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SOCIAL PLANNING UNDER THE CONSTITUTION— A STUDY IN PERSPECTIVES*

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I

Our present discontents have evoked many earnest words on the subject of "social planning." We are told that "capital can be defended only by constructive programs based on the consideration of social responsibility;" that we are headed for "a frightful cataclysm" unless we adopt "a national plan that will control and guide the basic industries, govern the investment of capital, and keep purchasing power in step with production;" that if we are to avoid revolution, "we dare not sit indefinitely in contemplative inaction;" that "we require a leadership that will help us think less about the theories of individualism and more about the tragedies to individuals," inasmuch as "men cannot eat words . . . cannot wear words . . . cannot trust their old age to words."[1] In brief, if we are to avoid something worse, we must take some thought for the morrow.

There have, to be sure, been dissident voices too. One of these was raised at the recent Episcopal Convention at Denver. In a report submitted to this body occurred the following passage:

> And yet, side by side with such misery and idleness, there are warehouses bursting with goods which cannot be bought; elevators full of wheat, while bread lines haunt our cities; carefully protected machinery lying idle, while jobless men throng our streets; money in abundance

* Presidential address delivered before the American Political Science Association at its twenty-seventh annual meeting, Washington, D.C., December 28-30, 1931.

[1] For the above sentiments, see, in order, Dean Donham's *Business Adrift*, p. 101; *New York Times*, July 20, 1931, Professor Stuart Chase speaking; *ibid.*, June 3, President Butler speaking; *ibid.*, June 22, President Frank speaking.

in the banks available at low rates. It is becoming increasingly evident that the conception of society as made up of autonomous independent individuals is as faulty from the point of view of economic realism as it is from the standpoint of Christian idealism. Our traditional philosophy of rugged individualism must be modified to meet the needs of a co-operative age.[2]

When this was read, that wise and good man who is best known to the world as the principal author of the Great Wickersham Mystery arose and made solemn protest. "I think," said he, "this is an expression of social philosophy that is expressed by the Soviet government of Russia. It is a negation of the whole concept of American civilization." It was thereupon explained to Mr. Wickersham that the sentences to which he objected had been culled largely from recent addresses by Mr. Gerard Swope and Mr. Owen D. Young.

Mr. Wickersham's objection to social planning is in substance the same as Mr. Hoover's: "The American way of life must be preserved." Others have urged the inherent difficulties of the task. "What folly!," exclaims former Secretary of the Treasury David F. Houston:

> What man or group of men in this country would know how to direct all, or many, of the leading activities of this great nation; and who is so innocent as to assume that, if they were to make a plan, our people would follow it, unless they could be made slaves? Certainly the federal government could not formulate or direct such a plan. It is none too successful in discharging its constitutional functions. It cannot even run a routine business like the Post-Office without a huge deficit.

Mr. Newton D. Baker is of the same persuasion. He doubts "whether there can be wisdom enough to plan an economic future for the United States," and adds, "progress is a function of freedom"—that is, presumably, freedom from social planning.[3]

Moreover, difficulty is a matter which is relative to character. So it is important to take into account Mr. J. T. Adams's suggestion that we Americans are not a planning race, having always taken the easier way of running away from our troubles. Hence he ventures to question whether it was the really capable Puritans who braved the Atlantic for New England's rockbound coast, hinting on the contrary that the best of the breed stayed at home, cut off King Charles's head, and eventually re-made the English constitution to their liking. And ever since then, Mr.

[2] *New York Times*, Sept. 29, 1931.

[3] Quoted by Professor Beard in his article in the *Forum*, July, 1931.

Adams continues, instead of facing the difficulties and at the same time appropriating the richer cultural possibilities of a stabilized life at home, we have, as population became denser and social arrangements more intricate, raced off toward the frontier, with the result that now when the frontier has vanished we are at a loss what to do.[4]

The easy and obvious answer to all which is that plans *have been* offered. No less a personage than the President of the United States, despite his faith in "the American way of life," has offered two plans at different times. The earlier one, antedating the catastrophe of October, 1929, called "with the help of God" for the early abolition of poverty; the other, elaborated after that event and with outside assistance no longer available, demanded in its first item a twenty million increase in population during the next twenty years—the idea being no doubt to relieve the Federal Farm Board of some of its anxieties.

Nor have our business leaders failed us in this crisis. Their program is that buying should be stimulated, to which end wages should come down and railway rates go up; also the Sherman Act should be repealed or modified, and at the same time "government should get out of business"—that is to say, out of the business of trying to govern; furthermore, in order that social planning may have a certain idealistic cast, the American taxpayer should be permitted to manifest his natural humanitarianism by agreeing to cancel Europe's war debts to the United States, thereby putting speculative banking loans to Germany on a sounder basis; and that this display of altruism may be truly national, the income tax must not be increased as to the upper brackets. Lastly, but by no means least, that most un-American contrivance, the "dole," must at all costs be avoided—except of course in its American form of the protective tariff. Provided with such a program, we have only to mount the Business Cycle, and before we know it we shall be whisked back to the golden days of 1929, but with this difference—forewarned by what happened then, we shall all sell out at the peak of the market this time and be able to retire millionaires!

And with Business thus alert to its opportunity, the question necessarily arises, What part is Political Science prepared

[4] This, I take it, is the general purport of views advanced by Mr. Adams in his recent *Epic of America*.

to take in social planning? The answer depends to some extent on what is meant by "social planning." When Charlie Chaplin met Mahatma Gandhi in London, he told him that he did not understand the reason for using such a crude device as Mr. Gandhi's hand spinning wheel when modern machinery seemed better for the purpose. Mr. Gandhi explained that it was necessary to provide occupation for India's millions and that modern machinery would leave them with too much leisure. "We might install modern looms like they have in Lancashire," he said, "but then we would produce more than we need and enforce idleness upon some other part of the world as a result of our overproduction."[5]

Of course, anything like social planning on the scale suggested by the Mahatma's words may be dismissed at the outset in the presence of "the American way of life." Despite Professor Einstein's warning that "anyone who thinks science is trying to make human life easier or more pleasant is utterly mistaken," that is just what we do think, especially when Science assumes the guise of Technology, in other words, enters the service of Business and profit-taking. So we remain blithe while the trucks and buses shove us off the highways and bankrupt the railways; we permit "the N.B.C. and associated stations" to turn over a major invention like the radio to crooning troubadours and purveyors of tooth-paste, thanking God the meanwhile that it has been kept free of "political control;" and we greet always with renewed enthusiasm any triumph of inventive genius whereby, we are assured, thousands of fresh recruits will be made available to the ranks of the unemployed.

No; with us social planning—in the probable absence from the scene of some miraculous combination of Confucius, Aristotle, Mussolini, Lenin, and a few others—must take place in the frame —or the "frame-up"—provided by Technology as above defined. It will, therefore, develop no grand strategy, nor reveal any considered theory of social arrangement and individual happiness. It will consist rather in desultory attacks upon what the Pragmatists delight to term "situations" and "predicaments." At that, its eventual rôle may not be unimportant if the habit be permitted to grow.

[5] *New York Times*, Sept. 23, 1931.

And in this work the part of political scientists should also be important; provided they choose their tools and techniques for the task in hand rather than *vice versa,* and provided also they continue to talk intelligibly. Some recent articles in the REVIEW are hardly reassuring on the latter score.[6] They remind one of the plight of small Genevieve. "Yes," said the proud mother, "Genevieve is now in school and is studying French and algebra. Come and say good morning to the lady in algebra, Genevieve." When political science begins talking algebra, it will make no great practical difference whether the people who understand it do so or not.

II

It is a maxim approved of cooks that if you would make an omelet you must break some eggs. Mr. Owen D. Young has recently voiced his endorsement of this maxim in his remarks on Mr. Gerard Swope's plan:[7]

> May I say, Mr. President, that economic planning will contribute to a standardized and so more stable prosperity, but in the same breath may I remind you that, like all other things in this world, it demands its price. A plan written on paper is of no service. A plan proposed for education is of some service, but it is likely to become obsolete before it becomes effective. A plan to be productive of quick results must be executed promptly. No one concern can make it effective. Coöperation is required by the great majority of the participants and the coercion of the rest may ultimately be necessary. I hate not only the term but the idea of coercion, and yet we are forced to recognize that every advance in social organization requires the voluntary surrender of a certain amount of individual freedom by the majority and the ultimate coercion of the minority. It is not the coercion of the recalcitrant minority but the voluntary submission by the large majority which should impress us. Anyhow, the question is whether the people who are calling for economic planning really mean what they say. Are they willing to surrender their individual freedom to the extent necessary to execute a plan?

And again:

> We can retain in this country unorganized individual planning and operation, but if we do its action will necessarily be at times chaotic, and we shall, as a result, pay the economic penalty of that disorder, such as we are paying now. We can in this country have organized economic planning with some curtailment of individual freedom which, if the plan be wise and properly executed, will tend to diminish economic disorder and the penalties which we pay. Then too, the question is to whom

[6] I refer to my friend Professor Charles H. Titus's articles in the February and August, 1931, issues of this REVIEW.

[7] *New York Times,* Sept. 17, 1931.

this individual freedom is to be surrendered? If the government is to undertake the great obligations which Mr. Swope's plan visualizes, then the price must be in the form of a surrender to political government. If industry itself is to perform those obligations, as is here contemplated, then the surrender of the individual units is to be made to the organized group, of which the unit is a part. If results are to be obtained, they call for surrender somewhere. The question for the public is to say whether they wish the results, and if so, by what agency they are to be accomplished.

While Mr. Young here holds out the possibility of Business setting its own house in order, he at the same time admits that there will always be recalcitrant minorities to be coerced. What is more, his expectation of the major part of Business seems a trifle optimistic, to say the least. The present depression is the fifteenth major depression of the past century, and no other—in the absence of that fillip to creative thinking which bears the label "Moscow"—seems to have suggested to either Business or Government anything more than hand to mouth expedients. What is more, no single important measure of the past forty years meant to correct business practices in the interest of a wider public can be pointed to which had the support of Business. The Interstate Commerce Act did not, the Sherman Act did not, the Federal Trade Commission did not, the Clayton Act did not, the Federal Reserve Act did not. On the contrary, Business presented in every one of these instances an almost solid front of opposition.

Any viable plan affecting business in an important way must unquestionably consult business experience, in other words, the experience of business men. With equal certainty, it must rely in part upon sanctions which only government can supply; and that means ordinarily, in view of the present structure of business, sanctions which only the national government can apply effectively. And so the question presents itself, What sanctions does the Constitution, that is to say, constitutional law, permit?

The present-day edifice of American constitutional law dates to an altogether unappreciated extent from this side of the year 1890, and so is fully a century younger than the Constitution itself; and especially is this true of those doctrines and principles concerning which the social planner needs feel special concern. These are not, in the main, the outgrowth of earlier precedents; more often they are the repudiation of them. They de-

rive from a point of view which became dominant with the Court about 1890 and remained so for somewhat more than a decade and a half.

Never had "the American way of life" been in such peril as in the decade which is divided by the year 1890. The Federation of Labor, the Haymarket riots, the Chicago stockyards strike, the Homestead strike, the panic of 1893, "Coxey's army," the Pullman strike, "Free Silver," "Coin" Harvey, "Crown of Thorns and Cross of Gold," Altgeld, Pennoyer, "Bloody-Bridles" Wait, and so on and so forth; why continue? The country was in a state of riot, and, in the phraseology of the common law, "men of firm mind, with property in the neighborhood and women and children to protect," were alarmed.

To compensate, on the other hand, for this most distressing situation of fact, what may be termed the ideological situation was most reassuring to those to whom, in the contemporary words of the president of the Reading Railway, "God in His wisdom had confided the destinies of this great nation."[8] There was not a teacher of political economy of any reputation in the country who did not teach that economic activity was governed by laws of its own which, so long as government did not interfere with their operation, worked inevitably for human betterment. Then to back the teachings of the classical political economy was the lesson drawn from the current Darwinian biology. Evolution was a universal process which had all nature, including human nature, in its grip, and was tugging it along to some far off divine event willy-nilly. For evolution meant "the survival of the *fittest;*" only it must be *evolution,* that is, improvement by the slow accumulation of minute differences, not *revolution,* of which indeed the century had earlier had rather more than its fill.

So when Mr. Gladstone uttered his well-intentioned eulogy of the Constitution of the United States as "the greatest work ever struck off at a given time by the brain and purpose of man," the pundits assailed him from every side. "Brain and purpose of man"—a gross heresy! The American Constitution was only a copy of the British Constitution "with the monarchy left out," and the British Constitution was the superlative embodiment of political wisdom which it was because in sooth it embodied no

[8] See W. J. Ghent's contemporary *Our Benevolent Feudalism.*

wisdom at all, being "a growth," "an accumulation." To consider the Constitution of 1789 as an instance of social planning was an utterly abhorrent notion to the generation of 1890.

But the mind which compacted the *laissez faire* political economy and biological evolutionism into a systematic philosophy was that of Herbert Spencer, whose *Social Statics* Mr. Justice Holmes once informed the Court, though unavailingly at the time, the Fourteenth Amendment was not intended to enact. There are few less humorous books in the language than Spencer's *Autobiography,* although this does not signify that it is entirely unamusing. Spencer's foible, along with omniscience, was originality, and indeed his claims on the latter score may usually be conceded. Educated in a haphazard fashion, he had developed something like genius for picking up information wherever he went and with whomever he conversed, and an equal genius, if so it should be termed, for combining facts and ideas into systems; whence Huxley's gibe that "Spencer's idea of a tragedy was a beautiful theory killed by an ugly fact." Had he been a mechanic, Spencer would have spent his days tinkering at perpetual motion; had he been a mathematician, he would have squared the circle, at least to his own satisfaction. Having, however, given his interest to social theory, or "Sociology," he did what was equivalent, reconciled—to his own satisfaction —the doctrine of natural rights, which he had imbibed in youth from the discourses of dissenting preachers, with the notion of society as an organism, an adoption and adaptation from the current Darwinism.

Society, being an organism, is, of course, subject to the evolutionary process, albeit in a manner somewhat peculiar. For the social organism, on examination, possesses two "organizations," the "nervous," which is the State or Government, and the "alimentary," or Industry. The former is "inferior," and therefore destined eventually to disappear through the operation of evolution on its constituent cells, that is, human beings, thus leading to increasing "individuation" and ultimately political anarchy. The evolution of the latter, on the other hand, is attended by progressive "integration of function" or "sympathy" among its cells, that is, these same human beings. So in the end the human family, pleasantly relieved of its nervous system, is absorbed into the social stomach, and along with this apotheosis universal

peace and good will hold sway. In short, while political subordination is utterly antagonistic to the nature of man, economic subordination is not.[9]

Mr. Ernest Barker opines that Spencer is just the kind of political philosopher that England deserved, a statement which is not intended apparently to be especially complimentary to either of the parties mentioned. The apostle of Spencer to the American people—and a very fervent one—was John Fiske. Of Fiske, his rival, the historian Winsor, maliciously, and perhaps a bit enviously, declared that he was "the greatest of historians among philosophers and the greatest of philosophers among historians." And through Fiske or more directly, American judges and lawyers became indoctrinated with the Spencerian concept of "equal freedom," that is, "such measure of freedom for each as is compatible with the like freedom for all"—a conception which Mr. Al Capone would undoubtedly applaud, implying as it does, the right of anybody to become a gunman or racketeer so long as he refrains from "elbowing in" tactics.

At any rate, furnished with this endorsement of the "American way of life" as part and parcel of a universal, ineluctable, and all-beneficent process, "the naïf, simple-minded men" (the phrase is Justice Holmes's) who composed the Supreme Court of the years 1890 and following set to work, with the resolution which only consciousness of a righteous cause can lend, to remake our constitutional law, and within a decade and a half had succeeded in doing so with astonishing completeness.

III

In the history of the Supreme Court, two terms of Court stand out above all others for the significance of their results to American constitutional law, the February term of 1819, when McCulloch v. Maryland, Sturges v. Crowninshield, and Dartmouth College v. Woodward were decided; and the October term of 1894 when the Sugar Trust case, the Income Tax cases, and *In re* Debs were passed upon.[10] Nor would it be easy to conceive how three decisions could possibly have been more to the liking of Business than the three decisions last mentioned. In the Sugar

[9] See Ernest Barker's *Political Thought from Spencer to the Present Day* and Francis W. Coker's *Organismic Theories of the State.*

[10] 156 U. S. 1; 157 U. S. 429 and 158 U. S. 601; 158 U. S. 564.

Trust case, the recently enacted Sherman Anti-Trust Act was put to rest for a decade, during which period Capital, fulfilling the Pauline injunction of "diligence in business, serving the Lord," made the most of its opportunities. In the Income Tax cases, the Court, undertaking to correct what it termed a "century of error," ruled that the wealth of the country was to be no longer subject to national taxation. At the same time, when the said wealth was menaced with physical violence, it was entitled, by the decision in the Debs case, to have every resource of the national executive and judicial power brought to its protection.

The so-called Sugar Trust was a combination of manufacturers which, the Court admitted, controlled a vast portion of the sugar market of the United States; and, as the Government pointed out, a manufacturer manufactures in order to sell his product, and in the case of a necessary of life like sugar the overwhelming proportion of the product will be sold outside the state where it is produced, and, if the concern is a monopoly, on terms dictated by it. The Court answered, nevertheless, that "this was no more than to say that trade and commerce served manufacture to fulfill its function!" Thus the very process which the Anti-Trust Act was designed to govern, namely, commerce in the etymological sense of "buying and selling," was assimilated to the local process of manufacturing—in short, was held not to exist. The result is the more striking in view of the fact that in the first case to arise under the commerce clause, Gibbons v. Ogden, the question at issue was whether "commerce" ever meant anything but buying and selling.

And so the law stood until the Swift case of 1905,[11] when the Court announced that it would no longer permit "a course of business" which was essentially interstate to be characterized by its intrastate incidents for the purpose of rendering national control of it ineffective. This holding, in which Justice Holmes spoke for the Court, injected new life into the Anti-Trust Act just as the second Roosevelt administration was getting under way. But meantime most of the damage had been done, and the Court so realized. In the Standard Oil and Tobacco cases[12] of 1912, Chief Justice White announced the famous "rule of reason," which is properly to be interpreted as an attempt on the

[11] 196 U. S. 375.

[12] 221 U. S. 1 and 106.

part of the Court to effect a *modus vivendi* between the resuscitated Sherman Act and the existing structure of American Big Business for which the Court itself was so largely responsible. The act had been restored to the statute books, to be sure, but there must be no "running amuck" with it.

Even more remarkable was the Court's correction of a "century of error" in the Income Tax cases. An error so venerable ought, one would think, to have become entitled long since to be regarded as truth, not to mention the fact that the trail of this particular error led to the very doors of the body which framed the Constitution. This was the idea that the term "direct taxes" comprehended only land and poll taxes, having been inserted in the Constitution, not for the purpose of reducing materially the complete power of taxation which elsewhere in the Constitution had been conferred on the national government, but for the very limited purpose of reassuring the Southern slave-holders that their broad acres and slaves would not be subjected to land and poll taxes. And the Court was equally dashing in its encounters with the precepts of the Aristotelian logic. The Chief Justice's opinion for the Court comprised the contention that a tax on income which is derived from property must be regarded as a tax on said property, and *so as a direct tax on it,* although if words be given their "ordinary meaning," as the Chief Justice was scrupulous to insist, it would seem clearly evident that a tax burden which reaches property in consequence of being imposed upon income derived from it reaches the property *indirectly.*

But the decision has also its "inarticulate major premise," save that, thanks to Justice Field, it did not remain inarticulate. In the words of his concurring opinion, the income tax was "but a beginning" of "an assault upon capital" which was bound to spread until "our political contests will become a war of the poor upon the rich;" and while Justice Gray, the other of the two Nestors of the Bench, kept silent—indeed very much so—he reversed the opinions of a lifetime—"over night," as Mr. Bryan would have it—to help resist the assault *in principiis.* The school-boy who defined "property" as "what Socialists attack" had, it may be surmised, been reading the Income Tax decision.

And, while the regulatory and taxing powers centered in Congress were being thus seriously diminished, the protective powers centered in the President and the courts were undergoing a

contrary process in the Debs case. Correcting another "century of error," the Court held in that case that the Executive has the prerogative right to enter the national courts independently of statutory authorization, and obtain an injunction to protect any widespread public interest of a proprietary nature, and to support the injunction with all requisite force. Should "the man on horseback" ever put in an appearance, he might well baptize his Bucephalus "In Re Debs."

Meantime, beginning with the first Minnesota Rate case, decided in 1890, our *laissez faire* Court had been struggling with the question of railway rate regulation, but did not achieve final results until Smyth v. Ames, seven years later.[13] The original theory of rate regulation was stated in 1876 in the great case of Munn v. Illinois,[14] while the Court was under the liberal presidency of Chief Justice Waite. It is to the effect that property embarked in a business which is "affected with a public interest"—a point subject ordinarily to legislative determination—is property which from the moment of its investment is "dedicated to a public use," and is therefore subject to the risk of regulation by and for the public. The theory underlying Smyth v. Ames is almost the exact antithesis of this. It is that a public regulation of charges is *pro tanto* an appropriation of property which up to that moment was *juris privati* only, a premise from which ensues almost mathematically the rule that rates which are set by public authority must yield a fair return on "the present value" of the property undergoing regulation. As is well known, this rule is the rock upon which, outside the jurisdiction of the Interstate Commerce Commission, all programs of public utility regulation have come to grief, and the only reason why it has not been a source of disaster in the national field is that there it has been largely ignored. The inability of the railroads, without the consent of the Interstate Commerce Commission, to boost rates in a situation in which rates, as today, are not yielding a "fair return" on railroad property can be reconciled with the doctrine of Smyth v. Ames only with the greatest difficulty, if at all.

But if Smyth v. Ames set up new restrictions on legislative power in control of business and property, by the same token it also enlarged judicial review in safeguard of those interests, and

[13] 134 U. S. 418; 169 U. S. 466. [14] 94 U. S. 113.

the decision in Holden v. Hardy[15] in the same term of court did so even more strikingly. In this case the Court, following some earlier backing and filling with respect to the matter, finally discarded the rule laid down in Munn v. Illinois for the determination of cases arising under the due process clause, that "if a state of facts could exist justifying legislation, it must be presumed that they did exist," and gave unmistakable warning that it intended henceforth to require the state to show special justification in support of measures restrictive of the right of employers to make such terms as their economic advantage enabled them to in dealing with employees and those seeking employment, that is, so-called "freedom of contract." This time, it is true, the special justification was found in the special dangers of underground mining, and so an eight-hour law for such employments was sustained as "reasonable" and therefore due process of law. The implications of the case became explicit, however, when, seven years later, such special justification not being found to exist as regards the baking business, a ten-hour law for such employments was held void in the famous Lochner case.[16]

The truly miraculous effect of Smyth v. Ames and Holden v. Hardy upon the Court's power of judicial review is not open to question. Anterior to that time, thirty years under the Fourteenth Amendment had given rise to one hundred and thirty-four cases under all clauses of the amendment. In the course of the next fifteen years, more than three times as many cases were decided under the due process of law and equal protection clauses alone. The Court had become a third house of every legislature in the country, or, as Justice Brandeis has expressed it, a "super-legislature."

Two other closely related lines of doctrine in this period may be dismissed more briefly, although they are of great importance for the protection which in combination they afford "the American way of life." The first is illustrated by the "Liquor cases,"[17] in which the Court for the first time projected the commerce clause sharply into the field of the states' police power. In these cases it was held that, liquor being "a good article of commerce," the states could not forbid interstate traffic in it, a doc-

[15] 169 U. S. 366.
[16] 198 U. S. 45.
[17] 125 U. S. 465; 135 U. S. 100.

trine which put the solution of the liquor question on a local basis out of the bounds of constitutional possibility, and so led finally to the Eighteenth Amendment, in somewhat the same way that the Dred Scott decision, by rendering a legislative solution of the slavery question constitutionally impossible, contributed to bring on the Civil War.

The other line of cases referred to was headed by the "Lottery case," Champion v. Ames.[18] In that case the Court, after three arguments, sustained, by a vote of five to four, an act of Congress excluding lottery tickets from interstate transportation, but did so on grounds which strongly implied that all efforts on the part of Congress to control concerns engaged in interstate business by the threat of stopping their interstate trade would be likely to be frustrated by the Court. The culmination of the course of reasoning adopted by the Court in Champion v. Ames is to be seen in the first Child Labor case, Hammer v. Dagenhart.[19] There Congress was informed that it could not prohibit the interstate transportation of child-made goods, since to do so would be to invade the police powers of the states; although by the Liquor cases just referred to any attempt by a state to do the same thing would amount to an invasion of the power of Congress to regulate interstate commerce.

Once again the Court was correcting a "century of error." That the power to regulate commerce comprises the power to prohibit it appears to the point of demonstration from the simple consideration that when prohibition is for any reason essential, it is the regulatory power which must provide it. And so it was assumed by the Federal Convention; otherwise, why the provision that the slave trade was not to be prohibited until 1808? As Judge Davis pointed out in the early case of the *William*,[20] growing out of Jefferson's embargo, this provision shows that "the national sovereignty" was thought to be authorized to abridge commerce "in favor of the great principles of humanity and justice," and for "other purposes of general policy and interest." Indeed, Hamilton in the *Federalist* had listed the commercial power as one of the powers which are vested in Congress "without any limitation whatsoever;" and Marshall's

[18] 188 U. S. 321.
[19] 247 U. S. 251.
[20] 28 Fed. Cas. No. 16,700.

later consideration of the same subject in Gibbons v. Ogden[21] is to like effect: "The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse."

The issue raised by the confrontation of these words with those of the Court in Champion v. Ames and Hammer v. Dagenhart is of the utmost importance from the point of view of any considerable program of social planning. As we have seen, planning means coercion for intransigent minorities—that at least—and if coercion is to be applied by the national government, it must usually be under the commerce clause.

I do not mean to suggest, however, that to Congress should be attributed an unconditional power over everybody's privilege of engaging in interstate commerce in all situations and for all purposes—that, for instance, of controlling marriage and divorce. What I do mean is that *all businesses whose operations extend beyond the boundary lines of a single state should be regarded as subject through their interstate commercial activities to the control of Congress fairly and reasonably exercised.* Commerce is business, and today business is dominated by its interstate characteristics—buying and selling across state lines, transportation across state lines, communication across state lines. So, in "the typical and actual course of events," even manufacturing becomes but a stage in the flow of the raw product to the mill and the out-flow of the finished product from the mill to the market; and while checking momentarily the current of interstate commerce, is at the same time, to adapt the words of Chief Justice Taft in Stafford v. Wallace,[22] "indispensable to its continuity." In short—to reverse the expression of the Court in the Sugar Trust case—manufacturing today serves trade and commerce to fulfil *their* function.

Over business thus organized the states are unable, in point both of law and of fact, to exert any effective control; nor would interstate compacts assist them materially in the attempt to do so if unaccompanied by extensive delegations of power from Congress. By Congress alone can the public interest which mod-

[21] 9 Wheat. 1.

[22] 258 U. S. 495. See also 262 U. S. 1.

ern business purports to serve be safeguarded ordinarily, for it is the interest of the country as a whole.

IV

"What proximate test of excellence can be found," asks Justice Holmes in his essay on Montesquieu, "except correspondence to the actual equilibrium of forces in the community—that is, conformity to the wishes of the dominant power?" "Of course," he adds, "such conformity may lead to destruction, and it is desirable that the dominant power be wise. But, wise or not, the proximate test of good government is that the dominant power have its way." Hence, "the true science of the law," as he elsewhere remarks, "consists in the establishment of its postulates from within upon accurately measured social desires"—a point for our statisticians.[23]

Justice Holmes brought his pragmatic outlook—perhaps it should be spelled with a capital "P"—to the Bench in December, 1902, although it was some years before its leaven began to affect perceptibly the heavy theological Spencerianism of that tribunal. Indeed, his opinion in the Swift case is the first clear assertion of the new point of view. And to his Pragmatism—wherein he was the teacher rather than the disciple of his fellow Cantabrigian, William James—Holmes the legal philosopher added the contribution of Holmes the historian of the Common Law—the discovery, revolutionary at the time, that the judges are not the mere automata of established rules of law, but are law-makers, whether they would be or not, and so must accept responsibility for the kind of law they make.

And yet—and this is the third point in the Holmesian credo—the traditions of their office should inspire judges with a certain aloofness toward the issues of the day. They should endeavor to look at things *sub specie quasi aeternitatis,* so to speak, and not be in a bustle to align themselves with either "the dominant forces of society" or the contrary forces. They should, indeed, let such forces have a fair field, and only come in at the end when their craftsmanship is needed to record the terms of settlement.

"It is a misfortune," he once asserted, with both our constitutional law and our common law in mind, "if a judge reads his conscious or

[23] *Collected Legal Papers,* pp. 224-26 and 258.

unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his countrymen to be wrong. . . . When twenty years ago a vague terror went over the earth and the word Socialism began to be heard, I thought and still think that fear was translated into doctrines that had no place in the Constitution or the common law. Judges are apt to be naïf, simple-minded men, and they need something of Mephistopheles.''[24]

Thus Justice Holmes became the mouthpiece on the Bench of a new gospel of *laissez faire,* namely, of *laissez faire* for legislative power, because legislative power is, or under the democratic dispensation ought to be, the voice of "the dominant power" of society.

At about the same time, moreover, the Court was also introduced to a new technique in the weighing of constitutional issues. This occurred when Mr. Louis D. Brandeis handed the Court, in defense of an Oregon statute limiting the working hours of women,[25] his famous brief, three pages of which were devoted to a statement of the constitutional principles involved and 113 pages of which were devoted to the presentation of facts and statistics, backed by scientific authorities, to show the evil effects of too long hours on women, "the mothers of the race." The act was sustained, Justice Brewer, the arch-conservative of the Court, delivering the opinion. And the work thus begun by Attorney Brandeis has been continued by Justice Brandeis. The Court's function, under the due process of law clause, he has defined as that of determining the reasonableness of legislation "in the light of all facts which may enrich our knowledge and enlarge our understanding.''[26] Indeed, this technique has imparted a new flexibility to the concepts of constitutional law in almost every one of its more important departments, and to have given it scope is the really valuable aspect of the modern doctrine of due process of law.

For our purposes, no detailed consideration of the work of the Court from 1905 to 1920 is essential. In the field of state legislation, the outstanding achievement was workmen's compensation; in that of national legislation, it was the reconstitution of the Interstate Commerce Commission and the immense

[24] *Ibid.,* p. 295.
[25] Muller v. Ore., 208 U. S. 412.
[26] 264 U. S. 504, 534.

augmentation of its powers, and in both instances the Court lent a helpful hand. A few dicta of the period are, however, so much to our purpose as to warrant quotation, notwithstanding limitations of time and space.

Speaking for the Court in the Workmen's Compensation cases, Justice Pitney hinted the premise of a much more comprehensive scheme of social insurance, characterizing the worker as "the soldier of industry" and industry as "the joint enterprise" of capital and labor.[27] Voicing the Court's approval of an act of Kansas regulating insurance rates, Justice McKenna protested "against that conservatism of the mind which puts to question every new act of regulating legislation and regards the legislation as invalid or dangerous until it has become familiar." In the face of this, said he, "government—state and national—has pressed on in the general welfare and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guarantees impaired."[28]

To the same Justice must also be credited a notable statement, in support of the White Slave Act, of the concept of coöperative federalism: "Our dual form of government has its perplexities, state and nation having different spheres of jurisdiction . . . but it must be kept in mind that we are one people; and the powers preserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral"[29]—a sentiment which, unfortunately, precisely one-half of one Justice too many was to forget or ignore when it came to deciding the first Child Labor case.

To the same period also belong the memorable words of Justice Holmes in sustaining the migratory game treaty with Canada:

> When we are dealing with words that are also a constituent act like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been forseen completely by the most gifted of its begettors. It was enough

[27] 243 U. S. 188 and 219.
[28] 233 U. S. 389.
[29] 227 U. S. 308.

for them to realize or to hope that they had created an organism. . . . The case before us must be considered in the light of our whole experience and not merely in the light of what was said a hundred years ago.[30]

Such statements evidence an inclination of mind, and one never can tell of what value they may be in imparting to a puzzled Court the same favorable inclination again.

V

Chief Justice White's presidency of the Court was, therefore, in the main, one of the expansive views of governmental power, although not always; Chief Justice Taft's period, on the other hand, was one, frequently, of reaction toward earlier concepts, sometimes indeed of their exaggeration. Yet even when the more advanced positions of the earlier period were later relinquished, they were not therefore obliterated. In the corporate memory of Bench and Bar and Jurists—to say nothing of the dissents of Justices Holmes and Brandeis, reinforced later on by Justice Stone—they still survive as *points d'appui* for the Court of to-day and tomorrow.

The *chef d'oeuvre* of the Taft Court was its decision in the Minimum Wage case, to which the Chief Justice himself dissented.[31] In the course of the war with Germany, the Court had sustained several measures, both state and national, on the ground that they met an existing emergency. From this circumstance the new membership of the Court proceeded to draw the rather questionable conclusion that an emergency must be forthcoming to justify even legislation designed to remedy long-standing conditions; and naturally in an era of "return to normalcy" a justifying emergency was often hard to produce.

For the rest, the Court's disposition of the Minimum Wage case reduces to this: that whatever might be urged on behalf of the statute on the score of the public interest involved or of widespread popular approval, inasmuch as it invaded fundamental property rights, it was null and void. Incontestably this is a position for which much may be said on historical grounds. The doctrine of vested rights, as applied in a number of the state courts before the Civil War, was to the general effect that the property right was subject to regulation primarily for the purpose of mak-

[30] 252 U. S. 416. [31] 261 U. S. 525.

ing the subject-matter of the right more secure in the hands of the owner and more useful to him in the long run; if the state wished to venture beyond this, it must employ the power of eminent domain. But the property right then thought of was, for the most part, a right of direct control over definite, tangible *things* and belonged to natural *persons,* parties to the social contract and endowed with the inalienable rights of man. Today the ownership of the vast proportion of the wealth of the country, probably of all of it of which the social planner would have to take account, is vested in corporations; and a corporation, in the language of that notable conservative, Justice Brewer, "while by fiction of law recognized for some purposes as a person . . . is not endowed with the inalienable rights of a natural person."[32]

Ownership, in a word, has become *depersonalized;* and this signifies, so far as the individual owner is concerned, a transference of control over his property which, were it to government, would amount to outright confiscation. When this Association was in session in Cleveland last year, we all had the opportunity of reading in the Cleveland papers of the outcome of a suit between the Bethlehem Steel Corporation and the Youngstown Sheet and Tube Company. From testimony taken in this litigation it transpired that the Bethlehem Steel directors had presented its executives, including several of said directors, nearly thirty-two millions of dollars during a period when dividends to the holders of common stock totalled less than forty-one millions; that indeed during the years 1925 to 1928 inclusive, when not a dollar was paid to the common stock holders, nearly seven millions of dollars had been paid to ten or a dozen favored executives and directors. A few months later a suit was brought in the New Jersey chancery court by certain stockholders to force an accounting from the bonus-grabbing directors and executives, and in passing on a preliminary phase of the suit the vice-chancellor said: "The administration of the bonus system has been sedulously suppressed from the stockholders, the result only coming to their notice recently." The defense of the bonus system was undertaken by Mr. Schwab, who assumed full responsibility for it. With his customary *suavity,* he declared: "I had the feeling that this damn company belonged to me, you know,

[32] 193 U. S. 197, 362.

and I went ahead and did the best I could." In point of fact, the books of the company showed that Mr. Schwab owned no common stock at all, but that his sole stock interest comprised forty-three thousand eight hundred sixty-six shares of preferred stock. The bonus system continues, nevertheless, although on a reduced scale. Nor is the principle which this parable illustrates at all obscure or recondite. It is phrased in a recent Supreme Court opinion in the following words: "The corporation is a person and its ownership is a non-conductor that makes it impossible to attribute an interest in its property to its members."[33]

But not only has ownership become depersonalized through absorption of its active elements into the rapidly expanding prerogatives of corporation management; property of all kinds has, as it were, become *dematerialized,* by which I mean merely that economic value is today a function of social arrangement as never before, so that when social process falters, value simply takes to itself wings. Within the last twenty-seven months, it has been estimated, anywhere between one-half and two-thirds of the "property," so-called, in this country has simply evaporated. The circumstance is of too impressive dimensions to leave constitutional theory respecting the property right unaffected. Nor should we overlook the concessions which the Court itself has made in recent years to governmental power in times of emergency—emergency being just what life nowadays "ain't nothing but."[34]

The truth is that even judicial conservatism is not always obdurate to ideas of social planning. The same Court which decided the Minimum Wage case, speaking through the same Justice, upheld, in Euclid v. Ambler Realty Company,[35] a zoning ordinance which the company asserted would reduce the market value of land owned by it from ten thousand to twenty-five hundred dollars per acre. "A belief, no matter how fervently or widely entertained, that municipal authorities can assert some sort of communal control over privately owned land," said counsel "is at variance with the fundamental nature of private ownership;" to which the Court responded: "The constantly increasing den-

[33] 282 U. S. 19.

[34] 243 U. S. 332; 252 U. S. 135 and 170.

[35] 272 U. S. 365. See also 254 U. S. 300, sustaining a "conservation" statute; also 260 U. S. 393, both opinions.

sity of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the state . . . . . to limit individual activities to a greater extent than formerly." Ownership, then, is not something static but an *activity,* and one that must be adjusted to other activities.

And in the meantime the same Court had endorsed a definition of "liberty" under the Fifth and Fourteenth Amendments the logical possibilities of which are at least challenging. In Holden v. Hardy and the Lochner case, "liberty" was defined as "liberty of contract"—a necessary adjunct, to the mind of a *laissez faire* Court, of the property right. Recent cases, however, bring within its protection freedom of speech and of the press; and if these, why not other comparable interests?[36] *The day may come, in other words, when the Court will treat the term "liberty" as itself embodying constitutional recognition of the entire range of those personal and humane values which enlightened social legislation is designed to promote.*

The Child Labor Tax case,[37] also decided by the Taft Court, merits a briefer word. Like the earlier Child Labor case, it proceeds on the assumption that the Court has a special mandate from the Constitution to refrigerate the distribution of power between the states and the national government as it exists at any particular time—in other words, a mandate to stereotype the so-called "federal equilibrium." Obfuscated by its sense of mission, the Court adopted in both these cases the very procedure against which Marshall protests in Gibbons v. Ogden. "In support of a theory not to be found in the Constitution," they denied "the government powers which the words of the grant, as usually understood, import."

Such a procedure indicates a serious misapprehension on the part of the Court of certain realities. It is by no means the case that any extension of national power into fields which were once occupied solely by the states necessarily spells a weakening of state power. One of the most evident extensions of national power within recent years is that which takes the form of so-called "federal grants-in-aid," and far from having proved annihilative of state power, these have generally proved stimu-

[36] 283 U. S. 697, and cases there cited. [37] 259 U. S. 20.

lative of it—rather too much so in some instances. Indeed, it may be said broadly that under modern conditions more power to the national government means more actually effective power to the states, the cause of effective government being confronted by the same hostile interests in both fields. Nor have our administrators overlooked this fact, with the result that a man can hardly commit murder in either Chicago or New York these days without having his income tax record ransacked by the federal authorities. There may still be cases, no doubt, in which the aggrandizement of national power may be justifiably regarded as taking place at the expense of the states; but even in such cases the question remains whether, with industry and crime both organized on the national scale that they are, the state can make efficacious use of its theoretical powers. If the answer is no, then such powers are to all honest intents and purposes non-existent, and a realistic jurisprudence will so adjudge them.

VI

What is the Court's outlook today—its cosmology? Fortunately, the preachments of our present-day scientific pontiffs are quite incapable of impelling the thought even of "naïf, simple-minded" men along a single track as did Laissez Faireism backed by Evolutionism, backed in turn by belief in a benevolent Unknown. Today, the biologist and sociologist have had to yield place to the physicist and mathematician, and while these gentlemen are generally in agreement that God too is a mathematician, at that point consensus ceases. "Eddington deduces religion," Lord Russell points out, "from the fact that atoms do not obey the laws of mathematics; Jeans deduces it from the fact that they do."[38] On another point, however, Jeans and Eddington find themselves in alliance once more, namely, in assertion of the second law of thermodynamics, which says that the universe is running down, whereupon Professor Millikan protests that they have evidently overlooked the restorative properties of cosmic rays. Then there is the interesting question whether the universe is a sort of four dimensional (at latest reports, five dimensional) bird cage or a species of toy balloon in process of rapid inflation; also, assuming it is the latter, just

[38] *The Scientific Outlook* (1931).

how long it will be until the final inevitable catastrophe? Six hundred thousand millions of years, avers Professor Jeans; ten thousand millions of years, asserts Professor Eddington. In either event, there ought to be time to try out some sort of social plan—even perhaps to give the "experiment noble in intention" a fair chance!

Nor must the lesson of "relativity" be overlooked in this connection. Suppose a judge to learn that by "the Fitzgerald principle of contraction" he is actually a smaller man when he is driving sixty miles an hour than when he is standing still, instead of being a bigger one as he had felt himself to be—is such a one likely henceforth to hold that doctrines laid down by the Court even so long ago as 1900 were laid down for all time? Nor could he fail to be edified by what has happened to Professor Einstein's one absolute, the speed of light. Queries a critic, at what speed then would two rays of light proceeding in opposite directions pass each other?—a question still unanswered.[39]

The truth of the matter seems to be that modern science throws man back on his own resources once more. Law, even in the scientific sense, is held to be a creation of the human mind, rather than a datum conferred by a benevolent Providence; it is an instrument of human power and control, as is the human mind itself. To be sure, the idea is one which might easily be misapplied. For instance, I should hesitate to advise anyone that either Einstein or Planck has so far repealed Newton that one can step off a roof into mid-air with complete impunity. But the point remains, nevertheless, that what measure of Utopia we are destined for—and it is probably a very modest measure—must be of our own contrivance. We are no longer headed for Heaven in a perambulator labeled Evolution, *Laissez Faire,* or any other uncomprehended force. If we get there, it will be on our own power.[40]

[39] James Mackaye, in *The Dynamic Universe.*

[40] "Nature does not obey definite physical laws and physical laws are not sufficient to determine the future of any object, living or not living. This question is vital to mankind for the reason, first urged strongly by Socrates, that if man's actions are determined by physical law, his motives and purposes are ineffective and life becomes meaningless. . . . . It thus becomes possible, in light of modern science, to see once more the vision that Plato saw, of man as master of his own destiny." Professor Arthur H. Compton, Address before the National Academy of Sciences, *New York Times,* Novem-

Although only passing notice requires to be given to the recently constituted Court, a necessary preface thereto is a further word of acknowledgment of that series of dissenting opinions, often brilliant, in which between the years 1920 and 1930 Justices Holmes and Brandeis, and more recently Justice Stone, kept the spark of life in the *Corpus Juris* of the decade preceding. Nor was this the only result of their inspired obstinacy. The public—or that portion of it which counts in such matters—was at last advised of the necessity of scrutinizing the philosophy of life no less than the professional attainments of a nominee to the Supreme Bench. The Senate debates over the nomination of Judge Parker and of Chief Justice Hughes demonstrated that.

Already the Court, under the able leadership of Chief Justice Hughes—who was also, it should be recalled, a member of the Court in the fruitful years immediately following 1910—has recovered an important segment of lost territory. In the Indiana Chain Stores case, the autonomy of state legislative power under the Fourteenth Amendment was asserted in what, from some angles, was a rather extreme case. In the New Jersey Insurance Commission case, the Court returned once more to the general outlook of Munn v. Illinois regarding price regulation. In other cases a check was at last given to the vastly exaggerated principle of tax exemption and hints thrown out that may lead eventually to a radical revision of the entire doctrine.[41]

The present "liberal" majority of the Court is, to be sure, a narrow and precarious one. But this very fact should serve to drive home the lesson of the importance of having judges of broad experience and outlook, and so to emphasize the responsibility of the President for proposing such men and of the Senate for seeing to it that only such men are finally approved.

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ber 22, 1931. On the other hand, both Einstein and Planck continue to assert the mechanical nature of the universe. Says the latter in his *Universe in the Light of Modern Science*, recently translated from the German, "All studies dealing with the behavior of the human mind are equally [that is, with physics] compelled to assume the existence of strict causality." Professor C. G. Darwin, of the University of Edinburgh, a grandson of Charles Darwin, also offers "a most strenuous opposition" to the idea that "the new outlook will remove the well-known philosophical conflict between the doctrines of free-will and determinism. . . . . The question is a philosophic one outside the region of thought of physics, and I cannot see that physical theory provides any new loop-hole." *New York Times*, Dec. 14, 1931.

[41] 283 U. S. 527; 282 U. S. 251; 282 U. S. 216 and 379.

Pertinent in this connection are the words of Mr. Justice Brandeis, then plain Mr. Brandeis:

> I see no need to amend our Constitution. It has not lost its capacity for expansion to meet new conditions, unless it be interpreted by rigid minds which have no such capacity. Instead of amending the Constitution, I would amend men's economic and social ideas. . . . Law has always been a narrowing, conservatising profession. . . . What we must do in America is not to attack our judges but to educate them.[42]

Or, harking back some two hundred and fifty years, we may recall the words of Lord Halifax, spoken with reference to the English Constitution: "The Constitution cannot make itself; somebody made it, not at once but at several times. It is alterable; and by that draweth nearer Perfection; and without suiting itself to differing Times and Circumstances, it could not live. Its Life is prolonged by changing seasonably the several Parts of it at several Times."[43] Whereto it needs only be added that the body whose task it is to keep the Constitution of the United States adjusted to time and circumstance, that is to say, *alive,* is ordinarily the Supreme Court.

Are we at the beginning of an epoch or in the midst of an episode? Hardly the latter merely. The forces which brought about the present crisis will still remain after it has passed away—assuming it ever does pass away—and will be potent, if not curbed, to produce similar crises again. Individual initiative may be, as my old teacher Charles Horton Cooley was wont to assert, "the life-giving principle of institutions." Unfortunately, that form of individual initiative which is called forth by the profit-taking motive—"the American way of life"—does not invariably work for the good of society as a whole; although if democracy means anything, it is precisely that the good of society as a whole should supply the forces which act upon and within society with their rational objective. So there must be, I venture to suggest, a measure of "social planning," and in the long run a considerable measure of it—either that or social dissolution, or a social order based on rather obvious force.

As to the difficulties which face the social planner, the peculiarly

[42] A. T. Mason, in 79 *Pennsylvania Law Review,* at p. 693.

[43] Works of *George Saville, First Marquess of Halifax* (Raleigh ed.), 211, quoted by Professor Frankfurter in 45 *Harvard Law Review,* at p. 85.

American institutions of Judicial Review and Constitutional Limitations do not today assume the obstructive proportions that on first consideration might be expected. This is so for three reasons: first, because Constitutional Law is today more flexible, more free from autonomous concepts, than it has been at any time within forty years; secondly, because the Court itself is more realistically aware than ever before of the essentially legislative character of its task—more aware of its real freedom of choice in the presence of the vast variety of juristic materials which a century and a half of discussion and decision have made available to it; thirdly, because a wider public is also aware of these things, and so not disposed to be unduly impressed by mystifying talk about the nature of the "judicial process."

For all which reasons, once the idea of "social planning" comes to be seriously entertained, the interest of Political Science will, I predict, turn less to questions of governmental power than to questions of governmental function and arrangement. What ought Government try to do? And is our government a well-constructed government to undertake such tasks? And if not, how ought it be amended? The ramshackle character of the national legislative machine, the imbecility of the American party system, the entire lack of assurance of qualified political leadership which these conditions breed—these, to speak only of political factors, are much more serious obstacles to "social planning" than is our system of Constitutional Law.