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MR. JUSTICE BRANDEIS: A STUDENT OF SOCIAL AND ECONOMIC SCIENCE

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The problem of Constitutional Interpretation is more than a matter of rule-of-thumb. The Supreme Court does not use the Constitution in deciding cases as a student uses the lexicon.¹ The written Constitution is phrased in such general language as to leave much to the discretion of the judges. This makes possible, and explains, a very important feature of our Constitutional law: the changing point of view which it exhibits from generation to generation. During the early years of our Constitution the relation of the states to the national government was defined by John Marshall from the point of view of intense sympathy with national power. Later it was interpreted, largely by Chief Justice Taney, from exactly the opposite point of view. Similarly the relation of the government to individual rights has been interpreted from time to time, and even in our own generation, from very different points of view.

Mention is made of these facts only for the purpose of emphasizing the importance of Constitutional theory. What the

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¹ "The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic, living institutions, transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." Language of Mr. Justice Holmes in *Gompers v. United States*, 233 U. S. 604, 610, 34 Sup. Ct. 693, 695 (1914).

Constitution means is, ultimately, what the judges say it means. What the judges say it means will be dictated by a number of forces, but their interpretation is more particularly influenced by the constitutional or judicial theory which the members of the bench entertain.² Constitutional theory in turn usually reflects the training, the economic and social background of the judges. The judge does not and cannot live in a vacuum. He is bound to be, and ought to be, influenced by the life about him.³ The meaning of the Constitution, therefore, varies not only from age to age, but among the judges on the same bench.

That an important phase of the judge's work is, and always has been, law-making, is not so much questioned today.⁴ The

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² "Under the Constitutional System as developed in this country the political philosophy of the judges is a matter of vital importance." Dodd, *Social Legislation and the Courts* (1913) 28 POL. SCI. Q. 3.

³ "The moral code of each generation, this amalgam of custom and philosophy and many an intermediate grade of conduct and belief, supplies a norm or standard of behavior which struggles to make itself articulate in law. The sanction or source of obligation for moral rules, it has been said, is the pressure of society on the individual. The same pressure is at work in making the law declared by the Courts. The state in commissioning its judges has commanded them to judge, but neither in constitution nor in statute has it formulated a code to define the manner of judging. The pressure of society invests new forms of conduct in the minds of the multitude with the sanction of moral obligation and the same pressure working on the mind of the judge invests them finally through his action with the sanction of law." CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* (1928) 17-18.

⁴ "Today, when all recognize, nay insist, that legal systems do and must grow, that legal principles are not absolute, but are relative to time and place, and that juridical idealism may go no further than the ideals of an epoch, the fiction (that the judges cannot make law) should be discarded." Pound, *Courts and Legislation* (1913) 7 AM. POL. SCI. REV. 361, 365. See also CARDOZO, *THE NATURE OF JUDICIAL PROCESS* (1928) c. 3.

In the light of a recent address by Mr. Justice Butler of the United States Supreme Court, the statement, that judicial law-making is now generally recognized, would seem to demand qualification: "Judges may not put aside or stretch the law in order to decide according to their individual conceptions of right and wrong or to give effect to what in their view would best meet social and economic needs. They are bound to take the law as it is. They have to apply it impartially to the conditions, whether new or old, that are properly disclosed in controversies brought before them for decision. It is for others to determine whether new commercial, industrial or social conditions require amendment of the law. Courts may not substitute for fixed principles the changing popular conceptions of right or justice that from time to time may seem to merit approval. Interpretation cannot be made to serve in the place of legislation. When changes in the law are regularly accomplished the Courts will give them effect according to their true meaning and intent." Address at the opening of the Civil Courts Building, June 21, 1930, St. Louis, Mo. For other illustrations of the prevalence of the idea that judges do not make law, see FRANK, *LAW AND THE MODERN MIND* (1930) c. IV.

Constitution does not embody a lifeless set of wooden precepts moved about according to the rules of mechanical logic.⁵ Indeed, if the Constitution is, as Woodrow Wilson once declared, "the vehicle of the nation's life," it is the Supreme Court that makes it so.⁶

In recent discussions of the Supreme Court one is impressed by the general recognition which these facts have received. "The Constitution of today," Senator Wagner observed in the debates on the nomination of Mr. Justice Parker, "is what the judges of the past have made it and the Constitution of the future will be what the judges appointed in our own day make it."⁷ The present Chief Justice not many years ago expressed very much the same point of view: "We are under a Constitution, but the Constitution is what the judges say it is."⁸ Senator Brookhart uses more extravagant language to state the point: "Marbury v. Madison arrogated to the Supreme Court the supreme authority in this country. It subordinated the legislature and the executive to the judicial department. That is the power which is the real sovereign in this country."⁹ While one may not be willing entirely to subscribe to the latter statement it embodies, I think, a large element of truth. Professor Corwin expresses very much the same proposition in these words: "Judicial Review, from being an instrument

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⁵ "The application of the law is not and ought not be a purely mechanical process. Laws are not ends in themselves; they are means toward the administration of justice." Pound, *Courts and Legislation* (1913) 7 AM. POL. SCI. REV. 365. See also the words of Senator Wagner, 72 CONG. REC. 8033 (1930).

⁶ WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES (1908) 157 *et seq.*

⁷ 72 CONG. REC. 8033 (1930).

⁸ HUGHES, ADDRESSES (1908) 139; quoted by Senator Wagner, *supra* note 7.

⁹ 72 CONG. REC. 3506 (1930). It should be pointed out that the Supreme Court is supreme over the executive and legislative organs only in the exercise of its judicial functions. The Court has repeatedly refused to invade the jurisdiction of the legislature and the executive branches of the government. "The Congress is the legislative department, the President is the executive department. Neither can be restrained in its action by the judicial department." *Mississippi v. Johnson*, 4 Wall. 475 (U. S. 1867). "The judicial cannot prescribe to the legislature department of the government limitations upon the exercise of its acknowledged powers." *Veazie Bank v. Fenno*, 8 Wall. 533 (U. S. 1869). See also *Luther v. Borden*, 7 How. 1 (U. S. 1849) and *Barry v. United States*, 279 U. S. 597, 49 Sup. Ct. 452 (1929). The conclusion is that within their respective jurisdictions Congress and the President are just as sovereign and supreme as is the Court in the exercise of its powers.

for the application of the Constitution, tends to supplant it. In other words, the discretion of the judges tends to supplant it.”¹⁰ Professor Frankfurter puts the same idea boldly when he declares that “The Supreme Court is the Constitution.”¹¹

The ever-increasing amount of social, economic and technical legislation in modern industrial society has placed new burdens and greater responsibility upon judges. A judge needs a high order of legal training but he should also have sympathetic appreciation of the economic and social life of today and its bearing on the problem of government. This accounts for the form which the debates in the Senate took not long ago when the names of Chief Justice Hughes and Judge Parker were under consideration.¹² Admittedly outstanding lawyers and men of unquestioned integrity, their nominations were nevertheless subjected to the most thoroughgoing scrutiny, and were questioned chiefly on account of their economic and social views. It was recognized that the qualities required in a good judge are not the same as those which make a good advocate.¹³ Knowledge of law is merely the lawyer's stock in trade, and only one, and perhaps a lesser consideration, in determining a candidate's elevation to the Supreme Court.¹⁴ It may usually be taken for granted that the nominee has the necessary legal equipment. In the course of

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¹⁰ CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* (4th ed. 1930).

¹¹ Frankfurter, *The United States Supreme Court Moulding the Constitution* (1930) 32 *CURRENT HISTORY* 235 at 237.

¹² The New Republic, discussing in 1916 the Senate Debates regarding the nomination of Mr. Brandeis made an accurate prophecy of the kind of discussion that took place in that house regarding the names of Parker and Hughes: “There is no use shirking the facts. The court has been dragged into politics, and if at some future time an appointment is made which is as conspicuously conservative as that of Mr. Brandeis was conspicuously liberal, it will not be surprising if the radicals, throwing off the self-restraint they have shown this time should follow the wretched example set by Mr. Brandeis’ conservative enemies.” (1916) 7 *NEW REPUBLIC* 134-5.

¹³ This fact was appreciated by Thomas Hobbes as early as 1651. “The abilities required in a good interpreter of the law, that is to say, in a good judge, are not the same with those of a good advocate, namely, the study of the laws.” *Leviathan* (Everyman's ed.) c. 26, 149.

¹⁴ “The Supreme Court by its own will has moved its activities into the larger orbit of determining social and economic policies, and then imparting to them the force of law. It has, in other words, brought itself to the place where legal competence is only one—and perhaps not the most important—test of fitness for service on that Court.” *The Baltimore Sun*, Feb. 13, 1930. Quoted in 72 *CONG. REC.* 3553 (1930).

the Senate debates, it was recalled that even John Marshall, as a lawyer, had his superiors. His supremacy lay not in his knowledge of law, but in his recognition of and penetrating insight into the problems that faced a new and growing country.

In a stimulating and forward-looking article published in 1916, just prior to his appointment to the Supreme Court, Mr. Louis D. Brandeis pointed out that John Marshall and his contemporaries gained this sort of training from professional practice, and from active participation in the political life of their time:

"Formerly the lawyers secured breadth of view largely through wide professional experience. Being a general practitioner, he was brought into contact with all phases of contemporary life. His education was not legal only; because his diversified clientage brought him, by the mere practice of his profession, an economic and social education. The relative smallness of the communities tended to make his practice diversified not only in the character of the matters dealt with, but also in the character or standing of his clients. For the same lawyer was apt to serve at one time or another both rich and poor, both employer and employee. Furthermore—nearly every lawyer of ability took some part in political life. Our greatest judges, Marshall, Kent, Story, Shaw had secured this training."¹⁵

Qualifications that fit a person for judicial functions in one generation would not be suitable for the next. The qualities that equip one for the exercise of judicial functions have been summed up and aptly described by the term "statecraft."¹⁶ That is to say, in addition to a knowledge of law, a judge should have an appreciation of the problems that confront his own generation. Certain it is that judges who have achieved pre-eminence on the Supreme Court throughout its history have been those thus equipped.

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¹⁵ Brandeis, *The Living Law* (1915) 10 ILL. L. REV. 461, 469. That Alexander Hamilton had this type of training is evidenced by the words of his biographer, F. S. Oliver: "In the vigor of his youth and at the very summit of hope, he brought to the study of the law a character already trained and tested by the realities of life, formed by success, experienced in the facts and disorders with which the law has to deal. . . . With him . . . the law was . . . a reality, quick, human, buxom and jolly, and not a formula, pinched, stiff, banded and dusty like a royal mummy of Egypt." Quoted by Brandeis, *ibid.*

¹⁶ FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* (1930) 75 *et seq.*

In our own day three problems of major importance confront the Supreme Court. The first is concerned with the extent to which the state may go, in the interest of the general welfare, in exercising police and taxing powers. The second problem has to do with rate regulation in the field of public utilities: What shall be a reasonable rate and what shall constitute the rate base for public utilities? The third problem is in the field of industrial relations: What is the scope of legitimate action by employers and employees who seek to advance their own social and economic interests? How far may Congress and the state legislatures go in their efforts to strike a balance between the naturally unequal bargaining powers of employer and employees? Clearly such questions are not primarily legal; they are chiefly economic and social in their nature. And when the Supreme Court passes upon these questions it becomes, in a sense, the ultimate judge of state and national legislative policy.¹⁷

That judges must exercise some choice of public policy, in dealing with these problems is scarcely debatable.¹⁸ But the point deserving special emphasis is not that judges pass upon policy,

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¹⁷ Judges "are policy determining officers, because they have power to declare null and void on principles of constitutional law which are scarcely more than general moral precepts, laws enacted by legislative authority. It is this function of declaring laws unconstitutional, especially as violative of broad and indefinable guarantees that 'no one shall be deprived of life, liberty or property without due process' which has made the Courts in this country essentially law-making bodies, determining in the end what legislative policies shall or shall not be adopted." W. F. Dodd, *Social Legislation and the Courts* (1913) 28 *POL. SCI. Q.* 3; "The Supreme Court of the United States is not only determining legal questions, but it is likewise determining great economic questions." Language of Senator Wheeler, 71 *CONG. REC.* 3516 (1930). "Under the Fourteenth Amendment the Supreme Court of the United States, as to most questions of a nature similar to the one which the Court passed upon in the railway case (*United Rys. etc. v. West*, 280 U. S. 234, 50 *SUP. CT.* 123 (1930)), becomes really the economic dictator in the United States." Language of Senator Borah, 72 *CONG. REC.* 3449 (1930). Mr. Justice Brandeis himself declares that the Court's application of the doctrine of due process as a test of reasonableness is an "exercise of the powers of a super-legislature—not the performance of the constitutional function of judicial review." *Burns Baking Co. v. Bryan*, 264 U. S. 504, 534, 44 *SUP. CT.* 412, 421 (1924).

¹⁸ "What is a fair return (on property devoted to a public use) cannot be settled by invoking decisions of this court made years ago based upon conditions radically different from those which prevail today. The problem is one to be tested primarily by present-day conditions." Sutherland, J., in *U. S. Railway and Electric Co. v. West*, 280 U. S. 234, 249, 50 *SUP. CT.* 123, 125 (1930). What will constitute a fair return in a given case is not capable of exact mathematical demonstration. It is a matter more or less of approximation about which conclusions may differ. *Ibid.* 251, 50 *SUP. CT.* at 125. In other words, it

but that by reason of their narrow legalistic training and the specialized nature of present-day legal practice, they are ill-prepared to exercise this important function. In the performance of this task, they need training in the very subject matter with which they are dealing—politics, economics and social science—that will enable them to appreciate and weigh highly intricate economic and social factors with which their cases so frequently have to deal. "In numerous instances the United States Supreme Court has departed from anything related to a fixed body of law except by the most tenuous thread, and has become a body engaged in the practice of economics."¹⁹ Judges are bound to make a choice of public policy; the nature of modern constitutional questions demand it, and by reason of this glaring gap in legal education they do it, as one writer declares, "confusedly or ignorantly and therefore without full sense of responsibility for what they are doing."²⁰

Since 1920 the Supreme Court has overturned more legislation than in the fifty preceding years. A fact even more significant for our purpose is that since 1921 thirty per cent. of the cases arising under the "due process" clause have been held invalid.²¹ Certainly these facts call for pause and consideration. Either one or both of two reasons may account for this unfavorable attitude toward social legislation. The judges may not have been in sympathy with the economic or social theory underlying the legislation in question. Of course this fact alone should not conclude the judgment of the Court regarding the constitutionality or unconstitutionality of legislation. As Mr. Justice Holmes declared in the *Lochner* case: "The Constitution is not intended to embody a particular economic theory, but was made for people of fundamentally differing views."²² The truth is, however, that the

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depends upon the view point of those who are passing on it; it is according to the view of whether one is thinking most about property and the rights of property, or about human rights or the rights of individuals. See 72 CONG. REC. 3449 (1930).

¹⁹ Baltimore Sun, Feb. 13, 1930. Quoted in 72 CONG. REC. 3553 (1930).

²⁰ Sabine, *Pragmatic Approach to Political Science* (1930) 24 AM. POL. SCI. REV. 877, 878.

²¹ These facts are given by Felix Frankfurter *supra* note 11; see also his recent book, *supra* note 16, at 47 *et seq.*

²² Dissenting opinion in *Lochner v. N. Y.*, 198 U. S. 45, 74, 25 Sup. Ct. 539, 547 (1905).

judges have been accustomed at times, whether consciously or unconsciously, to read their own economic and social theories into the Constitution. This at least is the opinion of one who has observed the Court at very close range. "When twenty years ago," Mr. Justice Holmes declared in 1913, "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 proper place in the Constitution or the Common Law."²³

Again, legislation, in certain instances, may have been invalidated because of an antiquated manner of approach to the problem of Constitutional interpretation. Too often judicial consideration of modern social and economic problems has remained either rational or historical.²⁴ Emphasis upon certain concepts, such as "liberty of contract," has formed the chief basis of objection to not a few legislative measures. Many, if not most, of our modern Constitutional questions cannot properly be dealt with in this manner.²⁵ The question whether membership in a trade

²³ Speech of Mr. Justice Holmes delivered February 15, 1913. 62d Cong. 3d Sess., 25 SEN. DOC. NO. 1106. Mr. Louis D. Brandeis expressed the same opinion in 1916: "The Supreme Court of the United States . . . showed by its . . . decision in the *Coppage* case the potency of mental prepossessions." Brandeis, *op. cit. supra* note 15, at 467. See also the dissenting opinion of Holmes in *Baldwin v. Missouri*, 281 U. S. 586, 50 Sup. Ct. 436 (1930) for a stronger exposition of the same thought.

"In the darkness beyond his short vision he (the lawyer) sees the terrifying spectres of many 'isms'—paternalism, socialism, communism, bolshevism; and he raises to combat them a spectral army of opposed abstractions—individualism, nationalism, or constitutionalism." J. DICKINSON, *ADMINISTRATIVE JUSTICE AND SUPREMACY OF LAW* (1927) 340-41. Mr. Justice Brewer openly expressed his fear: "The paternal theory of government is to me odious." *Budd v. N. Y.*, 143 U. S. 517, 551, 12 Sup. Ct. 468, 478 (1892). For other illustrations of the court's fear of "isms" in one form or another see *Pollock v. F. L. & T. Co.*, 158 U. S. 601, 15 Sup. Ct. 912 (1895); *S. C. v. U. S.*, 199 U. S. 437, 26 Sup. Ct. 110 (1905); *Anyway v. Grand Rapids R. Co.*, 211 Mich. 592, 179 N. W. 350 (1920).

²⁴ "Settled habits of juristic thought are characteristic of American legal science. Our legal scholarship is chiefly historical. Our professional thinking upon juristic subjects is almost wholly from the point of view of Eighteenth Century natural law." Pound, *Courts and Legislation* (1913) 7 AM. POL. SCI. REV. 361, 365.

²⁵ "Our legal philosophy and our whole system of constitutional guarantees were developed to fit conditions when property was the most general interest of the community, and the highly individualistic philosophy of our law was one not unadapted to the conditions of this country in the early days. For at least a generation, however, we have been living in a state of social and industrial development to which the earlier individualistic philosophy does not fit itself, and the

union bears a reasonable relation to the general welfare, whether a minimum wage for women may be justified on the grounds of health and morals, whether five, six or eight per cent. is a fair return on public utility property, cannot be decided out of mind alone. These, like so many cases in modern Constitutional law, involve knowledge of facts and judgment on policy. An explanation of the opposition which certain social legislation meets at the hands of the Court is given in 1916 by Mr. Louis D. Brandeis:

"Since the adoption of the federal constitution, and notably within the last fifty years, we have passed through an economic and social revolution which affected the life of the people more fundamentally than any political revolution known to history. . . . While invention and discovery created the possibility of releasing men and women from the thralldom of drudgery, there actually came with the introduction of the factory system and the development of the business corporation, new dangers to liberty. Large publicly owned corporations replaced small privately owned concerns. Ownership of the instruments of production passed from the workman to the employer. Individual personal relations between the proprietor and his help ceased. . . . The group relation of employee to employer with collective bargaining became common; for it was essential to the workers' protection.

"Political as well as economic and social science noted these revolutionary changes. But legal science—the unwritten or judge-made laws as distinguished from legislation—was largely deaf and blind to them. Courts continued to ignore newly arisen social needs. They applied complacently 18th century conceptions of the liberty of the individual and of the sacredness of private property. . . . Where statutes giving expression to the new social spirit were clearly constitutional, judges, imbued with the relentless spirit of individualism, often construed them away." ²⁶

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adjustment of legal principles and legal philosophy to these new conditions is a slow one." Dodd, *Social Legislation and the Courts* (1913) 28 POL. SCI. Q. 3.

"What he (the lawyer) really needs to see . . . are not such phantom abstractions but rather a wealth of other particular facts, equally concrete,—historical facts, economic facts, social facts,—stretching away to the boundaries of knowledge before the realm of ultimates begins ever to be reached. Only so can decisions like those in the *Ives* and *Lochner* Cases be avoided." DICKINSON, *op. cit. supra* note 23, at 341.

²⁶ Brandeis, *op. cit. supra* note 15, at 463-4.

Modes of juristic thought and method have not kept pace with changes in social and economic conditions.²⁷ During the agricultural era about all that was needed to settle most Constitutional questions was a study of the English and American reports. The social and economic background in the making and application of legal concepts, required little or no consideration. In the present industrial era the situation is entirely changed. The judge can no longer confine his researches to the law library.²⁸ In addition he must make a study of the available social and economic data bearing on his particular question. Nor is it possible today for the lawyer to acquire this kind of knowledge from the practice of the law.

"The last fifty years," Mr. Brandeis observed in 1916, "have wrought a great change in professional life. Industrial development and the consequent growth of cities have led to a high degree of specialization—specialization not only in the nature and class of questions dealt with, but also specialization in the character of clientage. . . . The deepening of knowledge in certain subjects was purchased at the cost of vast areas of ignorance and grave danger of resultant distortion of judgment.

"The effect of this contraction of the lawyers' intimate relation to contemporary life was doubly serious; because it came at a time when the rapidity of our economic and social transformation made accurate and broad knowledge of present-day problems essential to the administration of justice. . . .

"The judge came to the bench unequipped with the necessary knowledge of economic and social science, and his judgment suffered likewise through lack of equipment in lawyers who presented the cases to him." ²⁹

These same observations might well be made today, with such qualifications as Mr. Brandeis' own brilliant work and a few

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²⁷ "The Judicial mind has not kept pace with the strides of industrial development." KELLY, *SOME ETHICAL GAINS THROUGH LEGISLATION* (1905) 142.

²⁸ "We must look away from the piece-meal law books, the miscellaneous and disconnected statutes and legal maxims, the Court decisions, to the life of men. . . . After all, it is not a purely intellectual process, this interpretation of experience into law." Woodrow Wilson, *The Law and the Facts* (1911), 5 AM. POL. SCI. REV. 6, 9. See also FRANKFURTER, *op. cit. supra* note 16, c. I.

²⁹ Brandeis, *op. cit. supra* note 15, at 469, 470.

of his colleagues require. In the opinion of one acute observer, "courts are less and less competent to formulate rules for new relations which require regulation."³⁰ When one reads even some of the more recent Supreme Court opinions he may well wonder how much longer judicial thinking and method will be dominated by what may well be described as the sovereignty of concepts.³¹ Certainly one cannot as yet say of our own Constitutional jurisprudence what Hugo Krabbe has said of jurisprudence generally:

"We are about to close the period of our history in which the leading role was played by a rationalism which saw in the intellect the only source for the knowledge of reality, which opposed dogmas and doctrines to reality, and which confined the latter in a rigid form of thought where logic alone was decisive. We are on the point of discarding every thing in the field of law that is included under the ill-famed phrase, 'jurisprudence of Concepts.'"³²

General propositions should not decide concrete cases. Certainly decisions involving social and economic legislation should turn, as Mr. Justice Holmes has said, on "a judgment or intuition more subtle than any articulate major premise."³³ From this

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³⁰ Pound, *Common Law and Legislation* (1907) 21 HARV. L. REV. 403. "While the training and experience of the judges have qualified them to deal with strict questions of law, the same training and experience have not qualified them to deal in an expert way with such questions of fact, and they should not undertake to do so except when the relevant facts are properly brought before them either by means of direct evidence or through such presentation as justifies judicial notice." Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action* (1924) 38 HARV. L. REV. 6, 21.

³¹ "It happens too often in our Anglo-American case law that through over-ambition of our courts to lay down universal rules our empirical method is replaced in many portions of the legal system by a Jurisprudence of Conceptions." Pound, *op. cit. supra* note 24, at 372.

³² KRABBE, *THE MODERN IDEA OF THE STATE* (1922) 194.

³³ Dissenting opinion in *Lochner v. N. Y.*, *supra* note 22.

"In determining whether an act has a substantial and rational or reasonable relation to the enumerated matters, the Court has in mind a background of 'fundamental principles' which are beyond the reach of any legislative power. What those are and how they affect the question of the substantial or reasonable relation of the act to the enumerated objects, depends upon 'a judgment or intuition, more subtle than any articulate major premise.' They are indeed the inarticulate major premise itself." Kales, *Due Process, the Inarticulate Major Premise and the Adamson Law*" (1916) 26 YALE L. J. 519, 526. "Considerations of public policy underlie American constitutional law, but whether they are inarticulate is another matter. Usually they purport to be highly articulate in such terms as

it follows that in addition to the deductive training which the judge generally gains from his professional studies, he should have an intelligent and sympathetic comprehension of social and economic facts as well as some knowledge of the methods of ascertaining them. For "judicial law-making for sheer lack of means to get at the real situation, operates unjustly and inequitably in a complex social organization."³⁴ What is needed in cases having to do with social and economic questions is demonstration, by recourse to social facts, experience and statistics, that the legislation in question does or does not bear a reasonable relation to the general welfare, and is or is not inimical to those so-called fundamental rights which it is the duty of the court to protect. In a noteworthy article Walter F. Wilcox emphasizes the almost crying need in this particular:

"If the lawyer should turn to economics and statistics, which are perhaps the most inductive branches of social science, he would find a change in method sharply marked. The contrast between the mental characteristics exercised, on the one hand, in stating legal principles neatly and clearly and applying them convincingly to a given or assumed state of facts, and those exercised, on the other hand, in the patient investigation of the facts as they have been and are, is of the widest."³⁵

'freedom of contract', 'judicial independence', 'freedom of commerce', 'police power', and the like. Unfortunately, not only are such phrases often vague and jejune, but the values which they connote are frequently more or less contradictory. So the question arises whether the Court's employment of them may not conceal more than it reveals—whether in other words, they may not serve, with or without the conscious intention of their users, as instruments for converting the unstated preferences and biases of individual judges into law." Corwin, *Judicial Review in Action* (1925) 74 U. OF PA. L. REV. 639, 663.

³⁴ *Supra* note 30, at 404.

³⁵ Willcox, *The Need of Social Statistics as an Aid to the Courts* (1913) 47 AM. L. REV. 259, 260. "In the immediate past the social facts required for the exercise of the judicial function of lawmaking have been arrived at by means which may fairly be called mechanical. It is not one of the least problems of the sociological jurist to discover a rational mode of advising the Court of facts of which it is supposed to take judicial notice." Pound, *Legislation as a Social Function* (1913) 7 PUB. AM. SOC. SOC. 148, 161. "How long we shall continue to blunder along without the aid of impartial and authoritative science assistance in the administration of justice no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some such advance." Judge Learned Hand in *Parke-Davis & Co. v. Mulford & Co.*, 189 Fed. 95, 115 (C. C. S. D. N. Y. 1911). Quoted by Frankfurter, *Hours of Labor and Realism* (1915) 29 HARV. L. REV. 353, 373. See also GEE, RESEARCH IN THE SOCIAL SCIENCES (1929) especially c. 6.

It is an extraordinary fact that counsel frequently fail to produce facts, of which the court may take judicial notice, to show that the act under consideration actually does or does not promote the general welfare. The tendency is to rely upon presumptions in favor of the act. It is assumed that the legislature, prior to the enactment of the statute, made an investigation of the facts and found that the public interest demanded legislation. Seldom does the legislature follow any such procedure.³⁶ Lack of legislative findings to support the constitutionality of the act, has led the more alert counsel, in certain instances, to produce facts so elaborate and imposing as to compel judicial notice of them.

Mr. Louis D. Brandeis, who appeared as counsel in the case of *Muller v. Oregon*,³⁷ was the first to present to the Supreme Court a brief based upon such authoritative data.³⁸ Two scant pages of his brief covers the legal arguments; approximately one hundred pages were devoted to a new kind of evidence—over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe, all bear witness to the fact that long hours are dangerous to women's health, primarily because of the female physical structure and functions. Included in the brief also are extracts from similar reports discussing the general benefits of short hours from an economic point of view.³⁹ Strange as it may appear the Court responded favorably to this method of presenting the case, as evidenced by the following excerpt from the opinion:

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³⁶ "The student of the history of legislation has constant occasion to wonder, not merely at the absence of impartial and authoritative statements of facts and conclusions, but at the entire failure on the part of those demanding legislative interference to make an impressive or plausible, or, for that manner, any kind of a presentation of their case." FREUND, STANDARDS OF AMERICAN LEGISLATION (1926) 135. For an excellent article in this connection see Kales, *New Methods in Due Process* (1918) 12 AM. POL. SCI. REV. 241.

³⁷ Frankfurter, *Hours of Labor and Realism* (1916) 29 HARV. L. REV. 353.

³⁸ 208 U. S. 412, 28 Sup. Ct. 324 (1908). See also *Miller v. Wilson*, 236 U. S. 373, 35 Sup. Ct. 342 (1914) and *Bosley v. McLaughlin*, 236 U. S. 385, 35 Sup. Ct. 345 (1914) in which the Court upheld a California statute providing an eight-hour regulation of employment for women more far reaching than the Oregon statute. In both of these cases Mr. Brandeis prepared the briefs for the appellees.

³⁹ This brief, in the preparation of which Mr. Brandeis was assisted by Miss Josephine Goldmark, was reprinted for the National Consumers' League under the title, *WOMEN IN INDUSTRY*. Mr. Brandeis' brief is also reprinted in a volume, *GOLDMARK, FATIGUE AND EFFICIENCY* (1912) pt. II.

"It may not be amiss in the present case, before examining the Constitutional question to notice the course of legislation as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis . . . is a very copious collection of all these matters. . . . The legislation and opinions referred to in the margin may not be technically speaking authorities, and in them is little or no discussion of the Constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion. . . . At the same time, when a question of fact is debated and debatable, and the extent to which a special Constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration."⁴⁰

Here for the first time the Supreme Court recognized the need for a new technique in brief making, *i. e.*, that of supporting legislation by producing facts which tend to establish the reasonableness or unreasonableness of legislative action. The court rejected the fiction of freedom of contract as regards the working woman. And by implication, at least, the Court assumed the obligation to insist upon this new method of dealing with similar cases, at least before setting legislation aside. There is little question but that the Court has inherent power to accomplish this, either by indicating the kind of argument needed to reach a just decision, or by calling for argument by members of the bar who are peculiarly equipped to deal with the case in hand.⁴¹

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⁴⁰ 208 U. S. 412, 419, 28 Sup. Ct. 324, 325 (1908).

⁴¹ Frankfurter, *op. cit. supra* note 38. "The time may come", writes Professor Freund, "when courts will be justified in demanding that the legislature shall act only upon some evidence somewhere placed on record, but that time has hardly yet arrived . . . and if there have been instances of conclusions reached upon a totally unsatisfactory basis the courts have sinned in that respect no less than the legislatures." STANDARDS OF AMERICAN LEGISLATION (1926) 99. Another writer takes a more optimistic view: "The legislator is more inclined to make use of sociological investigations in the preparation of laws than he formerly was, when a great deal of legislation was based upon his general impressions as to social facts rather than upon the facts themselves, which

Beginning with *Muller v. Oregon*, the chief arguments in several labor cases, state and federal, were presented by Mr. Brandeis, sometimes as *amicus curiae*. In 1909, an Illinois statute similar to that involved in the *Muller* case was contested before the supreme court of that state. The manufacturer claimed that a certain woman, thirty-five years in his employment, could not earn a living wage unless she worked more than ten hours a day. Mr. Brandeis appeared for the defense and again the result was victory.⁴² In 1911 he was invited by the attorney-general of Ohio to assist in the defense of a statute regulating the hours of labor for women. He prepared the brief and successfully presented it to the Supreme Court.⁴³ In November, 1913, a request for expert assistance came from a new source. The legislature of Oregon established, in 1913, an Industrial Welfare Commission and empowered it to provide such regulation of wages, hours of labor and conditions of work as appeared, after investigation, to be necessary for the safety, health and welfare of the employees. The commission promulgated in 1913 a minimum wage for women employed in factories and stores. The validity of the act under which these orders were issued was contested, and at the commission's request Mr. Brandeis filed a brief in support of the act. The statute was sustained by the Oregon supreme court unanimously on the same grounds urged in support of hours of labor legislation for women.⁴⁴ When the case came before the Supreme Court of the United States in 1916, Mr. Brandeis found three

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were, and in many cases still are, impossible to obtain or inaccessible to the legislature." Eldon R. James, *Some Implications of Remedial and Preventative Legislation in the United States*, 7 PUB. AM. SOC. SOCIETY 162, 163.

⁴² *Ritchie v. Wayman*, 244 Ill. 509, 91 N. E. 695 (1910). This decision, in effect, overruled *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454 (1895) despite the Court's rather futile effort to distinguish the two cases. "In the first *Ritchie* case the Court, reasoning from abstract conception, held a limitation of working hours to be arbitrary and unreasonable; while in the second *Ritchie* case, reasoning from life, it held the limitation of hours not to be arbitrary and unreasonable." Brandeis, *op. cit. supra* note 15, at 465.

⁴³ *Ex parte Anna Hawley*, 85 Ohio 495, 98 N. E. 1125 (1911). Brief of Mr. Brandeis reprinted in GOLDMARK, *op. cit. supra* note 39. This case was carried on appeal to the Supreme Court of the United States. Here Mr. Brandeis also filed a brief and took part in the oral argument. The law was sustained without opinion in *Hawley v. Walker*, 232 U. S. 718, 34 Sup. Ct. 601 (1914). The Illinois Act was again subject to attack in 1912 and Brandeis took part in the defense in the case of *People v. Elerding*, 254 Ill. 579, 98 N. E. 982 (1912). Brief reprinted in GOLDMARK, *op. cit. supra* note 39.

⁴⁴ *Stettler v. O'Hara*, 69 Ore. 519, 139 Pac. 743 (1914).

pages of his brief sufficient to state the points of law in the case; evidence to support his contention that the legislation had a reasonable relation to the public health, safety and welfare comprises no less than three hundred and ninety pages.⁴⁵ The Supreme Court stood equally divided regarding the constitutionality of the act, Mr. Justice Brandeis having been appointed to the Court after having taken part in the preparation of the brief, not voting.⁴⁶ It was generally understood that this decision established the validity of minimum wage legislation. In *Adkins v. Children's Hospital*,⁴⁷ however, the Court revived the *Lochner* case and found in it a precedent for an unfavorable decision.

One other illustration bears convincing evidence of the effectiveness of Mr. Brandeis' new method of brief-making. In 1907 the New York Court of Appeals declared invalid a statute prohibiting night work for women on the ground that the act was "discriminative against female citizens, in denying them equal rights with men in the same pursuit."⁴⁸ Prior to the enactment of a second act on this subject, the legislature made a careful and detailed survey of the facts on which the new statute was based. When the constitutionality of the act was contested, Mr. Brandeis presented a summary of facts against night work for women covering more than four hundred pages. The exhaustive nature of his investigations is indicated by the fact that it required eighteen pages to list the sources from which the material was drawn. Some of these facts, it is true, were not available in 1907. Here they are presented in detail in addition to facts that were available but not produced by counsel in 1907. The Court, in sustaining the act, indicates the nature of the burden imposed upon the legislature which enacts social legislation as well as upon counsel who defend it:

"While theoretically we might (in 1907) have been able to take judicial notice of some of the facts and of some of the legislation now called to our attention as sustaining the belief and opinion that night work in factories is widely and

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⁴⁵ Reprinted by the National Consumers' League.

⁴⁶ *Stettler v. O'Hara*, 243 U. S. 629, 37 Sup. Ct. 475 (1916).

⁴⁷ 261 U. S. 525, 43 Sup. Ct. 394 (1923).

⁴⁸ *People v. Williams*, 189 N. Y. 131, 81 N. E. 778 (1907).

substantially injurious to the health of women, actually very few of these facts were called to our attention, and the argument to uphold the law on that ground was brief and inconsequential. . . .

"So, as it seems to me, in view of the incomplete manner in which the important questions underlying this statute—the danger to women of night work in factories—was presented to us in the *Williams* case, we ought not to regard its decision as any bar to a consideration of the present statute in the light of all the facts and arguments now presented to us and many of which are in addition to those formerly presented, not only as a matter of mere presentation, but because they have been developed by study and investigation during the years which have intervened since the *Williams* decision was made. There is no reason why we should be reluctant to give effect to new and additional knowledge upon such a subject as this, even if it did lead us to take a different view of such a vastly important question as that of public health or disease than formerly prevailed. Particularly do I feel that we should give serious consideration and great weight to the fact that the present legislation is based upon and sustained by an investigation by the legislature deliberately and carefully made through an agency of its own creation, the present factory investigating commission." ⁴⁹

Although the technique of the briefs filed by Mr. Brandeis was followed in a few cases, there are notable instances prior to the *Muller* case, and since, in which the Court reached its decision by paying little attention to social and economic data. The classic illustration is *Lochner v. New York*.⁵⁰ Here little attempt was

⁴⁹ *People v. Schweinler Press*, 214 N. Y. 39, 108 N. E. 83 (1915). For other illustrations of the differential attitude of the Court toward legislative findings of facts by bodies of their own creation, see *Chicago Board of Trade v. Olsen*, 262 U. S. 1, 43 Sup. Ct. 470 (1923); *Everard's Breweries v. Day*, 265 U. S. 545, 44 Sup. Ct. 628 (1924); *McLean v. Arkansas*, 211 U. S. 539, 29 Sup. Ct. 206 (1909). See, in this connection, Bickel, *op. cit. supra* note 30.

⁵⁰ 198 U. S. 45, 25 Sup. Ct. 539 (1905). After having characterized statutes of the kind in question as "mere meddlesome interference with the rights of the individual" even Mr. Justice Peckham expressed a willingness to be shown the social benefits of the hours of labor law for bakers when he admitted that the statute might be saved if there were "fair ground to say that there is material danger to the public health or to the health of the employees, if the hours of labor are not curtailed." *Ibid.* at 61, 25 Sup. Ct. at 544. See also *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. 277 (1908); *Coppage v. Kansas*, 236 U. S. 1, 35 Sup. Ct. 240 (1915); *Weaver v. Palmer*, 270 U. S. 402, 412, 46 Sup. Ct. 320, 322 (1926); *Liggett v. Baldridge*, 278 U. S. 106, 114, 49 Sup. Ct. 57, 59 (1928); *Ribnik v. McBride*, 277 U. S. 350, 48 Sup. Ct. 545 (1928).

made to bring to the attention of the Court facts such as might have been produced to explain and justify, on the grounds of experience, the ten-hour law for bakers. The majority opinion was confessedly based upon what was declared to be a "common understanding" of the effect of work in bakeshops upon the workers and the public. But is "common understanding" a safe guide for the Court in passing upon matters such as hours of labor, the minimum wage, state regulation and so forth? The brief of counsel for the State of Oregon in the *Bunting* case, prepared by Mr. Felix Frankfurter and Miss Josephine Goldmark under the direction of Mr. Louis D. Brandeis, answers this question in the negative:

"It is now clear that 'common understanding' is a treacherous criterion both as to the assumptions on which such understanding is based, and as to the evil consequences, if they are allowed to govern. (Citing authorities.) The subject is one for scientific scrutiny and critique, for authoritative interpretation of credited facts. To this end science has been devoted all over the world. Particularly in the last decade science has been giving us the basis for judgment by experience to which, when furnished, judgment by speculation must yield."⁵¹

This argument received a favorable response at the hands of the Court and gained a decision upholding the Oregon ten-hour law for men in general factory employments.⁵² The case is all the more significant because it, in effect, reversed the ruling in the celebrated *Lochner* case. Even a casual reading of the two opinions could scarcely fail to disclose the reason for the reversal of the earlier decision. In the *Lochner* case the Court did not feel that enough evidence was presented regarding the injurious effect of work in a bakery to justify the state in singling

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⁵¹ Reprinted by the National Consumers' League in two volumes under the title, *THE CASE FOR THE SHORTER WORK DAY* vol. I, XVI.

⁵² *Bunting v. Oregon*, 243 U. S. 426, 37 Sup. Ct. 435 (1917). The point which the court made of the failure on the part of counsel, who opposed the act, to produce facts to support their case is also significant: "There is a contention made that the law, even regarded as regulating hours of service, is not either necessary or useful for 'preservation of the health of employes in mills, factories and manufacturing establishments'. The record contains no facts to support the contention. . . ." *Ibid.* at 438, 37 Sup. Ct. at 437.

out bakers as a class and interfering with their freedom of contract. In the *Bunting* case, on the other hand, approximately one thousand pages of counsel's brief supplied evidence in abundance testifying to the damaging effect of long hours and showing the benefits economic, social and otherwise, of a short workday.

The method of argument followed by Mr. Brandeis marks a new departure in brief-making. Such cases heretofore had been argued deductively from legal precedents and abstract theories regarding fundamental, natural or constitutional rights. Mr. Brandeis' method was largely inductive. He paid comparatively little attention to legal arguments. Such use as he made of legal precedent was always supplemented by a microscopic examination of physiological, psychological and economic materials bearing on his case. In case after case he piled facts upon facts, having to do with labor, fatigue, health, economic productivity, and so forth, all for the purpose of showing the urgent social need for the legislation he was supporting. In this fashion something of the spirit of modern science was successfully brought by counsel into the court room.

The foregoing pages indicate the tremendous burden which the industrial era places upon counsel, the courts, legislatures and, in fact, upon government in all its branches. Government, during the formative period of American history, operated within a comparatively narrow range. Its chief function was the negative one of forbidding certain forms of conduct. There was then no such need, as there is now, for the government to compose manifold conflicts of interest. The ever-increasing complexity of social relations has compelled a steady extension of governmental control over a variety of social and economic interests. The number and the intricacy of technical problems that present-day government is called upon to handle has never been equalled. By the same token the need for legislators, judges, and administrators equipped to deal with the factors involved in contemporary politics as well as the need for perfecting and expanding our fact-finding agencies, is greater than ever before. Professor Frankfurter has aptly expressed the point as follows :

"The staples of contemporary politics . . . the organization of industry, the control of public utilities, the well-being of agriculture, the mastery of crime and disease . . . are deeply enmeshed in intricate and technical facts, and must be extricated from presupposition and partisanship. Such matters require systematic effort to contract the area of accredited knowledge as the basis of action."⁵³

The preceding pages also indicate the manner in which Mr. Brandeis, as counsel, approached one phase of the problem. He also applied this new technique in other fields of law with equally notable success.

Mr. Brandeis began the practice of law in Boston in the year 1878 at the age of twenty-two. Eight years later his practice was large, lucrative and variegated. He was no respecter of clients; he had his share of corporation work along with other phases of legal practice. He frankly confessed that he "even worked for a trust or two."⁵⁴ But his special interests lay in other fields—in matters of large public interest—in manifold and complicated social and economic problems. His decision to curtail private practice and give more and more time to public work was made with full knowledge that it would involve financial sacrifice and tremendous strain upon his vitality. It was the result of a deliberate purpose to give the people expert legal assistance in the support of general welfare measures. Referring in 1905 to the declining influence of the lawyer in affairs of state, he insisted that the reason for it was not lack of opportunity:

"Instead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either, able lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people. We hear much of the 'corporation lawyer' and far too little of the 'people's lawyer'. The great oppor-

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⁵³ Frankfurter, *Democracy and the Expert* (1930) 146 ATLANTIC MONTHLY 649-60.

⁵⁴ Ernest Poole (1911) 71 AMERICAN MAGAZINE, 481 at 482.

tunity of the American Bar is and will be to stand again as it did in the past, ready to protect also the interests of the people.”⁵⁵

These words were spoken in an address delivered before the Harvard Ethical Society at Harvard University. For several years Mr. Brandeis himself had been following his own advice. His purpose to enter affairs of state on the side of the public brought him face to face with such major economic and social problems as trust regulation, railway rates, public utilities, the supervision of insurance companies, the relations of capital and labor, old age pensions, and so forth. In these public struggles, his activities were no longer confined to the court room; he appeared before legislatures, city councils, legislative committees, on the public platform, and frequently in press.

His work began to attract nation-wide attention in 1897 when he went to Washington to appear before the Ways and Means Committee hearings on the Dingley Tariff Bill. Mr. Brandeis spoke in behalf of the consumers of the United States. Here he found anything but a congenial atmosphere; his ideas were received with much impatience and some ridicule. During the period from 1896 to 1911, he appeared at frequent intervals before the legislature of Massachusetts and successfully prevented letting franchises and leases to railways and public utilities for terms of years that would have injured the public interest. He entered a fight in 1903 in behalf of the Public Franchise League to prevent Boston gas companies from setting their capitalization at figures that would have barred lowering gas rates.⁵⁶ From 1906 to 1908 Mr. Brandeis acted as counsel for the Anti-Merger League whose purpose was to prevent the consolidation of the New York, New Haven and Hartford Railroad with the Boston and Maine Railroad. Temporary success rewarded his efforts, but with the election of a new state administration a bill was passed empowering the New Haven to acquire through a holding company all the stock of the Boston and Maine road. Difficulties,

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⁵⁵ BRANDEIS, BUSINESS—A PROFESSION (1925) 337.

⁵⁶ Brandeis, *How Boston Solved the Gas Problem* (1907) 36 AM. REVIEW OF REVIEWS 594. Reprinted in BRANDEIS, BUSINESS—A PROFESSION (1925) 99.

financial and otherwise, resulted from the merger; rates, as Mr. Brandeis had predicted, were increased and the service became demoralized. Complaints finally became so numerous that the I. C. C. ordered a thorough investigation. The results are given in Commissioner Prouty's report which served as a complete vindication of Mr. Brandeis' criticism of the New Haven's financial policy.⁵⁷

In no field were Mr. Brandeis' analytical powers, his mastery of facts and details, so effectively demonstrated as in his investigations of the insurance business as unpaid counsel for a protective committee of policy holders.⁵⁸ He revealed tremendous assets, nearly half concentrated in three Wall Street companies, with unscientific and wasteful management which resulted in costly insurance. The principles according to which he advocated reorganization of insurance companies were embodied in the Armstrong bill, largely at the insistence of Charles Evans Hughes. Mr. Brandeis was especially interested in devising cheaper insurance for wage-earners. Accordingly he sponsored the Savings Bank Insurance plan. He lectured frequently and wrote articles in its advocacy.⁵⁹ A bill of his own drafting was finally presented authorizing the savings banks of the state to establish insurance departments. The bill passed the Massachusetts legislature in 1907 despite the violent opposition of old-line companies.

The public work of Mr. Brandeis which gained most widespread publicity, is undoubtedly his investigations in the famous *Ballinger* controversy.⁶⁰ The historical background of this case is a matter of history and need not be detailed here. Mr. Brandeis' disclosures of misconduct in high places extending even to the Attorney-General's office, if not to the Presidency, were as dra-

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⁵⁷ *BRANDEIS, op. cit. supra* note 55, at 262 and 286.

⁵⁸ *Ibid.* 115 a.

⁵⁹ *Ibid.* 160 and 188.

⁶⁰ Pinchot-Ballinger controversy, SEN. DOC., 61st Cong. 2d Sess., vol. 44 and *ibid.* 3d Sess., vol. 34.

matic as they were shocking.⁶¹ But the real significance of the case may be put in his own words:

"This investigation has been referred to as a struggle for conservation, a struggle against the special interests. It is that; but it is more. In its essence, it is the struggle for democracy, the struggle of the small man against the overpowering influence of the big; politically as well as financially, the struggle to establish the right of every American to equal justice in the public service as well as in the courts, that no official is so highly stationed that he may trample ruthlessly and unjustly upon even the humblest American citizen. The cause of Glavis is the cause of the common people, and more especially the cause of hundreds of thousands of Government officials."⁶²

Brandeis was to deal with questions of greater magnitude. In 1910, the railroads of the United States, operating east of the Mississippi and north of the Ohio and Potomac Rivers, filed with the Interstate Commerce Commission new tariffs providing large advances in freight rates. In order to determine the reasonableness of the proposed increased rates, the Commission ordered an investigation. In this investigation, Mr. Brandeis acted as counsel for the Traffic Committee of the Trade Organization of the Atlantic Seaboard.⁶³ Here he demonstrated a knowledge of the economics of railroading that is extremely rare among members of the legal profession. For as one writer has observed, "so far as any direct influence upon our courts is concerned, our modern text-books in economics might as well be written in Chinese."⁶⁴

In answer to the railroad's contention that the possibilities of economies in operation had been exhausted, Brandeis replied in terms of *scientific management*. Thus far, he argued, the rail-

⁶¹ Brief of Brandeis in behalf of Glavis, 61st Cong., 3d Sess., SEN. DOC., vol. 41, 5041-5182. See also rather unmerciful cross-examination of Ballinger by Mr. Brandeis, *ibid.* vol. 40, 3786-3811, 3854-4093, 4113-4140. See, in this connection, Norman Hapgood's excellent chapter on "Mr. Brandeis" in a recent volume, *THE CHANGING YEARS* (1930) 186-191.

⁶² Quoted by Poole, *op. cit. supra* note 54, at 490.

⁶³ Argument of Brandeis, Counsel for Traffic Committee of the Trade Organizations of the Atlantic Sea Board. 53 SEN. DOC. 5251 (1911). Brief of Brandeis before Interstate Commerce Commission, *ibid.* at 4752 *et seq.*

⁶⁴ Humble, *Economics from a Legal Standpoint* (1908) 42 AM. L. REV. 379.

roads had realized economies from the "levelling of grades, elimination of curves, introduction of larger cars and engines—in short, improvement in plant. They had left practically unworked the field of attaining greater efficiency through the new science of management—a science which in other industries was already being developed with wonderful results, a science by which the efficiency of the individual workman was often more than doubled, resulting in both largely increased compensation to the worker and increased profit to the employer". In terms of dollars and cents it was estimated that at least \$1,000,000 a day could be saved by the methods of scientific management. "This investigation," Mr. Brandeis concluded, "has developed clearly that the railroads, to meet any existing needs, should look not without, but within. If their net income is insufficient, the proper remedy is not higher rates resulting in higher costs and lessened business, but scientific management, resulting in lower costs, in higher wages and increased business." ⁶⁵

That his argument was effective in the case is evidenced by the fact that the Interstate Commerce Commission refused to grant the proposed increase in rates. But his ideas on scientific management spread far beyond these bounds: "By a single stroke," as one engineer put it, "Brandeis created a greater advance in scientific management than would otherwise have come in the next quarter of a century." ⁶⁶

Brandeis' diagnosis of the money trust ranks in importance and influence with his work in connection with the railroads. In 1911 "Bigness" was considered as a necessary incident of efficiency. "Big railroad systems, big industrial trusts, big public service companies; and as instruments of these, Big banks and Big trust companies. J. P. Morgan and Company (in their letter of defense to the Pujo Committee) urge the need of 'Big Business' as the justification for financial concentration. They declare that what they euphemistically call 'co-operation' is 'simply a further result of the necessity for handling great transaction';

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⁶⁵ *BRANDEIS, SCIENTIFIC MANAGEMENT AND THE RAILROADS* (1911) 91.

⁶⁶ Quoted by Poole in foreword to *BRANDEIS, BUSINESS—A PROFESSION* (1925) xlviii.

'that the country obviously requires not only the larger individual banks but demands also that those banks shall co-operate to perform efficiently the country's business'; and but a step backward along this line would mean a halt in industrial progress that would affect every wage-earner from Atlantic to the Pacific".⁶⁷

Mr. Brandeis' study of trusts and corporations shows that these conclusions belie the facts. He also demonstrated that a point is reached in the growth of industry where "bigness" no longer makes for efficiency; that there is a limit to the size that makes for greatest efficiency.⁶⁸ In emphasizing this point of view he made a notable contribution to the study of business organization in general, and of the money monopoly in particular.

Attention and emphasis has already been given to the role which Mr. Brandeis played in support of labor legislation. His contact with the ever-present conflict between capital and labor was even more intimate. In the summer of 1910 he acted as arbitrator in the New York cloakmakers' strike which involved seventy thousand employees and a business of \$180,000,000 a year. The sore spot was the "closed shop." All attempts to bring the employer and employees together had failed. For a time even the subtle efforts of Mr. Brandeis seemed doomed to failure. The question of the "closed shop" was cautiously avoided until lesser differences could be settled. Brandeis finally introduced the subject under a compromise plan of his own making, *i. e.*, that of the "the preferential shop." The plan failed of acceptance; the strike continued. The final agreement, however, embodied the core of his plan:

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⁶⁷ *BRANDEIS, OTHER PEOPLES' MONEY AND HOW THE BANKERS USE IT* (1914) 162.

⁶⁸ "When . . . you increase your business to a very great extent, and the multitude of problems increase with its growth, you will find, in the first place, that the man at the head has a diminishing knowledge of the facts and, in the second place, a diminishing opportunity of exercising a careful judgment upon them. Furthermore—and this is one of the most important grounds of inefficiency of large institutions—there develops a centrifugal force greater than the centripetal force. Demoralization sets in; a condition of lessened efficiency presents itself. . . . These are disadvantages that attend bigness." Then follows a detailed examination of the records of numerous trusts. Hearings before the Committee on Interstate Commerce on the Control of Corporations, Persons and Firms engaged in Interstate Commerce. 62d Cong. 2d Sess. S. Res. 98, vol. I, p. 1147 *et seq.* (1912).

"A shop where union standards as to working conditions, hours of labor and rates of wages prevail, and where, when hiring help, union men are preferred; it being recognized that since there are differences in degree of skill among those employed in the trade, employers shall have freedom of selection as between one union man and another, and shall not be confined to any list nor bound to follow any prescribed order whatever. . . . The Manufacturers' Association, however, declare their belief in the union, and that all who desire its benefits shall share in its burdens." ⁶⁹

It is not inconceivable that a single mind could have tackled so many, if not all, the most important problems of our industrial civilization. But it is no less than extraordinary that a single mind should have gained such a comprehensive grasp of so many complicated questions and at the same time formulated constructive proposals for their solution. In all the public struggles in which he engaged, Mr. Brandeis displayed a degree of imagination, originality and penetrating insight that has seldom been equalled. From his study of public utility regulation he emerged with the "sliding scale system" which resulted in cheaper gas and higher security values; ⁷⁰ in the field of railway regulation, he laid down the principles of scientific management; in his study of trusts and corporations he destroyed the common delusion that efficiency is a necessary incident to size; in the field of industrial disputes he worked out and applied the "preferential union-shop principle."

Although a distinguished student of the law it is evident that Mr. Brandeis gained much of his training from close contact with the realities of social and economic life. "As a whole" he declared in 1911, "I have not got as much from books as I have from tackling concrete problems. I have generally run up against a problem, have painfully tried to think it out, with a measure of success, and have then read a book and found to my surprise that some other chap was before me." ⁷¹ Steeped in the

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⁶⁹ Quoted by Poole, *op. cit. supra* note 54, at 487.

⁷⁰ Brandeis maintained that no contract is good that is not advantageous to both parties. Accordingly the Massachusetts Legislature provided under the Sliding Scale Act of 1906 that for every five-cent reduction in the price of gas the dividend might be increased one per cent.

⁷¹ Quoted by Poole, *op. cit. supra* note 66, at xii. An expert in accounting, Mr. Brandeis' success in various fields has been attributed by at least one writer,

realities of modern industrial society, he gained an understanding of economic and social facts by close contact with them.

It is a matter of common observation that progress in the social sciences has not kept pace with our mastery of natural sciences; that our ability to deal effectively with the problems of modern industrial life offers a very poor parallel with the expertness with which scientific questions are considered.⁷² There are doubtless several explanations for this but one reason would seem to be obvious. Progress in dealing with social matters has not kept pace simply because comparatively few men of talent and ability have bent their efforts in this field.⁷³ What is needed is more social and economic scientists of Mr. Brandeis' type; he stands almost alone in the application of the social sciences, as a glaring counterpart to Pasteur, Edison and many others in the scientific field. The need for more workers of Brandeis' sort in the field of the law was emphasized not long ago by Graham Wallas:

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to his comprehension of figures: "When he succeeded in preventing a raise in freight rates, it was through an exact analysis of cost. When he got Savings Bank Insurance started in Massachusetts, it was by being able to figure what insurance ought to cost. When he made the best contract between a city and a public utility that exists in this country, a definite grasp of the gas business was necessary—combined, of course, with the wisdom and originality that make a statesman. He could not have invented the preferential shop if that new idea had not been founded on a precise knowledge of the conditions in the garment trades". Preface by NORMAN HAPGOOD to *BRANDEIS, OTHER PEOPLE'S MONEY* (1914).

⁷² "The knowledge of man, of the springs of his conduct, of his relation to his fellow-men singly or in groups, and the felicitous regulation of human intercourse in the interest of harmony and fairness, have made no such advance. Aristotle's treatises on astronomy and physics, and his notions of 'generation and decay' and of chemical processes, have long gone by the board, but his politics and ethics are still revered. Does this mean that his penetration in the sciences of man exceeded so greatly his grasp of natural science, or does it mean that the progress of mankind in the scientific knowledge and regulation of human affairs has remained almost stationary for over two thousand years? I think that we may safely conclude that the latter is the case." ROBINSON, *THE MIND IN THE MAKING* (1921) 7-8. It should not be supposed that the present writer subscribes to any such conclusions. Certainly the researches into psychology, anthropology and the social sciences has not been entirely fruitless.

⁷³ "We are sure to have for the next generation an ever-increasing contest between those who have and those who have not. There are vital economic, social and industrial problems to be solved. And for these we need our ablest men. The reason why we have not made more progress in social matters is that these problems have not been tackled by the practical men of high ability, like those who have worked on industrial inventions and enterprises. We need *social inventions*, each of many able men adding his work until the invention is perfect." Words of Brandeis, quoted by Poole, *op. cit. supra* note 54, at 492.

"One of the most important functions of any vocational body is the continuous revision and increase of the heritage of knowledge and thought which comes within its sphere. In the case of law this function is peculiarly important. Law is the framework of the social machine, and if a sufficient number of instructed, free and fertile thinkers could set themselves to ask in the light of our modern knowledge of history, politics, psychology, what are the purposes of law, and by what means those purposes can be attained, an incalculable improvement in human relations might result." ⁷⁴

It is becoming more and more apparent that the fields of economics, politics and law, to say nothing of anthropology, biology, and psychology, cannot be clearly differentiated. Brandeis was not alone in his recognition of the fact that law cannot properly be regarded as something proceeding from the will of the law-giver, but rather "as something proceeding from society through him; as being the product of economic and social forces working through him and finding expression in his words." ⁷⁵ Law considered as a branch of social science calls for a new approach to its study. As Professor Dickinson has well said:

"A correct approach to legal problems is distinguished by a sense of the need for acquaintance with the economic and social and psychological facts within which the law operates as its environment. Such a knowledge is essential to an application of analogies and distinctions which shall be free from confusion between substance and form. What the history of law and the study of social and ethical theory mainly teach is the importance of understanding the factual circumstances and origins of the claims which call for the formulation and application of legal rules. If law is no frozen world of arbitrary *a priori* abstractions existing in a vacuum and held together only by a formal logical consistency, it must be studied as a way of bringing into order a mass of human relations which get most of their significance from the facts and circumstances which must guide the formulation and application of the legal principles that are to govern them." ⁷⁶

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⁷⁴ WALLAS, *OUR SOCIAL HERITAGE* (1921) 126.

⁷⁵ Pound, *Courts and Legislation* (1913) 7 AM. POL. SCI. REV. 379.

⁷⁶ DICKINSON, *op. cit. supra* note 23, at 344.

The Institute of Law which has recently (1928) been established at the Johns Hopkins University is indicative of the growing dissatisfaction with our

Mr. Brandeis realized in 1916 that the law as then administered failed to meet contemporary social and economic needs. Remedy for the situation required, in his mind, neither displacing the lawyer nor the judge, but rather that they should be better fitted for their task. In this connection he quoted with approval the words of Professor Henderson that, in view of changed social and economic conditions, "one can hardly escape the conclusion that a lawyer who has not studied economics and sociology is very apt to become a public enemy."⁷⁷

"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, conservatizing profession. . . . What we must do in America is not to attack our judges but to educate them."⁷⁸

"We are powerless", Mr. Brandeis declared in another connection, "to restore the general practitioner and general participation in public life. Intense specialization must con-

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present system of legal study. The institute is devoted, runs the resolution of the Board of Trustees, "primarily to the scientific study of the law. The activities of the institute shall include not only a study of law in a narrow sense, but also a consideration of such branches of science and philosophy as may be necessary in order that the operation and effects of law in all its relations to human life may be effectively studied." Quoted by Ames, *Law as a Science* (1930) 32 CURRENT HISTORY 919.

An illustration of the tendency to consider the social sciences as a single unit of study is the establishment at Princeton of the School of Public and International Affairs. Formerly the related fields of history, politics and economics were organized at Princeton in a single department. The last fifteen years witnessed a gradual departmentalization of these three kindred branches of learning. What the School curriculum provides, in substance, is a return to the old system. Accordingly the fields of history, politics and economics are brought together and organized as a single course of study. A notable feature of the curriculum of the School is the inclusion of the study of modern languages, the idea being that language may be used as "an instrument in presenting the forces of civilization, moral, political, social, religious, which are mirrored in the various periods of the literature." Report of the President of Princeton University (1930) 11. See, in this connection, address of Elihu Root wherein he emphasizes the study of literature as affording a necessary background for legal education. (1920) 46 A. B. A. REP. 660. This point of view was also strongly urged by TAFT, POPULAR GOVERNMENT (1913) 237-8. For a recent and able treatment of the relation between the development of law and the work in other social sciences, see Updegraff, *The Social Sciences and the Law Curriculum* (1930) 25 ILL. L. REV. 743.

⁷⁷ Quoted by Brandeis, *op. cit. supra* note 15, at 470.

⁷⁸ Poole, *op. cit. supra* note 54, at 493.

tinue. But we can correct its distorting effects by broader education—by study undertaken preparatory to practice—and continued by lawyer and judge throughout life: study of economics and sociology and politics which embody the facts and present the problems of today.”⁷⁹

Louis D. Brandeis was provided no such training at the Harvard Law School, but he gained it even more thoroughly on the proving ground of practical experience. Indeed, it is not too much to say that no man in our generation has come to the Supreme Court so well versed in the many-sided, technical and complicated problems of today, no man who understood so well the actual relations between persons in concrete situations, their behavior and interests and conduct, as Louis D. Brandeis. The words of President Wilson in nominating him as associate justice of the Supreme Court must have been used advisedly:

“I nominated Mr. Brandeis because it was, and is my deliberate judgment that, of all the men now at the bar whom it has been my privilege to observe, test, and know, he is exceptionally qualified. I cannot speak too highly of his impartial, impersonal, orderly, and constructive mind, his rare analytical powers, his deep human sympathy, his profound acquaintance with the historical roots of our institutions and insight into their spirit or of the many evidences he has given of being imbued to the very heart with our American ideals of justice and equality of opportunity; of his knowledge of modern economic conditions, and of the way they bear upon the masses of the people, or of his genius in getting persons to unite in common and harmonious action and look with frank and kindly eyes into each other’s minds, who had before been heated antagonists. This friend of justice and of men will ornament the high court of which we are all so justly proud.”⁸⁰

It is a curious fact that where men are confronted with problems even more complex than those found in the natural sciences, as in the fields of economics, law, and the social sciences generally, the more confidently do they insist upon the prior existence of

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⁷⁹ Brandeis, *op. cit. supra* note 15, at 469.

⁸⁰ Hearings before the subcommittee of the Judiciary on the nomination of Louis D. Brandeis. 17 SEN. DOC. 6 (1916).

immutable and universal principles or laws which can be determined and applied by reason and logic.⁸¹ The extraordinary confidence in this method of approach to constitutional questions is doubtless rooted in a belief in "natural law", which is supposed to embody principles transcending all changes in time, place or circumstance.⁸² It is almost inconceivable that belief in the idea of natural law, and the deductive method which this concept implies, should still be so vigorous and persistent. Implicit confidence in the power of logic to solve constitutional questions, however novel or complex, has resulted in an almost complete absence of any testing of conclusions by experimentation or by study of the social and economic facts in which modern constitutional questions are enmeshed.⁸³ That is to say, our traditional technique makes little or no provision whereby counsel can furnish the court with essential social and economic data; nor does it provide the court with the machinery necessary to acquire such data. The reason is perhaps that judicial questions are considered purely as questions of law, and armed by "common understanding" and experience as men and as judges, it is believed that a case, notwithstanding the tangle of law and economics which it may involve, can be decided by simple rules of logic; no excur-

⁸¹ Cooke, *Scientific Method and the Law* (1927) 13 A. B. A. J. 307.

⁸² On the basis of the doctrine of natural law the Supreme Court has frequently argued that there are certain so-called "natural rights" of the individual beyond the control of government. When such rights are not secured by provisions of the Constitution, natural law has sometimes been invoked to protect them against governmental interference. Mr. Justice Chase in *Calder v. Bull*, 3 Dall. 386 (U. S. 1798) said: "I cannot subscribe to the omnipotence of a State Legislature or think it is absolute and without control, although its authority should not be expressly restrained by the Constitution or fundamental law of the state. . . . There are certain vital principles in our free, Republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power." For similar utterances, see Chief Justice Marshall in *Fletcher v. Peck*, 6 Cranch 87, 135 (U. S. 1810); Justice Story in *Wilkinson v. Leland*, 2 Pet. 627, 657 (U. S. 1829); Justice Miller in *Loan Association v. Topeka*, 20 Wall. 655, 663 (U. S. 1874); J. Field in *Butchers' Union v. Crescent City Live-Stock Landing Company*, 111 U. S. 746, 762, 4 Sup. Ct. 652, 656 (1884); *Webster v. Reid*, 11 How. 437 (U. S. 1851); *Hays v. Pacific Mail Steamship Co.*, 17 How. 596 (U. S. 1854); *Gilbert v. Minn.*, 254 U. S. 325, 41 Sup. Ct. 125 (1920). Since the adoption of the Fourteenth Amendment a legislative act which formerly might have been condemned as violative of natural law is now usually challenged as violative of "due process." See in this connection the excellent note in EVANS, *CASES ON AMERICAN CONSTITUTIONAL LAW* (2d ed. 1925) 953 *et seq.*; HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* (1930).

⁸³ RUEFF, *FROM THE PHYSICAL TO SOCIAL SCIENCES* (1929) Introduction by Oliphant and Hewitt, xxvii.

sions into the fields related to the law, such as economics and sociology, is deemed to be necessary.

It is obvious that when a new case is presented the judge is free, so far as compelling rules of logic are concerned, to decide very much as he pleases, and thus his choice will usually turn upon considerations of political, economic or social policy. If he makes this choice intelligently he must go far beyond the narrow confines of the law. At least two questions would seem to call for an answer, neither of which requires legal knowledge: First, what social consequences or results does the statute in question aim at. Second, how will a decision one way or another affect the attainment of those results.⁸⁴ It is very unlikely that the judge will have this knowledge. To acquire it he will have to take recourse to the other social sciences.

Admitting that the court should have such information in deciding cases having to do with social and economic matters, the next question presenting itself is this: Whose business is it to ascertain the facts concerning the need of social legislation? Should it be considered the function of the legislature which passes the statute, of the counsel who defend or oppose it, or of the court which passes upon its constitutionality? One may infer from the opinions of certain judges that this is the work of the legislature. "The legislature, being familiar with local conditions, is, primarily, the judge of the necessity for such enactments."⁸⁵ Certainly if the court is to accept the findings of the legislature as final, as Mr. Justice Holmes generally insists, legislative action should be preceded by a very careful investigation of the facts. Mr. Brandeis, as counsel, took upon himself the performance of

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⁸⁴ Cook, *op. cit. supra* note 81, at 308.

⁸⁵ Words of Mr. Justice Day in *McLean v. Ark.*, 211 U. S. 539, 548, 29 Sup. Ct. 206, 208 (1909). Quoted with approval by Mr. Justice Hughes in *Chicago, B. & Quincy R. R. Co. v. McGuire*, 219 U. S. 549, 569, 31 Sup. Ct. 259, 263 (1911). "Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. . . . If . . . the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it." Mr. Justice Holmes speaking for the Court in *Noble Bank v. Haskell*, 219 U. S. 104, 112, 31 Sup. Ct. 186, 187 (1915). According to Professor Freund, the problem of fact finding is "one that only the legislature can handle adequately". *STANDARDS OF AMERICAN LEGISLATION* (1926) 98.

this task, and this method of procedure received the expressed approval of certain state courts as well as the Supreme Court of the United States. He felt very keenly the responsibility of counsel in this particular. "A judge rarely performs his functions adequately unless the case before him is adequately presented. Thus were the blind led by the blind. It is not surprising that under such conditions the laws as administered failed to meet contemporary economic and social conditions."⁸⁶ Courts as compared with counsel and legislatures, are peculiarly unfitted to investigate social and economic conditions which legislation is designed to regulate. That is not their function; moreover, courts do not have the facilities for the examination of complex social and economic phenomena.⁸⁷ Despite these facts Mr. Brandeis, as Associate Justice of the Supreme Court, has continued his researches in the realm of the social sciences and has himself made investigations similar to those which he undertook formerly as counsel.⁸⁸

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⁸⁶ Brandeis, *op. cit. supra* note 15, at 470.

⁸⁷ "As a general proposition, courts have no adequate machinery for getting at the facts required for the exercise of their necessary law-making functions. As things are, our courts must decide on the basis of matters of general knowledge and on supposed accepted principles of uniform application. Except as counsel found material in their printed arguments, the Court has no facilities for obtaining knowledge of social facts comparable to hearings before committees, testimony of specialists who have conducted detailed investigations, and other means of the sort available to the legislature." Pound, 7 *PUB. AM. SOC. SOCIETY* 148, 160. Dean Pound goes on to suggest that judicial reference bureaus might well be developed which would aid the courts in judicial law-making in a manner comparable to the service rendered by legislative reference bureaus in some seventeen of our states today. Professor Freund doubts that the courts "will be furnished with investigating machinery that will equal in effectiveness the sources of information at the disposal of a legislative body." *Op. cit. supra* note 36, at 96. The position which the Court takes on this subject is indicated by the following quotation: "Questions of fact and public policy . . . belong to the legislative department to determine. . . . It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions." *Powell v. Pennsylvania*, 127 U. S. 678, 685, 8 Sup. Ct. 992, 996 (1888).

⁸⁸ Mr. Justice Brandeis stated his position on this subject as follows: "Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary, can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial and political, of the community to be affected thereby. Resort to such facts is necessary, among other things, in order to appreciate the evils sought to be remedied and the possible effects of the remedy proposed. Nearly all legisla-

Whether it be the business of the legislature, counsel or courts, to ascertain, collect, weigh and evaluate the facts, there is a great and growing need for enlarging and perfecting our agencies for ascertaining social and economic data. "Just as it requires an expert to know where to find the law, so it requires a person no less expert to know where to find statistical data." One writer has suggested that a solution of the problem may "be found in the use of the economist's knowledge as an expert on such subjects as taxation, transportation, finance, statistics, questions of public policy and the like."⁸⁹ But, in addition, the judge himself must have had such training in these subjects as will provide a disposition to use this kind of knowledge.

The United States has been peculiarly slow in the development of social and economic fact-finding agencies. In this regard we are, in Professor Frankfurter's opinion, comparatively, where England was in 1830.

"In 1830, the House of Commons wrangled as to the existence of economic distress and its extent. In England these facts—the conditions of trade and the state of unemployment—are now as dependably revealed in England as the barometer registers atmospheric pressure. Debate continues to be anxious and even bitter about modes for relieving unemployment. But at all events search for remedies is not confused and diverted by doubt and denial that anything needs to be remedied. We are still where England was in 1830. Congress still debates whether unemployment really exists, and, if so, where and how much. And we have the

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tion involves a weighing of public needs as against private desires; and likewise a weighing of relative social values. Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly, when the public conviction is both deep-seated and wide-spread and has been reached after deliberation. (Citing *Muller v. Oregon*, 208 U. S. 412, 420, 28 Sup. Ct. 324, 326 (1908).) What, at any particular time, is the paramount public need is, necessarily, largely a matter of judgment. Hence, in passing upon the validity of a law challenged as being unreasonable, aid may be derived from the experience of other countries and of the several states of our union in which the common law and its conception of liberty and property prevail". Dissenting in *Truax v. Corrigan*, 257 U. S. 312, 356, 357, 42 Sup. Ct. 124, 138 (1921). Then follows a detailed examination of the experience of the English-speaking countries in the development of rules for governing the relations between employers and employees.

⁸⁹ Humble, *op. cit. supra* note 64, at 385.

extraordinary spectacle of the Secretary of Labor of the United States issuing unemployment estimates which the Commissioner of Labor of New York denies." ⁹⁰

There are rather convincing illustrations of the need for fact-finding agencies the results of whose functioning will be more accurate. In cases where social data are furnished by counsel there is no assurance that the court will find these acceptable. The data may be biased, consisting of *ex parte* statements advocating a particular measure, or any number of other reasons may render alleged data unreliable as evidence. The manner in which the court may receive such material was illustrated in the *Oregon Minimum Wage* case where Chief Justice White, after examining Mr. Felix Frankfurter's elaborate collection of facts is said to have remarked: "Mr. Frankfurter, I could produce twice as much material to show that private property is wrong and should be abolished." ⁹¹

Even where a judge upon his own initiative furnishes the data, it may prove to be entirely ineffective. This was shown in the *Washington Employment Agency* case ⁹² where Mr. Justice Brandeis' collection of facts, showing the evils of employment agencies, proved to be unacceptable to the court. Evidently the court felt that other facts could have been supplied to show the utility of employment agencies.

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⁹⁰ Frankfurter, *Democracy and the Expert* (1930), 146 ATLANTIC MONTHLY 649. The work of this nature rendered by Royal Commissions in England is a matter of common knowledge. Frankfurter goes so far as to say that "the history of British Democracy might in a considerable measure be written in terms of the history of successive Royal Commissions." But "the experience and tradition of the British Royal Commission are lacking in the United States. We have no standards to guide the technique of inquiry, the mode of procedure, the relations to public and executive. Yet such Commissions of investigation ought more and more to be called into use to deflate feeling, define issues, sift evidence, formulate alternative remedies". FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* (1930) 162.

⁹¹ See Kales, *New Methods in Due Process* (1918) 12 AM. POL. SCI. REV. 274. Mr. Kales suggests that the skepticism of the court toward such data as Mr. Justice Brandeis presented in the *Employment Agency* case might be met by building up a record of evidence in the trial court. In the *Minimum Wage* decision the court observed concerning the material produced: "A mass of reports, opinions of special observers and students of the subject, and the like, has been brought before us in support of (the act), all of which we have found interesting but only mildly persuasive." *Adkins v. Children's Hospital*, 261 U. S. 525, 560, 43 Sup. Ct. 394, 402 (1923).

⁹² *Adams v. Tanner*, 244 U. S. 590, 37 Sup. Ct. 662 (1917).

There is, then, obviously considerable difficulty in applying the scientific technique in the realm of the social sciences. Certain writers have gone so far as to say that "it may well be that substantial agreement upon social phenomena can never be reached."⁸³ But even conceding that the subject-matter itself is more difficult to handle than that of the natural sciences, there is something wanting in the point of view of a court that could declare with reference to the social benefits of labor unions: "No attempt is made, or could reasonably be made, to sustain the purpose to strengthen these voluntary organizations . . . as a legitimate object for the exercise of the police power."⁸⁴

A close scrutiny of some outstanding controversies in the realm of politics, economics and morals, would doubtless reveal that the disputants were talking about entirely different things.⁸⁵ But even assuming agreement as to the social and economic phenomena that are to be determined, there is another difficulty which is not met in the natural sciences. In the latter field one deals with objective matter that is ponderable and measurable, whereas in the social sciences we are dealing with subjective imponderables that are extremely difficult of measurement. We are in no position to say, however, with what success the scientific method can be used and applied in the social sciences simply because little systematic effort has been devoted as yet to such concentration upon social phenomena as would enable us to deal with them impersonally and objectively. The tendency has been to adopt the position taken by the court in the *Coppage* case, *i. e.*, that the effort, if made, would be futile. Certainly no work has been done in this field that can begin to compare with that done in the natural sciences.

Mr. Brandeis' writings and legal practice are especially significant for the light they shed on methods whereby the law may be refreshed and vitalized by a study of social and economic science. Contrasting his own method of treating constitutional questions with that generally followed by the Court, he observed:

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⁸³ Rueff, *loc. cit. supra* note 83.

⁸⁴ *Coppage v. Kansas*, 236 U. S. 1, 16, 35 Sup. Ct. 240, 244 (1915).

⁸⁵ Rueff, *op. cit. supra* note 83, at xxii.

"In the past the Courts have reached their conclusions largely deductively from preconceived notions and precedents. The method I have tried to employ in arguing cases before them has been inductive, reasoning from the facts."⁹⁶ "I have no rigid social philosophy. I have been too intense on concrete problems of practical justice."⁹⁷

It should not be supposed, however, that Mr. Brandeis approaches facts and experience with that complete freedom from mental prepossessions which the inductive method is supposed to demand. On the contrary, he has a definite philosophy which he has voiced in no uncertain terms. Brandeis' chief concern is for freedom and liberty of the individual; not his political liberty but industrial liberty; not freedom from physical restraint, but rather his freedom from economic oppression. He is especially apprehensive for those who are dependent upon their daily wage for livelihood:

"Most men are employees and since most men must work to live, the law should see that they are protected from oppression in their work, from excessive hours of labor and other conditions injurious not only to them alone but through them to the common good."⁹⁸

"Politically, the American Workman is free—so far as law can make him. But is he really free? Can any man be really free who is constantly in danger of becoming dependent for mere subsistence upon somebody and something else than his own exertion and conduct? Men are not free while financially dependent upon the will of other individuals. Financial dependence is consistent with freedom only where claim to support rests upon right, and not upon favor."⁹⁹

Modern industrial society, as Mr. Brandeis sees it, is essentially a "contest between those who have and those who have not. . . . In old time the law was meant to protect each citizen from oppression by physical force. But we have passed to a subtler civilization; from oppression by force we have come to

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⁹⁶ Recorded by Ernest Poole from an interview with Mr. Brandeis. (1911)
⁷¹ AMERICAN MAGAZINE 481, 493.

⁹⁷ *Ibid.* 492.

⁹⁸ *Ibid.* 493.

⁹⁹ BRANDEIS, BUSINESS—A PROFESSION (1925) 59.

oppression in other ways. And the law must still protect a man from things that rob him of his freedom, whether the oppressing force be physical or of a subtler kind." ¹⁰⁰

These words sound the prevalent note of Mr. Brandeis' social and political philosophy. Under present social and economic organization, the wage earner and the public are in peculiar danger of oppression. For this reason he favors those institutions, whether economic, social or political, which tend to reinforce the position of the workers, and to safeguard the interests of society. The institution of property, for instance, should not be regarded, as it so frequently is, as an end in itself but as a means of promoting human freedom. When, therefore, "property is used to interfere with that fundamental freedom of life for which property is *only a means*, then property must be controlled. This applies to the regulation of trusts and railroads, public utilities and all the big industries that control the necessities of life. Laws regulating them, far from being infringements on liberty, are in reality protections against infringements on liberty." ¹⁰¹

Mr. Brandeis credits the labor unions with having made valuable contributions to human freedom. He believes that unions have been largely instrumental in bringing about improved economic and social conditions of wage earners; that they have not only benefited working men but society as a whole. Nor does he close his eyes to the abuses of trade unionism. For these the unions should be punished and restrained—not outlawed. "A bad act is no worse, as it is not better, because it has been done by a labor union and not a partnership or a business corporation." ¹⁰² For the defects in trade-union practices, he offers a remedy that no orthodox American Federationist has thus far been willing to accept—that of incorporation. Practical immunity of unions from legal liability, which most labor leaders consider a great advantage, serves, in Mr. Brandeis' opinion, merely to make officers and members reckless and lawless, to alienate public sympathy and frustrate labor's efforts. But worse still, it is this very immunity from suit and legal liability that has provided,

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¹⁰⁰ Poole, *op. cit. supra* note 94, at 492.

¹⁰¹ *Ibid.* 493.

¹⁰² BRANDEIS, *op. cit. supra* note 99, at 90.

he believes, the foundations on which has been built the greatest grievance which laborers have suffered at the hands of the courts—the so-called “government by injunction.” From this point of view he considers that the legal immunity of trade unions is dearly bought. He argues in favor of incorporation, believing that “if the courts had been dealing with a responsible union instead of irresponsible defendants, they would, doubtless in many cases, have refused to interfere by injunction.” ¹⁰³

Despite the many benefits of trade unions, much more is needed in our present industrial civilization in order to enjoy liberty:

“We must find (other) means to create in the individual financial independence against sickness, accident, unemployment, old age, and the dread of leaving his family destitute if he suffer premature death. For we have become practically a world of employees; and if a man is to have real freedom of contract in dealing with his employer, he must be financially independent of these ordinary contingencies. Unless we protect him from this oppression, it is foolish to call him free.” ¹⁰⁴

To secure independence from these modern forms of oppression government itself must intervene. Brandeis foresaw and advocated more and more governmental control. “The government must keep order not only physically but socially.” ¹⁰⁵ Accordingly, he has long been an advocate of legislation in behalf of trade unions, of hours of labor legislation, minimum wage laws, old-age pensions and unemployment insurance. He advocates these measures because he believes that “if society and industry and the individual (workman) were made to pay from day to day the actual cost of the sickness, accident, invalidity, premature death or premature old age consequent upon excessive hours of labor, unhygienic conditions of work, unnecessary risks, and irregularity of employment, those evils would be rapidly reduced.” ¹⁰⁶ In short, Mr. Brandeis believes that “industrial lib-

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¹⁰³ *Ibid.* 95-96

¹⁰⁴ Poole, *op. cit.* *supra* note 96, at 492-93.

¹⁰⁵ *Ibid.* 492.

¹⁰⁶ BRANDEIS, *op. cit.* *supra* note 99, at 70.

erty must attend political liberty;" "Industrial democracy should ultimately attend political democracy. We must avoid industrial despotism, even though it be benevolent despotism." ¹⁰⁷

It should not be supposed, however, that Brandeis would substitute a dictatorship by labor for the dictatorship of capital: "We gain nothing by exchanging the tyranny of capital for the tyranny of labor." ¹⁰⁸ He characterized "the plea of trade unions for immunity be it from injunction or from liability for damages. . . . as fallacious as the plea of lynchers." "Industrial liberty, like civil liberty, must rest upon the solid foundation of law. Disregard the law in either, however good your motives, and you have anarchy." ¹⁰⁹

With the highest respect for the dignity of the individual, Brandeis pleads for liberty. He well understands that liberty is not a thing to be conferred. Rather, he is eager to secure conditions which will enable the individual to develop his powers; to enjoy the health, time and wherewithal really to live rather than merely to subsist. For this the individual needs financial security; leisure and education for mental development. No materialist, Mr. Brandeis, through choice, has devoted his life chiefly to questions of large public interest. "I have only one life, and it's short enough. Why waste it on things that I don't want most? And I don't want money or property most. I want to be free." ¹¹⁰ Dissenting sharply from the materialism of Samuel Gompers and subscribing rather to the philosophy of Plato and Aristotle, he wrote in 1916:

"Undoubtedly 'A full dinner pail' is a great achievement as compared with an empty one, but no people ever did or ever can attain a worthy civilization by the satisfaction merely of material needs, however high these needs are raised. The American standard of living demands not only a high minimum wage, but a high minimum of leisure, because we must meet, also, needs other than material ones." ¹¹¹

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¹⁰⁷ *Ibid.* 16-17.

¹⁰⁸ *Ibid.* 27.

¹⁰⁹ *Ibid.* 26.

¹¹⁰ Quoted by Poole in his foreword to *BRANDEIS, op. cit. supra* note 99, at ii.

¹¹¹ *Ibid.* 29.

Leisure is necessary not merely for the sake of individual development: "We need leisure among other reasons, because with us every man is of the ruling class. Our education and conditions of life must be such as become a ruler. Our great beneficent experiment in democracy will fail unless the people, our rulers, are developed in character and intelligence."¹¹²

"The educational standard required of democracy is obviously high. The citizen should be able to comprehend, among other things, the many great and difficult problems of industry, commerce and finance, which with us necessarily become political questions."¹¹³ From this one may conclude that Brandeis takes democracy more seriously than is the fashion today.

Brandeis' contention that he has "no rigid social philosophy" is in a sense true. He is essentially a social scientist. Hence by reason of the subject-matter of his interest, problems for him are never solved but always in process of solution. New inventions, unforeseen emergencies and various other factors, give rise to new difficulties, and call for a different method of approach. But in view of his social and political philosophy, which was formulated long before he became a member of the Supreme Court, one need not be surprised to find in his opinions evidence of a social or political theory doubtless preconceived.¹¹⁴ Fundamentally, Brandeis is an idealist, not always entirely objective, seldom without a liberal bias regarding the social and economic questions with which the court has to deal. His vision is of an ideal state wherein tyranny, political and industrial, is abolished. In many Supreme Court cases involving bitter conflicts between employer and employee, between property rights and general welfare, between human rights and property rights, he has proved himself to be an ardent champion of the common man, and the public welfare. Accordingly he has strongly urged freedom of thought and expression, and has supported legislative and trade-

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¹¹² *Ibid.* 29.

¹¹³ *Ibid.* 32.

¹¹⁴ Excerpts from Brandeis' writings and speeches embodying his ideas as expressed before 1916 have been collected by Alfred Lief, in Chapter VII of his recent volume, *THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS* (1930). See the excellent review of this volume by Pollard, *New York Times Book Review*, Nov. 2, 1930.

union efforts to secure economic and financial freedom. In spite of the mental prepossessions which he cherishes, Brandeis' method of dealing with constitutional questions is unique among members of the Court. His peculiar service in this regard has recently been emphasized by Judge Cardozo:

"In the complexities of modern life there is a constantly increasing need for resort by the judges to some fact-finding agency which will substitute exact knowledge of factual conditions for conjecture and impressions. A study of the opinions of Mr. Justice Brandeis will prove an impressive lesson in the capacity of the law to refresh itself from extrinsic sources, and thus vitalize its growth. His opinions are replete with references to the contemporary conditions, social, industrial, and political of the community affected."¹¹⁵

A study of Mr. Justice Brandeis' opinions from this point of view will be the theme of a forthcoming article in this REVIEW.

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¹¹⁵ CARDOZO, *THE GROWTH OF THE LAW* (1924) 117.