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THE SUPREME COURT AND THE ADAMSON LAW.

The several opinions delivered by members of the Supreme Court on the constitutionality of the Adamson Law ¹ reveal the extent to which some important problems of constitutional law are still unsettled. They reveal also the significance of the individual viewpoints of the judges as factors in the solution of these problems. The diversity of opinion was greater than is indicated by the single fact that the statute was sustained by a vote of five to four, for there was disagreement among those who upheld the statute and disagreement among those who would have declared it invalid. In view of other questions now before the court or likely soon to come before it, an analysis of the viewpoints of the various judges is of more than antiquarian interest.

In sustaining the Adamson Law,² the court was compelled to give an affirmative answer to two questions: (1) Was the

¹ *Wilson v. New*, No. 797, October Term, 1916, decided March 19, 1917. Chief Justice White wrote the opinion of the court. Mr. Justice McKenna wrote a separate concurring opinion. Mr. Justice Day, Mr. Justice McReynolds and Mr. Justice Pitney wrote separate dissenting opinions. Mr. Justice Van Devanter concurred in the dissenting opinion of Mr. Justice Pitney. Mr. Justice Holmes, Mr. Justice Brandeis and Mr. Justice Clarke filed no opinions.

² The Adamson Law provided that beginning January 1, 1917, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of employees of interstate carriers, subject to certain exceptions in favor of electric roads and short railroads. Section 2 provided for the appointment of a commission to observe the operation and effects of the institution of the eight-hour standard workday, and the facts and condi-

act a regulation of interstate commerce? (2) Was it consistent with the requirements of due process of law? The opinions on the first question concern the division of governmental powers between the states and the nation. The opinions on the second question involve conceptions as to the limits of legislative power both in the states and in the nation.

Two of the four dissenting judges declared that the law was neither a regulation of interstate commerce nor consistent with due process. These were Mr. Justice Pitney, who wrote an opinion, and Mr. Justice Van Devanter, who concurred in this opinion. Mr. Justice McReynolds was not convinced that the statute was a regulation of commerce, but he did not directly express himself on the question of due process. Mr. Justice Day thought that the statute was a regulation of commerce, but held that the procedure by which it was enacted violated the requirements of due process. His objections were confined to the procedure, while Mr. Justice Pitney and Mr. Justice Van Devanter went further and declared that statutory interference with the wage contract was an unjustifiable interference with fundamental private rights. Mr. Justice McKenna wrote a separate concurring opinion, which did not dissent from the conclusion of the court on the question of legislative power, but differed from the chief justice with regard to the interpretation of the statute and indicated unwillingness to agree with some of the dicta uttered. In analyzing and comparing these differences of opinion it will be helpful to group them under two main heads: (1) The act as a regulation of interstate commerce; (2) the act and the requirements of due process of law. The second head embraces (a) the requirements of due process as to legislative procedure, and (b) the requirements of due process as to interference with freedom of contract.

tions affecting the relations between the carriers and their employees for a period of not less than six months nor more than nine months, and within thirty days thereafter to report its findings to the president and Congress. Section 3 provided that, pending the report of the commission and for thirty days thereafter, the compensation of employees subject to the act "for a standard eight-hour workday shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the *pro rata* rate for such standard eight-hour workday."

I. THE ADAMSON LAW AS A REGULATION OF INTERSTATE COMMERCE.

All the members of the court seemed to agree that, if the Adamson Law was a regulation of commerce, the commerce regulated was interstate. The dissent was based on the ground that the regulation of the contract relation between employers and employees engaged in commerce was not a regulation of the commerce in which they were engaged. Mr. Justice McReynolds gives no reasons for his dissent. He states merely:

"I have not heretofore supposed that such action [regulating pay of employees] was a regulation of commerce within the fair intendment of those words as used in the Constitution; and the argument advanced in support of the contrary view is unsatisfactory to my mind. I cannot, therefore, concur in the conclusion that it was within the power of Congress to enact the statute."

Mr. Justice Pitney is more elaborate. He says: "I am convinced, in the first place, that the act cannot be sustained as a regulation of commerce, because it has no such object, operation or effect." To this he adds that the act "removes no impediment or obstruction from the way of traffic or intercourse." This assertion he then proceeds to contradict. "The suggestion that it was passed to prevent a threatened strike, and in this sense to remove an obstruction from the path of commerce, while true in fact, is immaterial in law." The chief justice, on the other hand, holds that, since it is true in fact that the act prevented the interruption of interstate commerce, it is true in law that it was a regulation of interstate commerce.³ "What purpose," he inquires, "would be subserved by all the regulations established to secure the enjoyment by the public of an efficient and reasonable service, if there was no power in government to prevent all service from being destroyed?" This question is not answered by Mr. Justice Pitney, unless by the statement that the suggestion that the act removed an obstruction by preventing a strike "amounts to no more than saying that it was enacted to take care of an emergency." And "an emergency," he says, "can neither create a

³ "If the situation which we have described and with which the act of Congress dealt be taken into view, that is, the dispute between the employers and employees as to a standard of wages, the resulting absence of such standard, the entire interruption of interstate commerce which was threatened,

power nor excuse a defiance of the limitations on the powers of government." To this contention the chief justice takes exception.

"Nor is it an answer to this view to suggest that the situation was one of emergency and that emergency cannot be made the source of power. The proposition begs the question, since although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed. If acts which, if done, would interrupt, if not destroy, interstate commerce may be by anticipation legislatively prevented, by the same token the power to regulate may be exercised to guard against the cessation of interstate commerce threatened by a failure of employers and employees to agree as to the standard of wages, such standard being an essential prerequisite to the uninterrupted flow of interstate commerce."

The chief justice regards the act as one compelling the roads to carry on interstate commerce.

"Clear also is it that an obligation rests upon a carrier to carry on its business and that conditions of cost or other obstacles afford no excuse and exempt from no responsibility which arises from a failure to do so and also that government possesses the full regulatory power to compel performance of such duty."

This, Mr. Justice Pitney flatly denies. He dismisses the precedents cited by the chief justice on the ground that they all relate to powers of the states and not of Congress. Without citation of authority he announces a novel and surprising doctrine.

"The relation of the Federal Government to railroad companies not chartered by it is altogether different, being dependent entirely upon the fact that the companies have seen fit to engage in interstate transportation, a branch of business from which, in my opinion, they are at liberty to withdraw at any time—so far as any authority of the Federal Government to prevent it is concerned—however impracticable such withdrawal may be."

It seems safe to say that no such doctrine as this will ever receive sanction in authoritative decision. It is flatly opposed to the doctrine of the Pipe Line Cases.⁴ It implies that a vacuum

and the infinite injury to the public interest which was imminent, it would seem inevitably to result that the power to regulate necessarily obtained and was subject to be applied to the extent necessary to provide a remedy for the situation."

⁴234 U. S. 548 (1914). In this case the Supreme Court, in construing and applying the Hepburn Act, declared that certain pipe lines employed solely

has been created in legislative power by the institution of a federal, rather than a unitary, system of government. If there were any danger that the Supreme Court would accept the doctrine or any of its implications, Congress should speedily forbid any railroad to engage in interstate commerce without first obtaining a federal charter, and thus acquire the power to compel service which Mr. Justice Pitney concedes to the states as based "upon the power of the state to enforce the charter obligation and the reserved power to alter or amend the charter in the public interest." The possibility of indirect attainment of this result should be a sufficient refutation of the suggestion of legislative impotence to secure it directly.

Two other strands of Mr. Justice Pitney's argument invite criticism. "The suggestion," he says, "that an increase in the wages of trainmen will increase their contentment, encourage prompt and efficient service, and thus facilitate the movement of commerce is altogether fanciful." And his reasoning in support of this is based on the tacit assumption that the trainmen would continue to work at existing wages, and that the increase is merely in the nature of a bonus.⁵ A somewhat similar lapse appears in

in carrying oil produced or purchased by the owners of the lines should be considered common carriers within the meaning of the statute. The Interstate Commerce Commission ordered the pipe line companies to file a schedule of their rates. The companies brought suit to set aside the order. The Supreme Court sustained the order, thus in effect compelling corporations, chartered by a state, to transport oil not owned by them, although previously such companies had carried no oil produced by others except when such oil had first been purchased by the pipe line companies. This case is not cited in any of the opinions in *Wilson v. New*.

⁵ "The increase effected is not at all conditioned upon contented or efficient service. It benefits alike those who are efficient and those who are not. . . . As a measure for improving the quality of railroad locomotives, a law requiring the companies to pay 25 per cent. more than before for each locomotive, without stipulating for any improvement in the quality would be absurdly ineffective. Equally futile, as a measure for improvement of the quality of railway supplies, would be a provision of law compelling the roads to pay 25 per cent. more than formerly for rails, cross-ties, fuel, and the like, irrespective of the question of quality. In each of these instances the natural effect of the regulation as an aid to commerce would be precisely the same as that of the act under consideration—that is, *nil*." Such reasoning as this hardly seems to need reply. Mr. Justice Pitney cannot think that it would be absurdly ineffective as a measure for improving the quality of his secretarial assistance for Congress to provide an increase of 25 per cent. in the amount to be paid for such assistance. He cannot think that it would not improve the quality of his secretarial assistance, if he could get no secretary for the sum previously allowed and Congress then increased the allowance by 25 per cent.

his dismissal of the analogy between regulating rates and regulating wages. "Every member of the public," he says, "is entitled to be served, and rates are established by public authority in order to protect the public against oppression and discrimination." But in the next sentence the right of every member of the public to be served appears to be a precarious one, for it is said: "But there is no common or other right on the part of trainmen to demand employment from the carriers, nor any right on the part of the carriers to compel the trainmen to serve them." This may well be true in so far as rights of trainmen and carriers are concerned. But it does not get us far. It omits entirely the possibility of a right *on the part of the public* to compel carriers to induce employees to serve, which is the public right assumed to be exercised by the Adamson Law.

All of Mr. Justice Pitney's reasoning thus far referred to, with the exception of his contention that the roads are at liberty at any time to withdraw from interstate transportation, is presented in connection with the discussion of the commerce clause. But it is manifest that, throughout the discussion of the commerce clause, Mr. Justice Pitney has in the background of his mind the limitations on the commerce power by reason of the due-process clause. This is apparent from the concluding paragraph on this branch of the case.

"It proves nothing to say that the increase of pay was or is necessary, in the judgment of Congress, to prevent all railroad service in interstate commerce from being suspended. As a law to prevent a strike, the act is quite intelligible; but, as we have seen, the emergency conferred no power upon Congress to impose the burden upon the carriers. If the public exigency required it, Congress perhaps might have appropriated public moneys to satisfy the demands of the trainmen. But there is no argument for requiring the carriers to pay the cost, that would not equally apply to renewed demands, as often as made, if made by men who had the power to tie up traffic. I cannot believe that this is a regulation of commerce, within the meaning of the Constitution."

Mr. Justice Day's position seems much more tenable. Though he finds that the legislative procedure was wanting in due process, he concedes that the act was a regulation of commerce.

"I agree that upon the reasoning which sustained the power of Congress to regulate the hours of service of employees, and the degree of care which employers must observe to protect the safety of those engaged in the service and in view of the enactments which are held to be lawful regulations of interstate transportation, Congress has the power to fix the amount of compensation necessary to secure a proper service and to insure reasonable rates to the public upon the part of the railroads engaged in such traffic."

Mr. Justice McKenna, in his concurring opinion, agrees with the chief justice with regard to the power of Congress. He differs, however, in his interpretation of the act, and holds that the wage provisions were merely incidental to the object of enforcing obedience to the eight-hour provision, as far as practicable. It is to be regretted that Mr. Justice McReynolds gave no reasons for his judgment that the act was not a regulation of commerce. It is hardly satisfactory to say that he had not heretofore supposed that such action was a regulation of commerce and was not persuaded by the arguments advanced. His dissenting opinion, comprising only three brief paragraphs, acquits him of approving of the reasoning of Mr. Justice Pitney. But, instead of giving us better reasoning, he gives us none at all.

The concurrence of six members of the court in the opinion that the Adamson Law is a regulation of commerce should definitively end any contention that a regulation of the relations *inter sese* of persons engaged in commerce cannot be a regulation of the commerce in which they are engaged. But it does not follow that every regulation of such relations is necessarily a regulation of commerce. It is possible to agree with the test implied in a sentence of Mr. Justice Pitney's without agreeing with his application of the test to the case before the court.

"The primary and fundamental constitutional defect that I find in the act now under consideration is precisely this: that it undertakes to regulate the relations of common carriers by railroad to their employees in respect to a particular matter—an increase of wages—that has no real and substantial connection with the interstate commerce in which the carriers and their employees are engaged."

The difference of opinion between Mr. Justice Pitney and Chief Justice White on the question whether the Adamson Law

was a regulation of commerce comes down to a disagreement as to the directness of the connection between legislative raising of wages of railroad employees and the promotion of the commerce in which they are engaged. This is a question of degree. The chief justice looks at the situation as it actually was and sees a close and immediate connection. His opinion affords no basis for the complaint of Bentham that "in certain cases jurisprudence may be defined, the art of being methodically ignorant of what everybody knows." Mr. Justice Pitney, on the other hand, believes that in deciding whether the connection between the statute and commerce was close or remote, the facts should be disregarded. What he concedes to be true in fact, is, he says, "immaterial in law." But the question was a question of the facts and of a reasonable judgment on the facts. It was not a question of the literal interpretation of the phraseology of the Constitution. The meaning of the Constitution, as elucidated by the Supreme Court, is that, for a statute to be a regulation of commerce, it must sustain a direct relation to commerce. The attempt to apply this formula to a concrete situation without regard to the facts of the situation is about as sensible as an attempt to find the area of a lot without knowing its dimensions.

Statutes find their incidence in the realm of the actual. And when a judicial decision on the constitutionality of a statute requires, not the original discovery of a formula expressing an interpretation of the Constitution, but the application of an established formula to the facts with which the statute deals, such decision should be reached by considering the facts rather than by disregarding them. This method of applying the Constitution, sanctioned by a host of judicial precedents, is essential to the flexibility of our fundamental law, without which it could never have served the needs of a generation so unlike the one in which it was adopted. Mr. Justice Pitney's method of constitutional interpretation would severely hamper the process of gradual and experimental adjustment of the law to changing conditions. To illustrate by the present instance, if Congress were without power to compel carriers to serve the public, it would soon be under the necessity of undertaking the function of serving the public as a

governmental enterprise. Whether this would be desirable or undesirable is beside the point. A serious responsibility would rest upon any court which, by denying to the government the power to compel service under private ownership, would force the government to abolish such ownership. If such a result were caused by a judicial decision based, not on specific and unambiguous language in the Constitution, but on a judgment on a question of fact, a court which declared that what was true in fact was immaterial in law could not long command wide or profound respect. It is fortunate that the Supreme Court throughout its history has for the most part appreciated the importance of giving weight to the facts in passing a judgment upon the relation between the facts and the Constitution.

The practical wisdom of the majority in *Wilson v. New* in regarding the facts of the situation with which the Adamson Law dealt can hardly be open to question. Without any clear light from the language of the Constitution they had to decide a question of constitutionality. In essence their judgment whether the statute was a regulation of commerce was simply a determination of the effect of the statute on a practical situation. Any other answer to the particular problem before the court than that given by the majority would have been so devoid of simple common sense that it would inevitably have shaken the confidence which our supreme judicial tribunal deservedly enjoys. The bearing of the decision on the question whether other possible exertions of congressional power are regulations of commerce is well expressed in the concluding paragraph of the dissenting opinion of Mr. Justice McReynolds:

"But considering the doctrine now affirmed by a majority of the court as established, it follows as of course that Congress has power to fix a maximum as well as a minimum wage for trainmen; to require compulsory arbitration of labor disputes which may seriously and directly jeopardize the movement of interstate traffic; and to take measures effectively to protect the free flow of such commerce against any combination, whether of operatives, owners, or strangers."

Since Mr. Justice McReynolds is speaking only of the commerce clause, his inference from the decision of the majority

seems without flaw. It does not follow, however, that a statute which is admittedly a regulation of commerce is immune from the objection that it takes liberty or property without due process of law. This will depend upon an interpretation and application, not of the commerce clause, but of the due-process clause.

2. THE ADAMSON LAW AND THE REQUIREMENTS OF DUE PROCESS OF LAW.

All the opinions in *Wilson v. New*, except that of Mr. Justice McReynolds, touch upon the question whether the Adamson Law is an unconstitutional deprivation of liberty. It is clear, therefore, that eight members of the court hold that congressional regulations of commerce must meet the test of due process of law. The point would hardly have seemed open to debate, had there not been some judicial dicta to the effect that the due-process clause did not refer "to consequential injuries resulting from the exercise of a lawful power."⁶ The only legitimate meaning of such dicta is that some consequential injuries are deprivations of liberty or property with, rather than without, due process of law. The Fifth Amendment imposes limitations on all powers of Congress. An objection that a statutory taking of property is without due process cannot be dismissed on the sole ground that such taking is in fact a regulation of commerce. The silence of Mr. Justice McReynolds on this point does not warrant the inference that he holds otherwise. It was sufficient for him to state one ground of invalidity so long as that ground, if accepted by the majority, would be decisive of the case. The objections raised to the statute on the ground of due process applied to the procedure by which it was adopted and to its substantive effect.

⁶*Knox v. Lee*, 12 Wall. (79 U. S.) 457, at p. 551 (1871). For a contention that this statement stands for a doctrine that the due-process clause of the Fifth Amendment does not limit Congress in respect to statutes which are admittedly regulations of interstate commerce, see Henry Hull, "The Federal Child Labor Law," 31 *Political Science Quarterly* 519, at pp. 526-529. For a statement of the opposing view see Thomas I. Parkinson, "The Federal Child Labor Law," 31 *Political Science Quarterly* 531, at pp. 533-534, 539.

(a) *The Requirements of Due Process as to Legislative Procedure.*

The dissenting opinion of Mr. Justice Day declares the wholly novel doctrine that investigation and deliberation is an essential requisite of certain kinds of legislative action. The absence of such investigation and deliberation on the part of Congress before passing the Adamson Law, he declares to be a "violation of the spirit of fair play and equal right which the Constitution intended to secure in the due-process clause to all coming within its protection." The only precedents cited for this doctrine are cases involving the procedure of courts and administrative bodies. Where the judgments or orders of courts or administrative bodies are final determinations of the rights of individuals, such judgments or orders must be preceded by notice and an opportunity to be heard, in order that the judicial or administrative procedure satisfy the requirements of due process. But where these administrative or judicial determinations are not final, notice and hearing may be dispensed with.⁷ If, without any deliberation or hearing, a health board destroys food alleged to be unfit for human consumption, its action will be sustained provided the court finds that the food was in fact unfit for human consumption. So it would seem that a legislature should be permitted to act as hastily as it pleases, subject only to judicial review of the substantive effects of its action. Moreover, the Constitution expressly declares that "each house may determine the rules of its proceedings." Mr. Justice Day's contention seems flatly subversive of this specific grant of power to Congress. If subordinate administrative bodies are allowed to dispense with notice and hearing when the situation calls for immediate action, manifestly the supreme legislative body of the nation should be permitted to act with equal celerity.

Mr. Justice Day does not insist that Congress should accord a hearing before taking action. He says merely that "inherently,

⁷ *Hagar v. Reclamation District*, 111 U. S. 701 (1884); *Lawton v. Steele*, 152 U. S. 133 (1894); *North American Cold Storage Company v. Chicago*, 211 U. S. 306 (1908).

such legislation [fixing wages] requires that investigation and deliberation shall precede action," a principle, he says, which Congress has recognized in fixing rates. It has not, however, been declared by the Supreme Court that a hearing must precede the fixing of a rate.⁸ But even if this should become the law, different considerations may well apply to the procedure to be adopted in passing such a statute as the Adamson Law. The presence of emergency justifies the absence of notice and hearing in administrative action. It should also do so with regard to legislative action. No emergency exists with respect to the fixing of rates. Delay could not be fatal to the object of the statute. But there was good reason to believe that delay would be as baneful in dealing with the situation which prompted the Adamson Law as it would be in dealing with food alleged to be unfit for human consumption. Mr. Justice Day seems to recognize this in part. "I agree," he says, "that a situation, such as was presented to Congress at this time, properly called for the exertion of its proper authority to avert impending calamity." He agrees also that "Congress has the power to fix the amount of compensation necessary to secure a proper service." His position seems to be that, though Congress might pass the Adamson Law to avert a pending calamity, it must not pass it hastily, even though delay might defeat the purpose of averting the calamity.

Mr. Justice Pitney expresses his agreement with Mr. Justice Day, but does not add his reasons. The chief justice, evidently discussing Mr. Justice Day's position, answers it by saying:

"All the contentions as to want of consideration sustaining the action taken are disposed of by the history we have given of the

⁸In *Budd v. New York*, 143 U. S. 517, at pp. 546-547 (1892), it was expressly declared in the majority opinion that no hearing was necessary in legislative fixing of rates. This was, however, before the Supreme Court had definitely settled that rates fixed by the legislature were subject to judicial review on the question of reasonableness. In *Home Telephone and Telegraph Company v. Los Angeles*, 211 U. S. 265 (1908), in which it was contended that a schedule of rates fixed by a municipal council was invalid because no hearing was accorded to the company, Mr. Justice Moody found that a hearing had in fact been given, but he specifically left open the question whether a hearing was essential to due process of law. On page 279 he said: "If notice and an opportunity to be heard were indispensable, which we do not decide, it is enough that, although the charter be silent, such notice and hearing were afforded by ordinance, as in this case."

events out of which the controversy grew, the public nature of the dispute, the interposition of the president, the call by him upon Congress for action in conjunction with the action taken, all demonstrating not unwitting action or a failure to consider, whatever may be the room, if any, for a divergence of opinion as to the want of wisdom shown by the action taken."

He thus tells us that if deliberation were essential, it might precede rather than follow the introduction of a bill. He does not directly controvert the contention that deliberation was essential. This may indicate that there is creeping into our constitutional law the doctrine that a legislature cannot act in a hurry even though its action is otherwise free from fault. Probably, however, it indicates merely that the chief justice preferred to say no more than was necessary to show the inapplicability of Mr. Justice Day's position to the case before the court. As a caution to the legislature it may be well for a dissenting opinion to assert the importance of deliberation before passing a statute. Certainly legislative investigation and deliberation add greatly to the presumption in favor of the constitutionality of a statute. But it seems exceedingly unlikely that any court will ever declare that the absence of such deliberation is in itself a violation of the Constitution, when the Constitution expressly provides that the legislature may determine the rules of its proceedings. If the substantive results of a statute do not constitute a taking of liberty or property without due process, it would be rather absurd to declare that the statute was unconstitutional because the legislature came to a correct conclusion too speedily.

(b) *The Requirements of Due Process as to Legislative Interference with Freedom of Contract.*

An interference with freedom to contract is a deprivation of liberty.⁹ It is held to be also a deprivation of property.¹⁰ Not all deprivations of liberty or property, however, are forbidden by the Constitution. One may be constitutionally deprived of liberty

⁹ Allgeyer v. Louisiana, 165 U. S. 578 (1897).

¹⁰ Gillespie v. People, 188 Ill. 176 (1900): "The right of property involves, as one of its essential attributes, the right, not only to contract, but also to terminate contracts."

or property, provided the deprivation is not wanting in due process of law. The extent of the deprivation which will be held consistent with due process depends upon the importance of the public need which is served by the deprivation imposed upon the individual. Railroads may be compelled to make their bridges safe, though the cost is exceedingly burdensome. They may be required to promote the public convenience, but in determining the extent to which they may be forced to serve this end, the cost is an important element to consider.¹¹ It would seem that, if the Adamson Law were deemed essential to the public safety, the burden it imposed upon the railroads would be immaterial. If, however, it served public convenience only, and not public necessity, then the extent of the burden on the roads might acquire significance.

None of the opinions in *Wilson v. New* dealt with the problem in this fashion. Chief Justice White did not separate his consideration of the question whether the statute was a regulation of commerce from his discussion of whether it was obnoxious to the due-process clause. He commingled these two questions in a different grouping, as follows:

"All the propositions relied upon and arguments advanced ultimately come to two questions: first, the entire want of constitutional power to deal with the subjects embraced in the statute, and second, such abuse of the power if possessed as rendered its exercise unconstitutional."

Owing to the fact that Mr. Justice Pitney gave separate treatment to the inhibitions of the Fifth Amendment, it will be simpler to state his objections to the statute and then to indicate the answers given these objections in the opinion of the chief justice.

¹¹ The most familiar example is the regulation of rates. *Chicago, Milwaukee & St. Paul Railway Company v. Tompkins*, 176 U. S. 174 (1900). For an excellent statement of the relation between the public need and the cost to the individual of promoting that need, see the opinion of Mr. Justice Lamar in *Washington, ex rel. Oregon Railroad and Navigation Company v. Lawrence*, 224 U. S. 510 (1912), at pp. 528-530: "The question in each case must be determined in the light of all the facts, and with a just regard to the advantage to be derived by the public, and the expense to be incurred by the carrier. For while the question of expense must always be considered, the weight to be given that fact depends somewhat on the character of the facilities sought."

Mr. Justice Pitney held, as we have seen, that the federal government has no power to compel the service of the railroads in interstate commerce. Therefore he found no warrant for compelling the roads to pay enough to secure a labor force to continue that service. Thus he would accord to the federal government no greater powers over a public-service business than over a private business. It is difficult to reconcile his position in this respect with his recognition that "every member of the public is entitled to be served." It is still more difficult to reconcile it with the many decisions sustaining federal regulations of interstate carriers which greatly exceed any powers that government has ever exercised over purely private businesses. Mr. Justice Pitney's opinion abundantly justifies the comment made by the chief justice on the arguments which his dissenting colleague accepts:

"Indeed in seeking to test the arguments by which the propositions are sought to be supported we are of opinion that it is evident, that in substance they assert not that no legislative judgment was exercised; but that in enacting the statute there was an unwise exertion of legislative power, begotten either from some misconception or some mistaken economic view or partiality for the rights of one disputant over the other or some unstated motive which should not have been permitted to influence action. But to state such considerations is to state also the entire want of judicial power to consider them."

Mr. Justice Pitney insisted that the roads and their employees had the constitutionally guaranteed right to agree as to wages, or to disagree, and in the event of disagreement to decline to serve the public till their disagreement was ended, whatever the public calamity that might ensue. Chief Justice White conceded that the roads and their employees had the right to agree as to wages, but held that, in the event of disagreement, the public had the right to establish by law a wage scale for such period as might be necessary to enable the parties to come to an agreement. Mr. Justice Pitney asserted that "it is of the very essence of the right [to contract] that the parties may remain in disagreement if either party is not content with any term imposed by the other." He evidently misinterprets the statement of the chief justice with reference to the failure of the parties to exercise

their private right to agree. He seems to assume that it implies a denial of the existence of any private right to disagree under any circumstances. But this implication is not warranted. Complete freedom of contract would of course include freedom from any compulsion based on the failure to contract. But complete freedom of contract exists under no system of law. A law which compels a railroad to buy a certain kind of safety appliance interferes with freedom to contract and with freedom not to contract. When Mr. Justice White points out that the Adamson Law did not interfere with the freedom to contract, he does not mean that freedom to contract is the only freedom subject to constitutional protection. It is true that this implication is possible, if we isolate certain sentences from their context.

"Conceding that from the point of view of the private right and private interest as contradistinguished from the public interest the power exists between the parties, the employers and employees, to agree as to a standard of wages free from legislative interference that right in no way affects the lawmaking power to protect the public right and create a standard of wages resulting from a dispute as to wages and the failure therefore to establish by consent a standard. The capacity to exercise the private right free from legislative interference affords no ground for saying that legislative power does not exist to protect the public interest from the injury resulting from a failure to exercise the private right."

But the sentence immediately following makes it clear that the chief justice appreciates that there are constitutional limitations on legislative impositions of burdens on those who fail to exercise their private right to contract:

"In saying this, of course, it is always to be borne in mind that as to both carrier and employee the beneficent and ever-present safeguards of the Constitution are applicable, and therefore both are protected against confiscation and against every act of arbitrary power which if given effect to would amount to a denial of due process or would be repugnant to any other constitutional right."

The point made by the chief justice comes down to this. The Adamson Law did not interfere with agreements made by the two parties to the labor contract. It dealt with a situation created by the absence of any agreement. It ordered the carriers to make such agreement as was deemed essential to enable them to perform the services which they could be compelled to perform.

But it does not follow that under different circumstances and with regard to different parties, the right to be free from legislative compulsion in the event of failure to make a contract would not be sustained as within the fold of constitutional protection.

Mr. Justice Pitney treats freedom of contract as an abstract and universal concept protected by the due-process clause, whoever the parties in interest and whatever the circumstances. The right to control property, he says, "to manage and to dispose of it . . . the right to hire employees, to bargain freely with them about the rate of wages . . . these are among the essential rights of property, that pertain to owners of railroads as to others." To a degree, yes. But not absolutely and universally—as the entire law of the police power shows.

It is not clear just what the learned justice means by saying that the right to control or manage property is an "essential" right of property. "Essential" cannot mean "necessary," for owners of railroads have not the right to control and manage their property as they will, and yet their property still exists. It is likely that by "essential" Mr. Justice Pitney means "desirable" or "important" under nearly all circumstances. This is a tenable position. Adam Smith thought so. Herbert Spencer thought so. The philosophical anarchists think so. Adam Smith and Herbert Spencer may have been wise in their generations. But what was wise in their generations is not of necessity wise in ours. *Tempora mutantur*. Granting even the wisdom of Mr. Justice Pitney's view of what is essential, it remains a serious question whether the Constitution has delegated to him the power to substitute his wisdom for the judgment of the legislature. That it does not, is distinctly asserted in the opinion of the chief justice.¹²

It is not to be assumed that Mr. Justice Pitney's view of what is essential is influenced by any bias in favor of the economic interests of one group as against those of another. He is inclined to think that Congress might have appropriated public money to satisfy the demands of the trainmen. He says that he is "unable to find in the Constitution any authority on the part of Congress

¹² See passage cited on page 17.

to commandeer the railroads or the services of the trainmen." It is clear that it is his opinion that freedom from legislative coercion with regard to the continuance of employment or the wages to be paid or accepted for labor are equally "essential" characteristics of the "rights" of employees as well as of employers. Some of Mr. Justice Pitney's dicta will be as welcome to the employees as some of the dicta of the chief justice will be unwelcome. The chief justice implies that Congress can commandeer the services of employees.¹³ The chief difference between him and his dissenting colleague which reveals itself in the opinions under review relates to the extent to which the due-process clause permits the members of the court to substitute their views of desirability for those of the legislature. There may also be a difference as to what the two members of the court think desirable. The chief justice evidently does not think it an "essential" right of property or of liberty, for individuals to use their liberty in such a way as to bring about a great public calamity. His colleague disagrees. The facts are to him immaterial in law. Public calamity or no, the interest of individuals to be let alone is essential. Since it is clear from other opinions that the chief justice holds that "rights" which he deems "essential" or "fundamental" are protected by the due-process clause, it seems correct to infer that his judgment of what are essential rights differs from that of his colleague. And, since the selection of what is essential is not controlled by any inherent meaning in the words "due process of law," such selection must to a considerable degree be governed consciously or unconsciously by one's view of what is desirable.

As Mr. Justice Pitney was of opinion that under no circumstances whatever can Congress prescribe rates of wages for those engaged in public-service enterprises, he was not concerned with the question whether the Adamson Law was an abuse of an existing power. This question, however, was one which the contrary determination of the major issue by the chief justice required him

¹³ "Whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them and by concert of action to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest."

to discuss. On this point he emphasizes that the Adamson Law was a temporary measure, that it imposed a wage scale on the parties only after their failure to fix one by agreement and left them free after a brief time to fix a new scale if they could agree, that the scale imposed was not that demanded by either of the parties from the other, but was a compromise between the two, and that "no contention is made that in any view the enforcement of the act would result in confiscation." The meaning of the term "confiscation" must be that fixed to it in determining the validity of rate regulations, since manifestly the roads are compelled to pay more than they thought they would have to pay if left free to fight out their differences with their employees.

The problem before the court was considerably simplified by the failure of the roads to allege and prove that the enforced increase of wages would reduce their net earnings to a point below a fair return on the fair value of their property. If such allegations had been made and substantiated, their weight would seem to be dependent on the question whether the power exercised by Congress was that to promote public convenience only, or was that to promote public necessity, in the sense of health, morals or safety.¹⁴ The chief justice evidently takes the latter view. He

¹⁴ In regulations imposed on a business affected with a public interest, the importance of the expenditure involved in complying with the regulation would depend on whether or not the regulation related to what are called the "absolute duties." Mr. Justice Day and Mr. Justice McKenna both refer to the question of the extent of the burden imposed on the roads by the Adamson Law. The former says that the "cost of the experiment . . . must be paid, not by the public, nor be equally borne by the contracting parties, but by legislative edict is made to fall entirely upon one of the parties, with no provision for compensation should the subsequent investigation establish the injustice or impropriety of the temporary increase." Mr. Justice McKenna, after observing that to a carrier a wage law merely imposes an expense which can be adjusted through its rates, adds: "If it be said that rates cannot be changed at will, but only by permission of authority, I cannot think that permission will not be given if it is necessary to fulfill the command of the law. Indeed, if not given, the law might encounter constitutional restriction." He can hardly be speaking of the Adamson Law, for the determination which he implies might render some law unconstitutional was to be made only after the expiration of the wage provisions of the Adamson Law. It would seem that if the roads can be compelled to furnish transportation service and if a raise in wages is deemed essential to securing such service, the cost to the roads of raising the wages should be immaterial so long as they remain under a duty to serve the public. But such cost is of necessity an increase in expenses and will cause a decrease in net returns. If such increase in expenses decreases the returns below the point which is deemed a fair return on the fair value of the property, the existing rates imposed by

speaks of the act as an exercise of a "power to remedy a situation . . . which if not remedied, would leave the public helpless, the whole people ruined and all the homes of the land submitted to a danger of the most serious character." Mr. Justice Day referred to the situation at the time of the passage of the act as one calling for the exercise of proper congressional authority "to avert impending calamity." With these views of the purpose of the act, sanctioned by six of the judges, the element of cost in complying with the law should be no more material than it is in determining the constitutionality of statutes or administrative orders, requiring the destruction of dangerous buildings¹⁵ or of unwholesome food¹⁶ or the abandonment of the manufacture or sale of liquor.¹⁷ Some public advantages are deemed so essential that they may be secured by legislation even though such legislation involves the extinction of the entire value of the offending property. Such legislation frequently takes the form of the requirement of expenditure in connection with the use of property if such use is to be continued.

If, then, grave public danger authorizes the imposition of serious or even total and permanent loss of property in connection with purely private undertakings, a like danger would *a fortiori* justify the imposition of serious loss on those engaged in a business affected with a public interest. Such considerations, Mr. Justice Pitney brushes aside by declarations which involve a denial that interstate transportation is a business affected with a public interest. But Mr. Justice Van Devanter is his only colleague to indicate any concurrence in this doctrine. The other members of the court, with the possible exception of Mr. Justice

the Interstate Commerce Commission would be confiscatory and the roads would be entitled to permission to increase them. The question of cost should be regarded as material on the constitutionality, not of the Adamson Law, but of the existing orders of the Interstate Commerce Commission with respect to rates. For a discussion of this aspect of the question see 17 Columbia Law Review 114, at pp. 117-121.

¹⁵ Freund, Police Power (Chicago, Callaghan & Company, 1904), section 520.

¹⁶ North American Cold Storage Company v. Chicago, 211 U. S. 306 (1908).

¹⁷ Mugler v. Kansas, 123 U. S. 623 (1887).

McReynolds, may be assumed to agree with principles stated in the opinion of the chief justice.

"That the business of common carriers by rail is in a sense a public business, because of the interest of society in the continued operation and rightful conduct of such business and that the public interest begets a public right of regulation to the full extent necessary to secure and protect it, is settled by so many decisions, state and federal, and is illustrated by such a continuous exertion of state and federal legislative power as to leave no room for question on the subject. . . .

"That the power to regulate . . . embraces the right to control the contract power of the carrier in so far as the public interest requires such limitation, has also been manifested by repeated acts of legislation as to bills of lading, tariffs and many other things, too numerous to mention. . . .

"Clear also is it that an obligation rests upon a carrier to carry on its business and that conditions of cost or other obstacles afford no excuse and exempt from no responsibility which arises from a failure to do so and also that government possesses the full regulatory power to compel performance of such duty."

And later the chief justice specifically states that the "power of Congress to regulate" is "irrespective of the source whence the carrier draws its existence." The basis of the legislative power is the legal fact that the business regulated is a business affected with a public interest.

"There is no question here of purely private right since the law is concerned only with those who are engaged in a business charged with a public interest where the subject dealt with as to all the parties is one involved in that business and which we have seen comes under the control of the right to regulate to the extent that the power to do so is appropriate or relevant to the business regulated."

3. THE SIGNIFICANCE OF THE OPINIONS IN *WILSON v. NEW*.

From the foregoing analysis of the majority opinion it appears that the doctrine for which *Wilson v. New* stands is a rather limited one. In a business affected with a public interest, when employers and employees engaged in that business fail to agree upon a wage scale, and when such disagreement is likely to cause an interruption of the business which will produce a great public calamity, and when these facts have been matters of such public notice that the legislators may be presumed to have

been considering them, the legislature may fix for a limited period a wage scale which is a compromise between the respective demands of the employers and the employees and which does not deprive the employer of a fair return on the fair value of his property.

To this doctrine Mr. Justice Day adds the qualification that the legislature must investigate and deliberate between the introduction of the bill and its enactment. With this, Mr. Justice Pitney and Mr. Justice Van Devanter agree. It is not certain that they go further. The essence of their dissent may be that Congress has not the usual legislative powers over a business affected with a public interest unless such business is carried on by a corporation chartered by Congress. A necessary link in their argument is the assertion that Congress has not the power to compel service from an interstate carrier not having a federal charter. Nevertheless their language implies that the determination of the wages to be paid by an employer is a subject matter which, so far at least as legislative action is concerned, the due-process clause puts forever within the realm of anarchy and without the realm of law.

The dissent of Mr. Justice McReynolds is confined to the contention that the regulation of wages to be paid to those engaged in commerce is not a regulation of commerce and is therefore not within the constitutional grant to Congress. He gives no consideration to the clause of the Constitution giving Congress power "to make all laws which shall be necessary and proper for carrying into effect the foregoing powers." Clearly a law regulating wages might be not a regulation of what is technically regarded as commerce and yet might be a law which was necessary and proper to carry into effect a power to regulate commerce. The dissent of Mr. Justice McReynolds throws no light on his views of state legislative power, since the state legislatures have residuary and not delegated authority and need not bring their action within any defined class of powers.

Scattered through the several opinions are dicta not essential to the disposition of the case. The chief justice declares that, if the employers and employees can agree upon a standard of

wages, "the establishment and giving effect to such agreed-on standard is not subject to be controlled or prevented by public authority." This suggests the inference that he was one of the four members of the court who were of opinion that the Oregon minimum-wage law was unconstitutional. Mr. Justice Day says that he agrees that "Congress has the power to fix the amount of compensation necessary to secure a proper service," omitting any qualification that the exercise of such power is contingent on the inability of employers and employees to agree. Mr. Justice McReynolds and Mr. Justice Pitney say that the doctrine of the majority involves the conclusion that Congress may fix a maximum as well as a minimum wage for trainmen. The latter adds that, if Congress can fix wages of trainmen "during a term of months, it may do so during a term of years"; that, if it may "impose its arbitral award" in a dispute between employers and employees both of whom are engaged in interstate commerce, it may do the same in the event of a dispute between the railroads and "the producers of any commodities essential to the proper movement of traffic." The chief justice says that the right of the employee to leave the employment if he does not get such wages as he desires is "necessarily subject to limitation when employment is accepted in a business charged with a public interest." But Mr. Justice Day is "not prepared to admit that Congress may . . . coerce employees against their will to continue in service in interstate commerce." He thinks it not "necessary to decide, as declared in the majority opinion, that in matters of this kind Congress can enact a compulsory arbitration law," since "these questions are not involved in this case and their decision need not be anticipated until they actually arise." Mr. Justice Holmes, Mr. Justice Brandeis and Mr. Justice Clarke are silent with regard to these dicta. Their concurrence in the opinion of the chief justice does not indicate their agreement with statements not essential to the decision. The attitude of Mr. Justice McKenna is not definitely stated. His opinion is confined to the intention of Congress. "Of the power," he says, "I have no doubt. . . . Submission to regulation is the condition which

attaches to one who enters into or *accepts employment in*¹⁸ a business in which the public has an interest." Thus he seems to declare himself in favor of the power of Congress under the commerce clause to impose some coercion on employees. Yet he may imply that the due-process clause sets limits to coercion on employees that it does not on employers.

"To a carrier a wage law is but an item in its accounts, and requiring, it may be, an adjustment of its operations, the expense to be recompensed through its rates. . . . To an employee a wage law may be of more vital consequence, be of the very essence of his life, involving factors—many and various—which he alone can know and estimate, and which, besides, might not have an enduring constancy and be submissive to precedent judgment."

It is, however, in his next sentence that he says he is speaking only of congressional intention and not of power.

These various questions, though not necessarily involved in the problem before the court, are nevertheless likely within a decade to come before the court for actual decision. The dispute of the dicta in the opinion under review gives little hope for unanimity among the judges when the points discussed in dicta must be settled by decision. The dispute must be confusing to legislators who look to the Supreme Court for light as to the meaning of the Constitution. The difference between the judges both in the dicta and in the reasoning essential to the decision seems to be a difference quite unrelated to the phraseology of the Constitution, a difference not to be resolved by pointing out logical fallacies in the argument. The source of the difference seems to be the selection of different premises.

¹⁸ Italics are author's. Mr. Justice McKenna seems clearly of opinion that employees of businesses affected with a public interest have not complete liberty to withdraw at any time. "When one enters into interstate commerce one enters into a service in which the public has an interest and subjects one's self to its behests. And this is no limitation of liberty; it is the consequence of liberty exercised, and constrains no more than any contract restrains." For a valuable discussion of the question whether coercion on employees would be regarded by the Supreme Court as the imposition of involuntary servitude within the meaning of the Thirteenth Amendment, see Thomas I. Parkinson, "Constitutional Aspects of Compulsory Arbitration of Industrial Disputes on Public Utilities," *Proceedings of the Academy of Political Science in the City of New York*, Vol. VII, No. 1 (March, 1917), pp. 44-80.

The situation revealed in the opinions on the constitutionality of the Adamson Law prompts inquiry as to the nature and extent of the power of the judiciary to give the authoritative definition of the meaning of the terms "regulation of commerce" and "due process of law." It invites earnest consideration of the problem of discovering the factors that influence or determine the conclusions of each individual member of the bench. Why do judges disagree? Why is one so firmly convinced of the correctness of a conclusion which another so vigorously condemns as unsound? If the situation is undesirable, what shall be the remedy? The judicial controversy over the constitutionality of the Adamson Law is more significant for the larger questions which it raises than for the minor one which it settles.

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