doctrine of the second magnitude is compressed into a single compelling paragraph.

This judgment is a single specimen from the workshop of a distinguished jurist. In form it is not cut to a pattern; the opinions are suited to the variable task and the changing occasion. In spirit it is representative; the techniques which are law are given employment in the service of judicial statesmanship.

## II

In justice, as in every craft, the creative artist leaves his distinctive mark upon his work. The critic of art can distinguish the paintings of Raphael and Michelangelo; the musician, even at a first hearing, can separate the compositions of Mozart and Beethoven, Debussy and Stravinsky. The student of letters needs only brief excerpts to discover the characteristics which set Scott off from Fielding, Dickens from Thackeray, and Thomas Hardy from Edith Wharton. In law, even when rules are compelling and cases come along in dull monotony, the manner of the judge appears in the interstices of opinion. In constitutional decision, law encounters the problems of a culture in the making and its path must be broken; judges must find their ways as best they

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<sup>9</sup> Of late there has been much debate over how the Court, if it were minded to declare a minimum wage act valid, could distinguish the Adkins case. The device employed here by Brandeis would make such distinction unnecessary. Whether it was intention or accident, the Court in *Abie State Bank v. Bryan*, 282 U. S. 765, 51 Sup. Ct. 252 (1931), and *Missouri Pacific Railroad Co. v. Norwood*, 283 U. S. 249, 51 Sup. Ct. 458 (1931), has established an adequate legal foundation for such a decision. See pp. 1078, 1079, 1080 *et seq.* below, and compare (1931) 40 YALE L. J. 1101.

<sup>10</sup> In view of the evidence of the importance which the court attached to it, it is surprising that the case has provoked very little comment.

<sup>11</sup> The headnote, number 2, in the official report, *O'Gorman and Young v. Hartford Insurance Co.*, *supra* note 2, at 252, 51 Sup. Ct. 130 is an interesting side light: "A state statute, dealing with a subject clearly within the police power, cannot be declared void upon the ground that the specific method of regulation prescribed by it is unreasonable, in the absence of any factual foundation in the record to overcome the presumption of constitutionality." The whole matter, of course, has to do with the technique by which the court determines what lies within, and what without, the police power. In this case five justices found the subject "clearly within the police power," and four discovered it to be as clearly without. The headnotes are submitted to the justices before publication; how much scrutiny this paragraph had it is impossible to say.

can, through tangles of imperfectly understood situations, past the conflict of values which cannot be resolved, to answers which will do. The jurist, even as the spokesman for a court, cannot escape from being himself.

The annals of constitutional law attest an almost infinite variety of judicial workmanship. Marshall moves along with a majestic sweep an argument which will make no compromise with the word "peradventure."<sup>12</sup> Field turns expediencies into verities and identifies his righteous convictions with the supreme law and with God's commandments.<sup>13</sup> Harlan, quite without stint, transfers to the reports all that is on his mind.<sup>14</sup> White, in interminable sentences filled with polysyllables, sweeps aside opposing argument as self-contradictory.<sup>15</sup> Moody applies a Constitution, which embodies "the spirit of the nation-builder and not the code-maker," to "the infinite variety of the changing conditions of our national life."<sup>16</sup> Stone pries critically into a concept and wonders if it is not in itself question begging.<sup>17</sup> Even Holmes and Brandeis may look upon each other's work and find it good; but their opinions come out of different workshops. It is probably the conception of law as "the law" which has thrown into obscurity the fine art of the jurist.

The art of judgment is of its own kind. Unlike the poet, the historian, or the essayist, the jurist cannot listen to the promptings of his own heart, choose the subject upon which he would write, say as he would all that is in his mind, and follow his interest to a fresh theme. Instead, as a member of a court, his decisions are a mere step in the process of disposing of litigation. He cannot speak until the appropriate cause 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

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<sup>12</sup> An engaging discussion of the rhetoric of judicial opinion is to be found in the essay which gives title to Chief Judge Cardozo's book, *LAW AND LITERATURE* (1931).

<sup>13</sup> *The Legal Tender Cases*, 12 Wallace 457 (1871), at 634.

<sup>14</sup> *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436 (1904); *Southern Pacific R. R. Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. 18 (1897).

<sup>15</sup> *United States v. Delaware and Hudson R. R. Co.*, 213 U. S. 366, 29 Sup. Ct. 527 (1909); *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311, 37 Sup. Ct. 180 (1917).

<sup>16</sup> *The Employers' Liability Cases*, 207 U. S. 463, 520-522, 28 Sup. Ct. 141, 154 (1908).

<sup>17</sup> For example see the discussion of the concept of "public interest" in *Tyson v. Banton*, *supra* note 6, at 451-452, 47 Sup. Ct. at 435.

social question, but to a matter of policy translated into the language of 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.

An art, whose concern is mediation, is evident in Mr. Justice Brandeis' judicial style. It has been deliberately contrived to serve its unique purpose. His private conversation is marked by the veiled word, the pointed thrust, the neat characterization; and he possesses a gift of happy phrasing not incomparable to Holmes. Although his early opinions hold much of literary charm,<sup>18</sup> he presently committed himself to a direct, straightforward style as the most effective judicial utterance. He aims at simplicity of statement, clarity of meaning, and persuasiveness of argument; he tries to attain these qualities without resort to colorful words or rhetorical flourish. The use of exposition to do duty as argument has an effectiveness all its own; in the *Wan* case<sup>19</sup> he employs a bare recitation of the facts to make out a convincing indictment of "the third degree" methods of the police; in the *O'Fallon* case<sup>20</sup> he challenges the rule of the cost of reproduction new in the valuation of public utilities by a mere enumeration of the practical difficulties which attend its operation. The lawyer finds his opinions written in conventional language, concerned with legal questions, and filled with citations to the reports. The layman, after penetrating the outward form, discovers the facts, problems, and arguments from the universe he knows. Yet the stuff of the world seems at home in the habitat of law; there is no intellectual fault-line between constitutional issue and social problem. Above all his writing is communication, rather than self-expression;<sup>21</sup>

<sup>18</sup> See especially *New York Central Railroad Co. v. Winfield*, 244 U. S. 147, 154, 37 Sup. Ct. 546, 549 (1917).

<sup>19</sup> *Ziang Sung Wan v. United States*, 266 U. S. 1, 45 Sup. Ct. 1 (1924).

<sup>20</sup> *St. Louis and O'Fallon Railroad Co. v. United States*, 279 U. S. 461, 488, 49 Sup. Ct. 384, 389 (1929).

<sup>21</sup> A striking contrast exists in manner of writing between Mr. Justice Holmes and Mr. Justice Brandeis. The opinions of Holmes, lifted from the reports, live; *THE DISSENTING OPINIONS OF MR. JUSTICE HOLMES* (1929), edited by Alfred Lief, have been read with enjoyment and profit by many persons who could have had but the vaguest ideas of the controversies which prompted them and the judicial issues which are their subject-matter. The opinions of Brandeis, taken from their habitat, lose much of their vitality; *THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS* (1930), edited by Alfred Lief, fails, because of the lack of setting, to reveal the strength and variety of his workmanship.

it conveys to you his meaning, rather than provides verbal receptacles for your own thought.

In the use of the tricks of the legal trade,<sup>22</sup> Mr. Justice Brandeis is a master. His skillful use of extra-legal material has somewhat obscured the fact that he is probably the best technical lawyer on his bench. There is hardly a device or usage of intellectual method or judicial procedure which he does not employ. If he is less zealous than some of his brethren in keeping unworthy causes away, he knows how, on occasion, to put his knowledge of the jurisdiction of the court to very purposive use. In an original suit the states of Ohio and Pennsylvania prayed the court for an order restraining the state of West Virginia from giving effect to a statute granting to its own citizens a priority in the use of natural gas.<sup>23</sup> The case was novel, the records barren of precedents. Brandeis feared judicial interference in a matter which might be handled more constructively by some other agency of control. So he argued<sup>24</sup> that "the bills present neither a 'case' nor a 'controversy' within the meaning of the Federal Constitution"; that, in the absence of the gas-producing companies and the consumers, "there is a fatal lack of the necessary parties," and that the court, sitting in equity, lacked the power to grant effective relief. Thus the question was shifted from the constitutionality of the statute to the validity of judicial discretion in an industrial matter. Although his view did not prevail, it was only after the raising of new issues had led to the argument of the case for the third time that the court made up its mind. Moreover, it is evident that Mr. Justice Van Devanter reformed his argument; for, point by point, "the opinion of the court" is addressed to the Brandeis dissent.

In like manner, he puts to effective use the usages of procedure. The primary question before the court is always the disposition of the case; it is only as the exigencies of litigation demand that the Constitution is expounded. A neat example of the advantage taken of a suit at law to settle a substantive question is the opinion of Brandeis in the "live-stock commission case."<sup>25</sup> In accordance with the provisions of an act of Congress, the Secretary of Agriculture had issued an order fixing the rates to be charged by "market agencies" at the Omaha stockyards, and in a test case a lower federal court had found the regulation valid. The appeal to the Supreme Court alleged a number of errors,

<sup>22</sup> "The tricks of the trade" is used, for want of a less colorful expression, to describe the devices and procedures which make up the technology of legal judgment. It is impossible for cases to be decided without impersonal formulas of decision. For that reason the reader will understand that no invidious meaning lies in the words.

<sup>23</sup> *Pennsylvania v. West Virginia*, 262 U. S. 553, 43 Sup. Ct. 658 (1923).

<sup>24</sup> *Id.*, at 605, 43 Sup. Ct. at 668.

<sup>25</sup> *Tagg Brothers and Morehead v. United States*, 280 U. S. 420, 50 Sup. Ct. 220 (1930).

relating to the process of notice, the interpretation of the statute, and its validity under the due process clause. It was easy for the bench to vote to affirm the judgment below; but the argument was hard going, for on a number of recent occasions the court had in very broad language declared price-fixing to be an improper deprivation of liberty of contract.<sup>26</sup> The difficulty was met by putting in the foreground the allegations of error and insisting that they had not been proved. The device served to relegate substantive questions to a less conspicuous place in the argument, where Brandeis by deft strokes robbed former holdings of their compulsions. Even if the logical difficulties could not be escaped, the shift from major to minor theme made the rhetorical going much easier.<sup>27</sup> The task was for Brandeis the harder because he had not concurred<sup>28</sup> in decisions which in behalf of the court he was now called upon to distinguish.<sup>29</sup> The need for such a device grows out of the conflict between the judicial theory that the decisions of a court have logical continuity and the fact that a judicial body must on occasion overrule former holdings. The need to reconcile reality with appearance is most acute when changes in personnel bring changes in policy. In law, as elsewhere, an exercise of discretion must often wear the mask of compulsion.

Quite as adroit is Brandeis' employment of the legal device, "the facts of the case." He knows that in law there is a minor as well as a major premise, that the issue turns not only upon the categories invoked but also upon the classification of the particulars. He never confuses the statement of facts and their legal connotations into a single narrative, nor does he allow preconceived judicial notions to determine what facts are relevant. In his opinions the tangles which come out of society

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<sup>26</sup> See *Wolff Packing Co. v. Industrial Court*, 262 U. S. 522, 43 Sup. Ct. 630 (1923), and cases cited in note 6, *supra*.

<sup>27</sup> In *Bunting v. Oregon*, 243 U. S. 426, 37 Sup. Ct. 435 (1917), Mr. Justice McKenna employed the same device to avoid the holding in *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539 (1905). The attorney for the plaintiff-in-error had argued that the statute, by the provision of time-and-a-half for overtime, was a regulation of wages. McKenna answered that it was only a regulation of hours, hence there was no error, hence the decision of the Oregon court was to be affirmed. His strategy makes it unnecessary to refer to the *Lochner* case and the one citation employed, to a case which has nothing to do with hours of labor, is a work of judicial supererogation.

<sup>28</sup> In *Williams v. Standard Oil Co.*, *supra* note 6, Mr. Justice Brandeis technically "concurred in the result."

<sup>29</sup> In a footnote it is perhaps permissible to set down the problem with which Brandeis was confronted in writing this opinion. He had really to meet three conditions: (1) to distinguish recent holdings adverse to price-fixing; (2) to write an argument acceptable to the majority of the court; and (3) to make the opinion as useful as possible in future cases concerned with the same issue. The conflicting demands of these values deny to the argument logical symmetry, but they give occasion for a superb display of the jurist's art. It would be interesting to know the number of drafts out of which the finished product emerged.

are fully and realistically presented before the legal issues are raised. It often happens that the student, after reading "the opinion of the court" and passing on to "Mr. Justice Brandeis, dissenting," finds himself in another intellectual world. In "the printing press case,"<sup>30</sup> which is typical, an employer is asking for an order restraining a labor organization and the affiliates from using the secondary boycott in a campaign to organize its shop. Mr. Justice Pitney, who speaks for the court, deals with the two parties as if they were strangers, regards union program and policy as irrelevant, and recognizes no motive in the activities other than the malicious injury of the employer. It is only from the dissent<sup>31</sup> that we learn that there are in the country four manufacturers of printing presses, that all save the Duplex Company are organized, that the effectiveness of the organization is threatened by the non-union shop, and that the purpose of the boycott is the preservation of the wages and working conditions of the union employees. The relevance of this single item, ignored by Pitney and put to the fore by Brandeis, is the vital point in the case; it determines whether the matter is to be approached in terms of a common-law rule surviving from the days of handicraft or as a problem of the legal limits of group activity in an industrial society. Present or withdraw this one salient fact, and the rest of the erudite and fine-spun argument, concerned with rules of law, the pertinence of precedents, the ways of interpretation, and the meaning of statutes, stands or falls. In his judicial strategy Mr. Justice Brandeis does not forget that a case may be won or lost before a legal question is ever raised.

The knack of distinction is probably the neatest trick of the jurist's trade; and Brandeis employs it in his own distinctive way. Any lawyer who knows the indices can muster precedents in imposing array; the length of his list of citations is limited only by his industry. It takes a capacity for analysis to separate holding from dicta and to limit it to its specific meaning; it requires a sense of historical reality to see that precedents are not lifted across factual and ideological gulfs to be given novel applications. The dissenting opinion of Brandeis in "the news-stealing case,"<sup>32</sup> is an elaborate exercise in the art of separating lines of decision which are only verbally alike. The Associated Press was applying for an injunction against the International News Service. The complaint was that items, copied from early morning editions of its clientele in the East, were published in the supporting Western news-

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<sup>30</sup> *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 41 Sup. Ct. 172 (1921).

<sup>31</sup> *Id.*, at 479, 41 Sup. Ct. at 181.

<sup>32</sup> *International News Service v. The Associated Press*, 248 U. S. 215, 39 Sup. Ct. 68 (1918).

papers of the rival organization. Brandeis passes in review<sup>33</sup> the several series of cases in which the courts have accorded a limited protection against disclosure or republication to common-law copyright, ticker service, and to trade secrets, and against unfair competitive practices; he shows, in each instance, the difference from the instant case in the factual situation, the interests of the parties, and the incidence of judicial interference upon the conduct of the business. There is nothing unprecedented in a court of equity doing an unprecedented thing; but the dissent robs of its foundation in formidable precedents the restraining order which the court grants, and makes it clear that a property right is being created by judicial process. Here, as in like instances,<sup>34</sup> an ordinary usage becomes an instrument of a realistic jurisprudence.

But the touch of the artist is most apparent in Mr. Justice Brandeis' creative use of judicial notice. The judgment of the court is predicated not only upon the law but also upon the matter to which it relates. The constitutionality of a statute depends upon its reasonableness, and reason invites a pragmatic test. An informed judgment awaits alike a knowledge of the conditions out of which legislation emerged and of the way in which it may be expected to operate. It was not Brandeis who first introduced realistic discussions of the matters to which statutes relate into the law reports; but he, more than any other person, has domesticated the device to judicial service. The state of Nebraska, by official act, allowed a leeway of no more than two ounces in the pound in the weight of loaves of bread; the constitutional issue of "the taking of property" and "due process of law" became the practical question of whether the technique of baking had attained such perfection as to make the tolerance sufficient.<sup>35</sup> Brandeis examined the literature of a branch of the culinary art, concluded that the restriction was justified by prevailing practice, and forced the spokesman for the court to justify his decision by a like resort to the lay word.<sup>36</sup> The state of Washington forbade private employment agencies to charge fees from employees for whom they found jobs;<sup>37</sup> Brandeis made an exhaustive study of their operation, discovered their method to be exploitative, found their function adequately performed by public agencies, and concluded that the magnitude of the evil justified the drastic remedy.<sup>38</sup> To

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<sup>33</sup> *Id.*, at 248, 39 Sup. Ct. at 75.

<sup>34</sup> A rather different, but equally realistic, example is Brandeis' distinction of *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association*, 274 U. S. 37, 56, 47 Sup. Ct. 522, 528 (1927), from *Duplex Printing Press Co. v. Deering*, *supra* note 30.

<sup>35</sup> *Jay Burns Baking Co. v. Bryan*, 264 U. S. 504, 44 Sup. Ct. 412 (1924).

<sup>36</sup> *Id.*, at 517, 44 Sup. Ct. at 415.

<sup>37</sup> *Adams v. Tanner*, *supra* note 1.

<sup>38</sup> *Id.*, at 597, 37 Sup. Ct. at 665.

the spokesman of the court this was "not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way."<sup>39</sup> A case turning upon the power of the President to remove an executive officer led him to an exhaustive research out of which emerged an historical essay upon senatorial and presidential control of federal office-holders.<sup>40</sup> The challenge, in the name of "the equal protection of the laws," of an act of Pennsylvania imposing upon the corporate operators of taxicabs taxes from which individuals were exempt led him to inquire how it had come about that privileges conferred upon chartered companies by the state had ripened into constitutional rights.<sup>41</sup> In a suit concerned with the proper valuation of a street railway property, Brandeis discovered the questionable item in the capital account, examined all the books on accounting in the Library of Congress, and wrote perhaps the best discussion of the basis of depreciation to be found in print.<sup>42</sup> Among many skills this is distinctly his—to contrive to make terms between the law and the secular subjects upon which it operates.

But a mere sample must do duty for a catalogue of the techniques with which Brandeis does his work. The lines of argument may be one or many, simple or complex; the manner, the device, the combination of skills varies from opinion to opinion.<sup>43</sup> In the southern lumber case,<sup>44</sup> he does no more than recite the conditions which attend an uncontrolled

<sup>39</sup> *Id.*, at 594, 37 Sup. Ct. at 664.

<sup>40</sup> *Myers v. United States*, 272 U. S. 52, 240, 47 Sup. Ct. 21, 66 (1926).

<sup>41</sup> *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 403, 48 Sup. Ct. 553, 555 (1928).

<sup>42</sup> *United Railways and Electric Co. of Baltimore v. West*, 280 U. S. 234, 255, 50 Sup. Ct. 123, 127 (1930).

<sup>43</sup> The text must be reserved for matters which may be documented; but surely one may employ a footnote to set down the personal conclusion that often neat bits of Brandeis' work are to be discovered in the opinions of others. In the last of the leading cases concerned with workman's compensation, *Arizona Employers' Liability Cases*, 250 U. S. 400, 39 Sup. Ct. 553 (1919), it was argued that, under the operation of competitive forces, a workman could be induced to go into a dangerous trade only by the payment of a differential in wages, and hence that an authoritative provision of work accident benefits imposed upon the employer a double payment for the risks the employee had to run. The court answered that if compensation had its separate provision, the operation of the same competitive forces, could be depended upon to remove the differential for risk from the rate of wages. In the case of *Wilson v. New*, 243 U. S. 332, 37 Sup. Ct. 298 (1917), it was argued that in the matter of wages and hours Congress had, through the Adamson Act, substituted its will for a contract between the parties. The court answered that since authority had not been invoked until after the process of bargaining had failed to lead to an agreement, there had been no replacement of private consent by public action. One of these answers-in-kind appears in an opinion by Pitney, the other in an opinion by White; yet both bear on their face the marks of a Brandeisian authorship.

<sup>44</sup> *American Column and Lumber Co. v. United States*, 257 U. S. 377, 413, 42 Sup. Ct. 114, 121 (1921).

competition in the industry, and show the need for a trade association;<sup>45</sup> in the *Di Santo* case, he is content to show the necessity for the legislative protection of immigrants against the fraud of unscrupulous sellers of steamship tickets.<sup>46</sup> On the contrary, when exigency commands, he employs an elaborate strategy. In the *Hitchman* case,<sup>47</sup> an employer prays for an injunction against the officials of a labor organization who are attempting to unionize its mine; in opposing the writ,<sup>48</sup> Brandeis examines the concepts of contract, property, and conspiracy; interprets the common-law and the anti-trust act, and inquires into the usages and limits of equitable relief. The opinion ranges from a technical examination of the meaning of "the contract," by which workingmen were bound to their employer not to affiliate with a labor union, to a realistic consideration of organization as an agency of economic security among coal miners. In the *Frost* case, he elaborates a legal discussion of a license, the privileges it confers, and the legal protection to which it is entitled; adds a financial argument that capital stock, dividends, and service to non-members cannot be used as criteria in separating business ventures from mutual benefit societies; and employs the whole complex dialectic to refute the argument that the granting of permits to gin cotton to private corporations and to farmers' cooperatives upon different terms is a denial of "the equal protection of the laws."<sup>49</sup> But no enumeration of its elements can reveal a way of work. As with all creative effort, it is not the device, but the skilled use of the device, not the procedure, but the procedure suited to the occasion, which reveals the craftsman. The workmanship of Brandeis, to be appreciated, must be studied in its native habitat—the reports.

For the key to the judicial technique of Mr. Justice Brandeis is not far to seek. In ordinary cases his mind moves along with the decorous processes of law; in great constitutional questions, where the words of a document must be adapted to the changing circumstances of society, the supreme question is what difference it makes whether the decision goes the one way or the other. He knows that usages

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<sup>45</sup> An interesting contrast between the factual method of Brandeis and the philosophic approach of Holmes is afforded by their dissents in this case. As against Brandeis' detailed presentation of the practical operation of the "Open Competitive Plan," is to be set Holmes' presumption, "I should have supposed that the Sherman Act did not set itself against knowledge. . . . I should have thought that the ideal of commerce was an intelligent interchange made with full knowledge of the facts as a basis for a forecast of the future on both sides." *Id.*, at 412, 42 Sup. Ct. at 121.

<sup>46</sup> *Di Santo v. Pennsylvania*, 273 U. S. 34, 37, 47 Sup. Ct. 267, 268 (1927).

<sup>47</sup> *Hitchman Coal and Coke Co. v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65 (1917).

<sup>48</sup> *Id.*, at 263, 38 Sup. Ct. at 76.

<sup>49</sup> *Frost v. Corporation Commission of Oklahoma*, 278 U. S. 515, 528, 49 Sup. Ct. 235, 240 (1929).

employed in the process of judgment are inventions contrived to serve the ends of justice; he regards them as instruments to be employed, rather than compulsions to be obeyed; and as conditions change and common sense gives way to its better, he would keep them alive by fresh contact with reality. To him the great constitutional doctrines are formulas; and, as cause follows cause, their antithetical terms of public welfare and private inconvenience must be given weights from the stuff of life before a balance can be struck. Here rule and concept, fact and precedent, are to him henchmen who serve the greater and more enduring values of jurisprudence. In Brandeis' opinions one must look beyond the deft employment of the tricks of the jurist's trade for the secret of their use.

### III

In the art of the jurist the thought and its words, the substance and its form, the man and the justice, are inseparable. The lines and the larger meaning of the Constitution abide; but, as bench succeeds bench with the passing years, different winds of doctrine blow through its classic phrases. The how and the why in the opinions of Bradley and Waite, of Brewer and Gray, of McKenna and Pitney run back of judicial utterance to ways of thought which they shared with the laity. Although he is intellectually aware and the most self-restrained of judges, the universe of ideas which lives in Mr. Justice Holmes' head is an essential ingredient in his constitutional law. The very conception of the instrumental character of the mechanism of justice makes the intellectual views of the man dominant in the opinions of Mr. Justice Brandeis.

At the very heart of his juristic theory lies the idea of the worth of the individual. The spirit of the Constitution is to be found in the amendments which make up the Bill of Rights. Its makers "recognized the significance of man's spiritual nature," "sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations," and thus "undertook to secure conditions favorable to the pursuit of happiness."<sup>50</sup> In a democracy "harmony in national life is a resultant of the struggle between contending forces"; for that reason "the full and free exercise" by the citizen of the right to speak or write about public affairs is a duty; and "in the frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action."<sup>51</sup> In economic matters he recognizes "the fundamental right of free men to strive for better conditions through new legislation and

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<sup>50</sup> *Olmstead v. United States*, 277 U. S. 438, 478, 48 Sup. Ct. 564, 572 (1928).

<sup>51</sup> *Gilbert v. Minnesota*, 254 U. S. 325, 338, 41 Sup. Ct. 125, 129 (1920).

new institutions"; he would not have argument suppressed merely because it seems "to those exercising the judicial power to be unfair in its portrayal of existing evils, mistaken in its assumptions, unsound in reasoning, or intemperate in language."<sup>52</sup> To him a greater danger, in fact "the greatest danger to liberty, lurks in insidious encroachment by men of zeal, well-meaning, but without understanding."<sup>53</sup> He protests against the fuller protection accorded to "property" than to "liberty" in constitutional interpretation.<sup>54</sup> The recent decision of the court, announced by Mr. Chief Justice Hughes, that a state statute providing for the suppression of newspapers as nuisances is an infringement of the freedom of the press comprehended within the Fourteenth Amendment, epitomizes<sup>55</sup> a doctrine to which he is firmly committed.<sup>56</sup> Even if all justiciable questions resolve themselves into matters of degree,<sup>57</sup> and constitutional law has no absolutes, the rights of free men must have the utmost protection against legislative action.

It is, however, not an abstract individual, but man in an organized society, who occupies this unique distinction. In a culture as complex as ours there can be few laws "of universal application." In fact, "it is of the nature of our law that it has dealt, not with man in general, but with him in relationships."<sup>58</sup> The legislature, therefore, must be allowed wide latitude in classification, in order that its statutes may be neatly accommodated to the variety of enterprises which variously

<sup>52</sup> *Pierce v. United States*, 252 U. S. 239, 273, 40 Sup. Ct. 205, 217 (1920).

<sup>53</sup> *Olmstead v. United States*, *supra* note 50, at 479, 48 Sup. Ct. at 572.

<sup>54</sup> *Gilbert v. Minnesota*, *supra* note 51, at 343, 41 Sup. Ct. at 131.

<sup>55</sup> *Near v. Minnesota*, 283 U. S. 697, 51 Sup. Ct. 625 (1931). The case may become a landmark in constitutional law. The use of the concept "liberty," rather than "property," seems deliberate; it enables the court to read the guarantees of the First Amendment into the Fourteenth. In a previous case, *Gitlow v. New York*, 268 U. S. 652, 45 Sup. Ct. 625 (1925), it was assumed, for purposes of jurisdiction, that freedom of speech and of the press were comprehended within the word "liberty" of the Fourteenth Amendment; in their dissent, Holmes and Brandeis, *JJ.*, were "of opinion" that "the general principle of free speech" must "be taken to be included" within the words. In the case of *Meyer v. Nebraska*, 262 U. S. 390, 43 Sup. Ct. 625 (1923), "the right to teach" was found to be included in the word "liberty." See also *Pierce v. Society of Sisters*, 268 U. S. 510, 45 Sup. Ct. 571 (1925). For a full discussion see *The Bill of Rights and the Fourteenth Amendment* (1931) 31 COLUMBIA LAW REV. 468.

<sup>56</sup> It is of interest, in passing, to note the neat contrast between the *O'Gorman*, *supra* note 2, and the *Near*, *supra* note 55, cases. The former abridging freedom of contract is found constitutional, and the latter abridging freedom of the press unconstitutional by the same vote, five to four. The off-hand conclusion would be that one member of the court is more willing to indulge the presumption of the constitutionality of a state statute in cases involving freedom of contract than in cases involving freedom of speech. The fact is that nine justices make presumption count for more in the one case than in the other. Every vote cast for constitutionality in the *O'Gorman* case was cast against constitutionality in the *Near* case, and *vice versa*. The two cases throw the conflict within the court between personal and property rights into sharp relief.

<sup>57</sup> *Schaefer v. United States*, 251 U. S. 466, 482, 483, 40 Sup. Ct. 259, 264, 265 (1920).

<sup>58</sup> *Truax v. Corrigan*, 257 U. S. 312, 355, 42 Sup. Ct. 124, 138 (1921).

serve the community. He would not, in the name of "the equal protection of the laws," visit judicial disapproval upon statutes taxing corporations and exempting individuals,<sup>59</sup> imposing higher franchise taxes upon chain stores than upon individual merchants,<sup>60</sup> and making the way easier for farmers' cooperatives than for ordinary business ventures.<sup>61</sup> He favors the trade association as a "commendable effort by concerns engaged in a chaotic industry to make possible its intelligent conduct under competitive conditions";<sup>62</sup> he sees in the trade union an instrument for the maintenance of conditions of work and standards of living by workingmen.<sup>63</sup> The use of similar language to justify the activities of trade associations and of labor unions<sup>64</sup> attests a concern in economic order deeper than sympathy with a particular interest. But it is the less strategic group and little business, rather than large-scale production and combination, which has his support. He has, as occasion gave opportunity,<sup>65</sup> noted that his court has held that "it was not unlawful to vest" in single corporations "control of fifty per cent of the steel"<sup>66</sup> and "practically the whole of the shoe machinery industry."<sup>67</sup> His tolerance of cooperation is associated with a distrust of centralization. To him mere size is never a virtue; the giant enterprise substitutes routine for discretion; its over-organized activities are not easily accommodated to changing conditions. His values belong to a theory of society which discounts advertising, skyscrapers, and "the bigger and better," and exalts the individual and personal enterprise.

<sup>59</sup> *Quaker City Cab Co. v. Pennsylvania*, *supra* note 41, at 403, 48 Sup. Ct. at 555.

<sup>60</sup> *State Board of Tax Commissioners of Indiana v. Jackson*, 283 U. S. 527, 51 Sup. Ct. 540 (1931). Brandeis, *J.*, concurs in the opinion of the court.

<sup>61</sup> *Frost v. Corporation Commission of Oklahoma*, *supra* note 49, at 528, 49 Sup. Ct. at 240.

<sup>62</sup> *American Column and Lumber Co. v. United States*, *supra* note 44, at 418, 42 Sup. Ct. at 123.

<sup>63</sup> *Hitchman Coal and Coke Co. v. Mitchell*, *supra* note 47, at 263, 38 Sup. Ct. at 76; *Duplex Printing Co. v. Deering*, *supra* note 30, at 448, 41 Sup. Ct. at 184; *Truax v. Corrigan*, *supra* note 58, at 354, 42 Sup. Ct. at 137; *Bedford Cut Stone Co. v. Stone Cutters' Assn.*, *supra* note 34, at 56, 47 Sup. Ct. at 528.

<sup>64</sup> See especially *American Column and Lumber Co. v. United States*, *supra* note 44, at 418, 42 Sup. Ct. at 123, and *Duplex Printing Co. v. Deering*, *supra* note 30, at 488, 41 Sup. Ct. at 184.

<sup>65</sup> *American Column and Lumber Co. v. United States*, *supra* note 44, at 419, 42 Sup. Ct. at 123, and *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.*, *supra* note 34, at 65, 47 Sup. Ct. 523, 531.

<sup>66</sup> *United States v. United States Steel Corporation*, 251 U. S. 417, 40 Sup. Ct. 293 (1920). In this case "the opinion of the court" did not represent the prevailing views of a majority of its members. The decision came by a vote of four to three, and McReynolds and Brandeis, *JJ.*, who regarded themselves as technically disqualified to sit, would have voted with the minority.

<sup>67</sup> *United States v. United Shoe Machinery Co.*, 247 U. S. 32, 38 Sup. Ct. 473 (1918). In this case, likewise, McReynolds and Brandeis, *JJ.*, did not sit, and the decision was announced by a vote of four to three.

Out of such values and trends of thought Brandeis' theory of constitutionality emerges. He makes a sharp separation between the rights of individuals of flesh and blood and the privileges of corporations, artificial persons, created by the government. The contrast between the two appears in cases involving freedom of speech and freedom of contract. The right to a free and full expression of personal opinion has such value that only a positive case will justify its abridgement; the right of free contract is a business usage which has its important but limited function. The interference by the state, to regulate hours, to set standards of safety, in hazardous employments, to keep inferior wares out of the market, and even to fix prices, is rather a modification of the arrangements under which industry is carried on than a deprivation of individual rights. As culture advances, "rights of property and the liberty of the individual must be remolded, from time to time, to meet the changing needs of society."<sup>68</sup> In the practical effort to improve institutions, which are of human contrivance, the state, as well as other institutions of control must be employed. The task is essentially experimental; and great latitude must be allowed to the legislature in adapting remedial measures to economic maladjustment. It is, therefore, essential that the legal formulas in which constitutional questions are stated should not obscure the conflict of social values with which they are concerned. Although "*stare decisis* is ordinarily a wise rule of action"<sup>69</sup> it "does not command that we err again when we pass upon a different statute."<sup>70</sup> This view led him, in days when the presumption was in favor of freedom of contract, to present a factual argument for a challenged statute. It leads him, now that the presumption favors legislative action, to demand a recitation of fact from its opponents. His concern, in constitutional issues, is that current necessity shall not be judged by the borrowed merits of former causes.

It follows, almost as of course, that he assigns to the judiciary a limited province in the social order. The legislature, the administrative commission, the court, the voluntary association within industry, are complementary agencies of control; each has its structure, its peculiar domain, its distinctive way of work. The business of the court must be limited to tasks which it can intelligently and constructively perform. It may well be that news collected at great expense needs to be protected against piracy; but "courts are ill-equipped to make the investigations which should precede" positive action and "powerless to prescribe the detailed regulations essential to the full enjoyment of the

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<sup>68</sup> *Truax v. Corrigan*, *supra* note 58, at 376, 42 Sup. Ct. at 146.

<sup>69</sup> *Washington v. W. C. Dawson and Co.*, 264 U. S. 219, 238, 44 Sup. Ct. 302, 309.

<sup>70</sup> *Di Santo v. Pennsylvania*, *supra* note 46, at 42, 47 Sup. Ct. at 270.

rights conferred" by judicial protection.<sup>71</sup> The struggle between employers and employed falls far short of industrial order, but so long as militancy prevails, "it is not for judges" to "set the limits of permissible contest and to declare the duties which the new situation demands."<sup>72</sup> The Interstate Commerce Commission has an acquaintance with, and an appreciation of, the values involved in the determination of railroad rates and valuations which a busy judiciary cannot bring to so alien a task.<sup>73</sup> The legislature can inquire into evils, examine experience, contrive remedies, and revise its measures of reform as expediency dictates. The ways of courts, and the remedies at their disposal, are still too much in the service of suits between litigants, to be given the dominant role in the government of industry.<sup>74</sup> The Supreme Court must not elevate "the performance of the constitutional function of judicial review" into "an exercise of the powers of a super-legislature."<sup>75</sup>

A kindred value is his conception of the office of jurist. When he speaks for the court, he is their spokesman—so far as his own integrity will allow. The views he sets forth are the common opinion which compromise makes possible; they represent, not what any member would like to say, but what all who concur are willing to accept. It is here that Brandeis exhibits in greatest variety the technique of the jurist; he employs great ingenuity in bringing the sanctions of law to common-sense judgment;<sup>76</sup> he distinguishes, quite neatly, contrary holdings. If the procedure seems at times to the layman to border upon verbal magic, it must be remembered that it serves a rhetorical, rather than a logical, purpose, and that Brandeis is not responsible for a theory of judicial work which has no place for trial and error. Accordingly, it is no accident that the great opinions of Mr. Justice Brandeis are dissents. The cause has for the moment been lost; the little questions will

<sup>71</sup> *International News Service v. Associated Press*, *supra* note 32, at 267, 39 Sup. Ct. at 82.

<sup>72</sup> *Duplex Printing Press Co. v. Deering*, *supra* note 30, at 488, 41 Sup. Ct. at 184.

<sup>73</sup> *Great Northern Railway Co. v. Merchants Elevated Co.*, 259 U. S. 285, 291, 42 Sup. Ct. 477, 479 (1922).

<sup>74</sup> Compare the statement of Mr. Justice Stone, speaking for the court, in *United States v. Trenton Potteries Co.*, 273 U. S. 392, 398, 47 Sup. Ct. 377, 379 (1927): "Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making a difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies."

<sup>75</sup> *Jay Burns Baking Co. v. Bryan*, *supra* note 35, at 534, 41 Sup. Ct. at 421.

<sup>76</sup> Excellent examples of recent date are his opinions in *Buck v. Jewell La Salle Realty Co.*, 283 U. S. 191, 51 Sup. Ct. 410 (1931), and *Arizona v. California*, 283 U. S. 423, 51 Sup. Ct. 522 (1931).

presently cease to be of moment; the larger issue alone is important; the task is to set forth in argument the values which have not had recognition.<sup>77</sup> In dissent Brandeis sharply and clearly states the question, presents from the law reports and secular literature all that he finds relevant and brings to judgment everything of information and understanding which he possesses. His workmanship, to quote a favorite phrase of his, is "painstaking"; his opinions are written and rewritten until they convey his studied conception of the problem; the dissenting opinion in the *O'Fallon* case<sup>78</sup> is said to have gone through thirty drafts. The dissent is his own utterance, unconfused by the need of voicing the opinions of others; it is not the law, but the law as he would have it be. Brandeis does not over-value immediate victory. He contrives an informed and reasoned argument, spreads it upon the record,—and is content to leave to the future the final verdict. His great dissents attest his most dominant value; he has a profound belief in the power of truth ultimately to prevail.

It is this scheme of values which gives quality to his workmanship; in them is the source of the strength of his judicial utterance. His art is the employment of the technique of the advocate in the service of the jurist. His opinions seem to reveal a mind rather quickly made up, a process of judging by the reference of facts to his scheme of values, a use of legal devices to secure the right answer to the dominant question. A great many of his dissenting opinions read like briefs; they put forward the arguments which might—if only attorneys had been abler and better informed—have been presented in behalf of the losing causes. But it is pleading of a very high order, free from cheap appeal, in a sense detached, aiming to convince rather than merely to persuade, resting upon information and understanding, and prompted by a sincere belief in the goodness of his cause. In a word, it is the art of the advocate, subdued to intellectual inquiry, and directed to the ends of social justice.

If the quest for the secret of Brandeis' art runs further, it is to be found in the manner of the man. He was born in Kentucky, in 1856, when the state was ringing with the clash of interests and of values which attended the conflict over slavery. He is of Jewish faith; in his family the great tradition of social righteousness had long been

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"More truly characteristic of dissent is a dignity, an elevation, of mood and thought and phrase. Deep conviction and warm feeling are saying their last say with knowledge that the cause is lost. The voice of the majority may be that of force triumphant, content with the plaudits of the hour, and recking little of the morrow. The dissenter speaks to the future, and his voice is pitched in a key that will carry through the years." CARDOZO, *LAW AND LITERATURE* (1930) 36.

<sup>78</sup> *St. Louis and O'Fallon Ry. Co. v. United States*, *supra* note 20, at 488, 49 Sup. Ct. at 409.

cherished. His parents, natives of Prague, were members of a band of "Pilgrims of '48";<sup>79</sup> the failure of revolution in Europe led them to emigrate to America. They brought with them democratic notions and grand pianos, hard sense in their heads and verses from the romantic poets upon their lips. Brandeis went to school in Germany and came away with his head full of the lines and the ideas of Goethe. He attended the Harvard Law School when the dogmatism of the text was being discarded, and Langdell was beginning to find out the actual ways of the courts by the case-method. In an unique law practice, he came to be a kind of general counsel for the public, taking cases affected with a social interest, and arguing the cause of the shipper, the laborer, or the consumer. He was among its ablest and most distinguished members, when he was transferred from the bar to the bench of the United States Supreme Court.

In appointing him a justice of our highest court, Woodrow Wilson set down his judicial qualities. The President referred to "his impartial, impersonal, orderly, and constructive mind," to his "rare analytical power and deep human sympathy," to "his profound acquaintance with the historical roots of our institutions," to "his devotion to our American ideals of justice and equality of opportunity," and to "his knowledge of modern economic conditions and the way they bear upon the masses of the people."<sup>80</sup> Among these traits a faith in intellectual procedure yields place only to a ruling passion for social righteousness. This is a superb equipment for a jurist; the opinions in the reports attest how well it has been put to use. The language Brandeis speaks is that of the Justice; the thought he expresses is that of the man.

#### IV

It is much too early to appraise the work of Mr. Justice Brandeis, and to assign to him a place among jurists. Among the men who have sat in his court, perhaps among the great judges of all time, his rank will be high. But what that place will be, and what contributions will be conceded as distinctly his no man may certainly say. In the development of our culture we cannot tell what lies around the corner; the thought we regard as common sense may give way to its better or worse; in the immediate future even constitutional law cannot escape taking its chances.<sup>81</sup> Yet the worth of any product of the mind depends upon what the future makes of it.

<sup>79</sup> GOLDMARK, *PILGRIMS OF '48* (1931).

<sup>80</sup> Woodrow Wilson to Charles A. Culbertson, *CONG. REC.* 64th Cong. 1st Sess. Vol. 53, at 9048.

<sup>81</sup> "Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances has to take some chances, and in the great majority of instances no doubt justice will be done." Mr. Justice Holmes, in *Blimm v. Nelson*, 222 U. S. 1, 7, 32 Sup. Ct. 1, 2 (1911).

Already the course of judicial events has given increasing importance to the work of Brandeis. When the court condemned the practices of the trade association, Brandeis dissented;<sup>82</sup> when in time the issue reappeared, he was silent, for the court had come around to his way of thinking.<sup>83</sup> A decision which denied to a cooperative association a chance to win its experimental way drew from him a studied protest;<sup>84</sup> when another case, involving an almost identical factual situation came along, the decision went the other way, and a colleague easily distinguished the former holding on a legal issue.<sup>85</sup> An argument that in matters of taxation it was proper for the legislature to make industrial differences a basis for classification<sup>86</sup> has passed from dissent into official utterance.<sup>87</sup> He protested in vain against a judicial interpretation which left stevedores without work accident benefits;<sup>88</sup> the protection against industrial injury has since been extended to harbor workers and to longshoremen by Congressional act.<sup>89</sup> The decisions in a number of cases, involving in one way or another "freedom of speech"<sup>90</sup> failed to win his support;<sup>91</sup> he has just concurred in an opinion which finds the guarantees of the First Amendment in the word "liberty" in the Fourteenth.<sup>92</sup> The critic may easily separate holdings; but the

<sup>82</sup> American Column and Lumber Co. v. United States, *supra* note 44, at 413, 42 Sup. Ct. at 121.

<sup>83</sup> Maple Flooring Manufacturers Assn. v. United States, 268 U. S. 563, 45 Sup. Ct. 578 (1925); Cement Manufacturers Protective Assn. v. United States, 268 U. S. 588, 45 Sup. Ct. 586 (1925). On technical points these cases may possibly be distinguished from American Column and Lumber Co. v. United States, *supra* note 82. But it seems the more significant that of the five justices who sat in the earlier case and the later cases only one, Mr. Justice Van Devanter, was able to make the distinction.

<sup>84</sup> Frost v. Corporation Commission, *supra* note 49, at 528, 49 Sup. Ct. at 240.

<sup>85</sup> Corporation Commission of Oklahoma v. Lowe, 281 U. S. 431, 50 Sup. Ct. 159 (1930).

<sup>86</sup> Quaker City Cab Co. v. Pennsylvania, *supra* note 41, at 403, 48 Sup. Ct. at 555.

<sup>87</sup> State Board of Tax Commissioners of Indiana v. Jackson, *supra* note 60.

<sup>88</sup> Washington v. W. C. Dawson and Co., *supra* note 69, at 228, 44 Sup. Ct. at 305.

<sup>89</sup> LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, 33 U. S. C. A. §§ 901-950 (1927).

<sup>90</sup> Toledo Newspaper Co. v. United States, 247 U. S. 402, 426, 38 Sup. Ct. 560, 566 (1918); Abrams v. United States, 250 U. S. 616, 631, 40 Sup. Ct. 17, 22 (1919); Schaefer v. United States, *supra* note 57, at 482, 40 Sup. Ct. at 264; Pierce v. United States, *supra* note 52, at 253, 40 Sup. Ct. at 211; Gilbert v. Minnesota, *supra* note 51, at 334, 41 Sup. Ct. at 128; Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U. S. 407, 417, 41 Sup. Ct. 352, 356 (1921); Gitlow v. New York, *supra* note 55, at 672, 45 Sup. Ct. at 632; Whitney v. California, 274 U. S. 357, 372, 47 Sup. Ct. 641, 647 (1927). In the last case Brandeis, *J.*, writes a concurring opinion.

<sup>91</sup> These cases, of course, involve a number of rather distinct legal questions. But a careful reading of them leaves the impression that the attitudes of the justices were determined by the values which they placed upon freedom of speech.

<sup>92</sup> Near v. Minnesota, *supra* note 55. See also the discussion in note 55, *supra*.

values which have impelled the members of the bench to judgment lie far deeper than the criteria of legal distinction. Brandeis has seen a presidential nomination to his court rejected, because the appointee as a federal judge did not follow his dissent in a labor case;<sup>93</sup> he has just participated in the grant of an injunction to preserve the integrity of a process of collective bargaining.<sup>94</sup> In the two bulky volumes which record the work of the last term, one looks in vain for the once familiar line, "Mr. Justice Brandeis, dissenting."<sup>95</sup> One can but wonder, whether in his new role, Brandeis will be as effective in declaring the law as he has been in blazing its path.

Another generation must discover the lasting qualities in Brandeis' work; but already his contribution to the doctrine of constitutionality appears to be significant. Others have contended that law supplies only the formula whose terms of public policy and private rights must be weighted with social facts, and have agreed with him that not even the exposition of the supreme law of the land is above the experimental attitude.<sup>96</sup> Brandeis' distinctive work has been in converting these secular intellectual procedures into the technique of the jurist's trade. His court has of late agreed with him about the factual foundations of public policy; it has even accepted the idea of trial and error, and during its last term has reconsidered, "in the light of actual experience,"<sup>97</sup> two statutes upon the validity of which it had already passed.<sup>98</sup> It chances, however, that the currency of the realistic test is not firmly established, for it has the support of a bare majority of the court.

But, even if there is a reversion to older doctrine, the way of Brandeis seems destined to prevail. Our ways of thought are changing, and the individualistic values of a pioneer society have served their

<sup>93</sup> *Hitchman Coal and Coke Co. v. Mitchell*, *supra* note 47, at 263, 38 Sup. Ct. at 76.

<sup>94</sup> *Texas and New Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548, 50 Sup. Ct. 427 (1930).

<sup>95</sup> During the last term Brandeis, *J.*, has dissented six times, as compared with twice for the justice most, and twelve times for the justice least, in accord with the court. In *Beidler v. South Carolina Tax Commission*, 282 U. S. 1, 10, 51 Sup. Ct. 54, 55 (1930), Holmes, *J.*, announced his own and Brandeis' dissent, "without repeating reasons which did not prevail with the court"; in *United States v. Chicago, Milwaukee, St. Paul and Pacific Ry. Co.*, 282 U. S. 311, 344, 51 Sup. Ct. 159, 161 (1931), and in *Coolidge v. Long*, 282 U. S. 582, 638, 51 Sup. Ct. 306, 324 (1931), Brandeis, *J.*, concurred in the dissents of Stone, *J.*, and Roberts, *J.*, respectively; in *United States v. Macintosh*, 283 U. S. 605, 635, 51 Sup. Ct. 570, 579 (1931), and in *United States v. Bland*, 283 U. S. 636, 637, 51 Sup. Ct. 569, 570 (1931), in dissents expressed by Hughes, *C.J.*; and in *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 583, 51 Sup. Ct. 601, 606 (1931), in the dissenting opinion of Stone, *J.*

<sup>96</sup> *Di Santo v. Pennsylvania*, *supra* note 46, at 42, 47 Sup. Ct. at 270; *Washington v. W. C. Dawson and Co.*, *supra* note 69, at 238, 44 Sup. Ct. at 309.

<sup>97</sup> *Abie State Bank v. Bryan*, *supra* note 9, at 772, 51 Sup. Ct. at 255.

<sup>98</sup> *Abie State Bank v. Bryan*, and *Missouri Pacific R. Co. v. Norwood*, both *supra* note 9.

day. The words "liberty" and "property," "natural law" and "individual right," no longer suffice for a statement of the problem of economic order. The problem of "the state and industry" does not present a choice between "restraint" and "freedom"; government and business are alike schemes of control whose compulsions we must obey and within whose arrangements we may do as we will. Social legislation is not an abridgment, nor "free enterprise" a realization, of "industrial liberty"; they are alike rules of the game of making a living, alike in being of human contrivance and subject to improvement. We are, rather empirically than by deliberate choice, beginning to face the problem of making an instrument of national welfare out of a rather unruly industrial system. Even if we succeed in having business contrive for itself an adequate organization, the state must have a place in the scheme of control. As statutes are passed, the Supreme Court, by separating the valid from the invalid, must continue to mark out the limits of the province of government. In an approach towards planning for national life, it is no small asset to have the question of constitutionality stated in terms of the interests and values of a developing society. The supreme task of the jurist is to square changing social necessity with the established law. In this abiding process a living law owes no mean debt to the art of Mr. Justice Brandeis.

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