THE UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 10

JULY 1943

NUMBER 4

THE LABOR-WELFARE CASES: A SOCIO- LEGAL APPROACH*

JULIUS COHEN†

I

IN EVALUATING the impressive array of judicial decisions which have upheld liberal labor enactments, students of the social scene have overlooked one rich repository of data—the briefs and arguments of those whose task it has been to make these enactments palatable to the Supreme Court. Yet these materials provide fresh insight not only into the values of our industrial society, but into the Court as an instrument through which these values find expression. It is in the briefs and arguments of counsel defending the constitutionality of labor-welfare legislation—more so than in the language of the judicial decisions themselves—that the smoke of social tension and conflict is often more perceptible, and the social values which emerge more articulate. This may be ascribed less to any proclivity on the part of judges to conceal these values, than to the common tendency of men in all walks of life to make ethical judgments *ad hoc*, without laying bare the fundamental precepts upon which they are based.

One is struck by the presence of a persistent factor in the presentation of the labor-welfare cases before the Court—this despite wide gaps of time, despite variations in issues, despite the diversity of legal talent responsible for the preparation of the briefs and arguments. In very few instances have counsel in these cases relied solely on the argument of “reasonable deprivation,” i.e., the argument that this type of legislation has been de-

* The author is indebted to Professor Walton Hamilton and Professor Max Lerner for their helpful suggestions in the preparation of this article. The responsibility for the views expressed is, of course, solely the author's.

† Department of Government, West Virginia University; on leave to the War Manpower Commission.

terminated by the legislative bodies to be socially desirable, and that even though it may militate against the property rights of management in terms of extra cost, the burden it imposes is nevertheless reasonable. Instead, they have persisted in demonstrating to the Court that no matter how great the benefits to labor, the costs would not be borne by management. Not content merely to urge that these measures do no harm to the interests of management, counsel in many instances have mustered extensive factual data to impress upon the Court that these measures, though framed in terms of labor welfare, actually inure to the *benefit* of the interests of management. By contrast, the Court, in upholding these enactments, rarely makes these considerations articulate. Instead, the items of justification are usually couched in terms of employee welfare or in such broad expressions as "harmonious whole," "community interest," "social welfare," etc. This may be demonstrated with but few exceptions in most of the important labor-welfare cases from *Holden v. Hardy* to the *National Labor Relations Board-Jones-Laughlin* controversy.

II

Hours of labor in underground mines.—One of the early enactments relating to the welfare of labor was an act of the Utah legislature in 1896, which placed a maximum limit upon the number of hours of work in underground mines. The clash over its constitutionality came in the celebrated case of *Holden v. Hardy*.¹ Counsel for Hardy, seeking to uphold the validity of the legislation, argued:

The investigation of hospital records and health statistics concerning labor in mines and smelters by the Legislature before the passage of this act; the general discussions of its merits and advantages, *its approval by most mine owners*² and by employees . . . the fact that experience of mining and smelter employers and employees showed in those particular industries *more labor could be done in a year when employees worked eight hours per day than when they attempted to work ten hours per day* . . . are matters not appearing in the record, but were facts of which the court below very properly took notice as facts of general knowledge.³

. . . . In the enactment of this law the legislature had before it . . . the clause of the State Constitution enjoining legislation for the health and safety of miners; the discussion of this clause and of the particular bill before its passage both in the daily press and in the legislature; the investigations and reports of legislative committees as to the effect upon health of underground miners and employees in smelters of long hours of work; the statistics so obtained showing that where such employees worked

¹ 169 U.S. 366 (1898).

² For the sake of convenience, italics will be regarded as the author's unless otherwise specified.

³ Brief for Defendant in Error 11.

ten or twelve hours per day, the usual result was that such employee was "leaded" or otherwise disabled, and was compelled to lose from one fourth to one third of the days in each month. . . . And that with these matters thoroughly and at length discussed and considered *this statute was enacted by unanimous vote of the State Senate and by over two-thirds of the House. As to objections which have developed later, we have heard none. The law received the general approval of both employers and employees.*⁴

In brief, this argument constituted an assurance (1) that the support of the legislation was widespread, (2) that sufficient consideration was given to the merits of the legislation to repel the possible stigma of arbitrariness, and (3) that the legislation was not antagonistic to the interests of management—in fact, would result in greater efficiency in the productive process.

By contrast, the Court's opinion, upholding the enactment, seemed to view it as a legitimate measure for limiting "self-interested" employers who endeavor, by virtue of their superior economic position, to take advantage of their employees:

The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health and strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.⁵

No mention was made of the argument urged by counsel that the legislation had, among other things, the general approval of the employers.

The "scrip" law.—In 1901, the Supreme Court considered the validity of a Tennessee statute which created a duty upon all persons, firms, corporations, or companies using scrip, "punchouts," "store orders," etc., as a media of payment, to redeem the scrip in legal tender when demanded by the employees.⁶ Counsel for the Knoxville Iron Company, arguing against the legislation, dramatized the deleterious effect of such "paternalistic legislation" and warned of the dangers of its extension.⁷ To demonstrate how it impinged upon the freedom of business enterprise, an attempt was made to show that the legislation was tantamount to a direct

⁴ *Ibid.*, at 32.

⁵ 169 U.S. 366, 397 (1898).

⁶ *Knoxville Iron Company v. Harbison*, 183 U.S. 13 (1901).

⁷ "In nothing is the tide of paternalistic legislation sweeping higher than in the attempted regulation of dealings between employers and employees. . . . The consequences of the decision of this question, which will inevitably determine to a great extent whether the present legislative tendency shall be checked, or whether it shall be encouraged in its flood, involves

regulation of wages—the assumption, of course, being that as such it was invalid on its face.⁸

Counsel for Harbison, the defendant in error, arguing for the validity of the statute, emphasized the fact that it did not really militate against the interests of those represented by the Knoxville Iron Company:

The statute does not require the payment of a single penny in excess of the contract of employment, nor the payment in any other mode or medium than that fixed by the contract. The statute simply regulates the method of payment; *it does not shorten the time between pay days; it does not increase the amount of wages; it does not make a contract between employer and employee; it simply requires the employer, when it is demanded, to pay the wages of the laborer in money according to the original contract.*⁹

It neither interferes with existing contracts nor does it contain a prohibition against future contracts. *It is not in the least degree oppressive to the employer because it imposes no burden upon him which he did not assume when he engaged the services of the employee.* It is necessary to the welfare of the employee, because it enables him to obtain the full amount of his wages without being compelled to take payment thereof in coal, which he cannot consume, or in coal orders which he cannot convert into money except at costly discount.¹⁰

This was to inform the Court that whatever benefit would accrue to the employees as a result of the legislation would not be gained at the expense of the employers. The decision of the Court in this case, per Shiras, J., recorded with rare frankness that “[the plaintiff in error] in no event pays more in dollars and cents for labor than the contract price.”¹¹

Hours of labor for women.—Due to the influence of Mr. Brandeis’ widely heralded “sociological brief,” the case of *Muller v. Oregon*,¹² coming before the Court in 1908, was regarded by many as marking a new era in the realm of jurisprudence. It is because of the importance then and now attributed to it that an analysis of the brief and the resultant decision merits revived attention. The Oregon statute involved forbade the em-

far-reaching consequences whose ultimate results can scarcely be overestimated. If this Act be sustained it will in all probability be followed by much other legislation of the same character; if held constitutional the new departure in legislation will be checked.” Brief for Plaintiff in Error 8.

⁸ “Its [the act’s] only object can be to attempt to enforce a higher rate of wages through payment in cash instead of merchandise. Its framers . . . overlooked . . . the fundamental fact that wages are necessarily the result of the operation of economic laws, depending, in the last analysis, upon the law of supply and demand, which regulates the rate of wages as inevitably as it regulates the rate of interest upon capital. With a given competition to which the industries of the State are subjected . . . the rate of wages cannot be permanently fixed higher than the result of this competition will justify . . . so that if temporarily raised above what economic laws would justify in the fact of this competition, the inevitable result must be . . . a cessation of industry and driving of both capital and labor from the domain of the state.” *Ibid.*, at 22.

⁹ Brief for Defendant in Error 5.

¹⁰ *Ibid.*, at 13.

¹¹ 183 U.S. 13, 20 (1901).

¹² 208 U.S. 412 (1908).

ployment of females in any mechanical establishment, factory, or laundry for more than ten hours during any one day. The strategy of the Brandeis brief, prepared to convince the Court of the validity of the legislation, is most revealing. Approximately fifteen pages were devoted to an effort to ward off any possible shock of innovation or daring experiment. In these pages were listed the extensive American and foreign legislation on hours of labor already in existence. This gave assurance that such legislation would result in no strange social innovations. It was an appeal to the Court's innate conservatism. Thirty-seven pages were devoted to a presentation of evidence showing the direct relation of long hours of labor to the health of women in industry; seven pages were devoted to the proposition that shorter hours would result in better condition of health, which would reflect itself in the home, and therefore in the community at large. Section IV of the brief, however, contains the heart of the appeal. In approximately twenty pages, under the caption "Economic Aspect of Short Hours," Brandeis presented an array of evidence pointed to the conclusion that not only would the regulation not be detrimental to business, but that it would result in an increment to business enterprise. The paragraph headings in themselves are suggestive of the character of his drive:

A. EFFECT ON OUTPUT

The universal testimony of manufacturing countries tends to prove that the regulation of the working day acts favorably upon output. With long hours, output declines; with short hours, it rises. . . . Production is not only increased, but improved in quality.¹³

B. EFFECT ON REGULARITY OF EMPLOYMENT

Wherever the employment of women has been prohibited for more than ten hours in one day, a more equal distribution of work throughout the year has followed. The supposed need of dangerously long and irregular hours in the season trades are shown to be unnecessary. In place of alternating periods of intense overwork with periods of idleness, employers have found it possible to avoid such irregularities by foresight and management.¹⁴

C. ADAPTATION OF CUSTOMERS TO SHORTER HOURS

Experience shows how the demands of customers yield to the requirements of a fixed working day. When customers are obliged to place orders sufficiently in advance to enable them to be filled without necessitating overtime work, compliance with this habit becomes automatic.¹⁵

D. INCENTIVE TO IMPROVEMENT IN MANUFACTURE

The regulation of the working day has acted as a stimulus to improvement in processes of manufacture. Invention of new machinery and perfection of old methods have followed the introduction of shorter hours.¹⁶

¹³ Brief for Defendant in Error 65. ¹⁴ *Ibid.*, at 77. ¹⁵ *Ibid.*, at 79. ¹⁶ *Ibid.*, at 80.

E. UNIFORMITY ESSENTIAL TO JUSTICE TO EMPLOYERS

To grant exceptions from the restriction of hours to certain industries places a premium upon irregularity and the evasion of law. When restrictions are uniform, the law operates without favor and without injury to individuals. Few employers are able to grant their employees reductions of hours, even if they are convinced of its advantages, when their competitors are under no such obligation. Justice to the employer as well as to the employee therefore requires that the law set a fixed limit of hours for working women and a limit for all alike.¹⁷

Even more assurance was forthcoming in the presentation of what Mr. Brandeis captioned "Opinions of Employers," containing statements representative of industry in Germany, Great Britain, and the United States, corroborating his thesis that such "welfare legislation" should be sanctioned not only because of its value to the laborers involved, but because of the benefits to inure to the business class. The Court's acknowledgment of this argument took the following form:

As healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest and care in order to preserve the strength and vigor of the race. The limitations which this state places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are *not imposed solely for her benefit, but also for the benefit of all*.¹⁸

The "of all" would seem to indicate that the Court will acquiesce in experimentation devoted to "social welfare" when it can be convinced, as it evidently was in the *Muller* case, that benefits to employees will at the same time result in benefits to the business class. At least, the Court must be convinced that business or industry is not to carry the costs of the legislative venture.

From the standpoint of the direction of the attack, the Brandeis brief cannot be called an innovation. The assurance to business interests that employee welfare was not to be gained at their expense was also present in the *Holden* case. What is different is that the Brandeis brief represents the crystallization of the attitude into a sharpened technique. The fact that Mr. Brandeis repeatedly utilized the identical pattern in other cases in which he argued the merits of social legislation lends credence to this view. Thus, in the famous *Schweidler* case, argued before the highest New York tribunal, the brief prepared by Mr. Brandeis and Miss Goldmark contained over eighty pages devoted to the analysis of the effect upon "business" of the law outlawing night-work for women. The following are typical:

¹⁷ *Ibid.*, at 82.

¹⁸ 208 U.S. 412 (1908).

The experience of those countries which have longest prohibited employment at night, shows that commercial prosperity is not hampered by such regulation. According to testimony of observers, the increased efficiency of the workers, due to the regular rest at night has reacted so favorably upon output that commercial prosperity has profited instead of being injured by the prohibition of women's nightwork. The apprehensions of danger to industry expressed by employers before nightwork prohibition went into effect proved to be groundless. The opposition which accompanied the introduction of the law in various countries has yielded to the proof of its beneficial action.¹⁹

The testimony of manufacturing countries tends to prove that the output of night work is inferior to that of daywork. Quality and quantity both degenerate. The profits from the uninterrupted use of plants which are operated by night as well as by day are reduced by the increased running expense, the wear on machinery and the lessened efficiency of the workers. The prohibition of nightwork, by preserving the health and energies of the workers, as well as the material equipments, tends to increase production.²⁰

In *Hawley v. Walker*,²¹ the Brandeis-Goldmark brief contained the same thought:

The increased efficiency of the workers due to shorter working hours, together with the general improvement of industrial communities in physique and morals, reacts so favorably upon that output that commercial prosperity is heightened rather than impaired by legal limitation of hours.²²

The universal testimony of manufacturing countries tends to prove that the regulation of the working day acts favorably upon output. With the long hours, output declines; with short hours, it rises. The heightened efficiency of the workers, due to the shorter day, more than counterbalances any loss of time. Production is not only increased but improved in quality.²³

¹⁹ Brandeis and Goldmark, *The Case against Nightwork for Women* 226—Brief in *People v. Schweinler Press*, 214 N.Y. 395, 108 N.E. 639 (1915).

²⁰ *Ibid.* (brief), at 291. By contrast, it is interesting to note the interpretation placed upon the Schweinler brief in a recently published work on labor problems: "Opposition to nightwork, especially for women, was if anything even more strenuous than in the case of the long working day. Many public spirited people, among them social workers, teachers, physicians and legislators, felt that work at night was harmful to the individual and a menace to the national well-being. Perhaps the clearest and most comprehensive statement of this position is contained in the brief drawn up by Louis D. Brandeis and Josephine Goldmark in *People v. Schweinler Press*. This document is full of quotations from official reports, medical works, and sociological treatises. Much was made of the opinion that nightwork was dangerous to the health of the individual in that sleep during the day was less refreshing than at night; that it was more likely to lead to illness and accident than daywork; and that it was in opposition to efforts to promote education and reduce illiteracy. Nightwork, it was argued, also had a bad effect on morals and destroyed family life." MacDonald and Stein, *The Worker and Government* 37 (1935). Like many other interpretations of the "sociological brief," this fails to take cognizance of the extended data used in the brief to assure the Court that the legislation will inure to the benefit of the *business* interests.

²¹ 232 U.S. 718 (1914). This involved the validity of an Ohio statute regulating the hours of labor for women working in factories, etc.

²² Brief for Defendant in Error 400.

²³ *Ibid.*, at 407.

In *Miller v. Wilson*²⁴ and *Bosley v. McLaughlin*,²⁵ involving the constitutionality of the California eight-hour day for women, counsel for plaintiffs in error spared no language in dramatizing for the benefit of the Court the impending dangers of such legislation:

The daily papers are now filled during the legislative days with accounts of every sort of proposal . . . for the . . . ills of the times,—minimum wage laws, compulsory insurance, a complete liability on the part of the employers, irrespective of the negligence of the injured employee, etc., the danger of all this is obvious enough to one who has at all studied the development of government in this country.

Once the public has grown used to an uncurbed indulgence in interference with private rights, it will be difficult, not to say dangerous, to attempt to bring it back to salutary limits. A season of reform has set in with uncommon severity.

Every citizen wants to reform—his neighbor's affairs. It costs no self-denial, not even that of careful consideration. Unchecked by the courts, paternalism, socialism, and universal government would sweep over us, for the process of passing such laws is so easy, and it has the charm of benevolence without cost. *The man in the street car is coming into his own.*²⁶

From the days of Athens and Cleon down to that of [the] French Committee of Safety there has been no tyranny like that of the unchecked majority of "the people"—and it's been the more thorough that it was always under the cloak of *salus populi*. So we come back to the first principle,—that the freedom of contract, that *sine qua non* of property rights, will be frittered away, unless the courts enforce the constitutional rule that any restrictions of an adult citizen's right to contract must be necessary to his or her health—reasonably necessary, not merely possibly beneficial.²⁷

That the Court in the face of this emotional barrage should unanimously uphold the legislation spoke well for the efforts of Mr. Brandeis and Miss Goldmark. Their chief reliance was upon the persuasive weight of "the world's experience concerning the hours of labor for women in industry, submitted to this court in *Muller v. Oregon* and *Hawley v. Walker*."²⁸

Although the Court acknowledged *Muller v. Oregon* as a forceful precedent, the currents which underlay the Brandeis brief in that case were not exposed. Instead, the ratio decidendi of the *Muller* case was judicially characterized as being "based on considerations relating to woman's physical structure, her maternal functions, and the vital importance of her protection in order to preserve the strength and vigor of the race."²⁹

Hours of labor for men in manufacturing establishments.—Despite the fact that the briefs in *Bunting v. Oregon*³⁰ and *Stettler v. O'Hara*³¹ were only

²⁴ 236 U.S. 385 (1914).

²⁵ 236 U.S. 373 (1914). The briefs in both of these cases were combined.

²⁶ Brief for Plaintiff in Error 16.

²⁹ *Miller v. Wilson*, 236 U.S. 385, 396 (1914).

²⁷ *Ibid.*, at 85.

³⁰ 243 U.S. 426 (1917).

²⁸ Brief for Defendant in Error 3.

³¹ 243 U.S. 629 (1917).

partially prepared by Mr. Brandeis, the Brandeis influence is so evident in their make-up as to permit their inclusion in the cluster of cases bearing his stamp. In the *Bunting* case, the Court³² sustained a ten-hour law for men employed in manufacturing and mechanical establishments. The attitude toward the Court manifested in the brief is significant. In the introduction, reference was made to the incidence of Lord Shaftesbury's Ten Hour Act:

When that Act had been in operation seventeen years, Professor William Overmarch, President of the Economics Section of the British Association for the Advancement of Science, . . . called the Factory Acts 'wholly successful,' spoke of the limitation of hours as a 'security against foreign competition, a guarantee of power, and a fund of undivided profits.'³³

The latter part of the brief contained an expansion of the same concept:

The universal testimony of manufacturing countries tends to prove that the shortening of the workday acts favorably upon output. The introduction of a shorter workday does not result in lessened output. Whenever reliable statistics of output have been kept, before and after the introduction of a shorter workday, they show that with rare exceptions the aggregate production under shorter hours has either equalled that of the long day, or risen above it. . . . The most recent investigations have confirmed the facts, and have shown that what was true of a single industry applies to practically all industries, and is thus not a special but a general rule.³⁴

Greater promptness in starting in the morning and at noon, more interest and application on the part of the workers and the elimination of "soldiering" and lost time contribute to the increased output under shorter hours.³⁵

With excessive hours of labor, the efficiency of the workers is so much reduced that output deteriorates both in quantity and quality. Over-fatigue results in 'spoiled work' which must often be done over again the next day. The early belief that profits were dependent on the last hours of the working day has long been proved a fallacy. On the contrary, the output of the last hours shows a steady and marked decline.³⁶

Mr. Frankfurter and Miss Goldmark, who prepared a supplemental brief for the plaintiff in error, continued in the same vein—but with an additional factor added, i.e. national defense:

Since the first argument of *Bunting vs. Oregon* . . . the most notable contributions to the world's experience with industrial fatigue and its consequences, have come from Great Britain. The war has forced into national prominence the condition of the workers in munition plants and in other factories manufacturing war supplies. It has come to be recognized that *upon their output and efficiency depends*, in the last resort, *the national defense*. It has therefore been, as never before, a matter of national concern to study and conserve the working capacity of these industrial workers.³⁷

³² Three members of the Court dissented. Justice Brandeis took no part in the decision.

³³ 1 Brief for Defendant in Error x.

³⁴ 2 *ibid.*, at 636.

³⁵ *Ibid.*, at 819.

³⁵ *Ibid.*, at 737.

³⁷ Supp. Brief for Defendant in Error upon Re-argument 1.

Minimum wage legislation for women.—*Stettler v. O'Hara*,³⁸ concerning the constitutionality of minimum wage legislation in Oregon, does not add a great deal to the understanding of the technique and assumptions underlying the arguments prepared for the Court. One statement, however, by Mr. Frankfurter tends to reveal even more clearly the direct force of the appeal:

Efficiency proves in both England and Australia that *while a small number of inefficient employers may suffer*, who have relied for their profits upon cutting wages to the lowest possible point, *the establishment of minimum rates has not injured any trade nor checked its development*. In England, for instance, since minimum wages have been fixed in the tailoring trade, exports to South Africa, the largest foreign market for English clothing, have steadily increased.³⁹

Here, one finds that the appeal is not indiscriminately pointed to the enhancement of *all* of those engaged in some form of business enterprise, but rather to the more efficient, the more enlightened segment of the business population, the far-sighted ones who know what, in the long run, would be beneficial to the class as a whole.⁴⁰

III

The impact of what we have been calling "the Brandeis brief" has taken many curious twists. Dean Pound has hailed it as a hope for the "sociological jurisprudence" which he has long championed. In one of his early writings he noted that "something like sociological interpretation has begun in this country. The briefs submitted by Mr. Brandeis in the case of *Muller v. Oregon* and in the case involving the Illinois statute as to hours of labor for women show what may be achieved in this direction."⁴¹ Happily, this statement releases a flood of much-needed light upon the "scope and purpose" of "sociological jurisprudence"⁴² and permits a penetration into the armor of liberalism which has so often protected the school of thought bearing such a disarming name.

Inherent as a postulate of the "Brandeis brief" (and of "sociological jurisprudence," of which it is allegedly an embodiment), is an endorsement of experimentation, of "social engineering." Judging from the pattern of the briefs, however, it seems clear that the experimentation which is urged upon the Court was not meant to encourage departure from the

³⁸ 243 U.S. 629 (1917).

³⁹ Brief for Defendants in Error 506.

⁴⁰ For a detailed development of this thesis, see Kales, "Due Process," *The Inarticulate Major Premise and the Adamson Act*, 26 Yale L.J. 519 (1917).

⁴¹ Pound, *Courts and Legislation*, 9 *Modern Legal Philosophy Series* 225 (1921).

⁴² See Pound, *Scope and Purpose of Sociological Jurisprudence*, 25 *Harv. L. Rev.* 140, 489 (1921).

present context of social relationships, but rather to preserve it. Its purpose was to inform the Court that a society, meeting the impact of new industrial conditions, can best perpetuate itself by accommodating itself to these new conditions. It contained masterful demonstrations to the dominant business groups that the accommodating process, although involving departures in techniques, actually insured the retention of the system under which their dominance was expressed.⁴³ The briefs were not addressed to the interests of the "whole people,"⁴⁴ but were more in the nature of assurances to business enterprise that the enactments would not jeopardize their interests.⁴⁵

In commenting upon the significance of the cases involving the "Brandeis brief," both Frankfurter and Cardozo followed Pound in subscribing to the "new approach" as an innovation. In his essay, "Hours of Labor and Realism in the Law," Frankfurter characterized the innovation thus:

The emphasis is shifted to *community* interests, the affirmative enhancement of the human values of the *whole community*—not merely society conceived of as independent individuals dealing at arms' length with one another, in which legislation may only seek to protect individuals under disabilities, or prevent individual aggression in the interest of a countervailing individual freedom.⁴⁶

Cardozo, after pointing out that "the method of sociology . . . puts its emphasis on the social welfare," exemplified the method by reference to the *Schweidler* case:

Courts have often been led into error in passing upon the validity of a statute, not [from] misunderstanding of the law, but from misunderstanding of the *facts*. This

⁴³ For an excellent analysis of Brandeis' position in the "social justice" period of American history, see Lerner, *The Social Thought of Mr. Justice Brandeis*, in the collection of essays, *Mr. Justice Brandeis* (Frankfurter ed. 1932).

⁴⁴ One of the premises of the sociological jurist is "the study of actual social effects of legal institution and doctrine." Dean Pound would contend that the "sociological" interpretation would be in terms "of the whole people." See his analysis of Kohler, to whom he is greatly indebted, *op. cit. supra* n. 41, at 224: ". . . rules of law are not to be interpreted according to the thought and will of the lawmaker, but they are to be interpreted *sociologically*, they are to be interpreted as products of the *whole people* whose organ the lawmaker has become."

⁴⁵ However, Dean Pound's attacks upon the "economic interpretation" have been most persistent. See Pound, *op. cit. supra*, n. 42, at 494. In his *Interpretations of Legal History* 92-113 (1923) may be found his criticism of the "dominance" theory of Brooks Adams, with the reservation that ". . . it would be a grievous error to reject the economic interpretation wholly because of the extravagance of its advocates." In *The Formative Era of American Law* (1938), particularly at 83-91, Dean Pound again minimizes the importance of the "economic interpretation" and stresses the importance of the "taught tradition" as "the outstanding phenomenon." See also *The Economic Interpretation and the Law of Torts*, 53 *Harv. L. Rev.* 363 (1941). That Dean Pound perhaps overstates his case is suggested in Cohen, *Law and the Social Order* 329 (1933): "At times . . . he seems to argue as if the presence of ethical motives and logical reasons proves that economic forces were not influential. This is clearly an inadequate view, since logical, ethical and economic considerations are mutually exclusive."

⁴⁶ 29 *Harv. L. Rev.* 353, 367 (1916).

happened in New York. A statute forbidding nightwork for women was declared arbitrary and void in 1907. In 1915, with fuller knowledge of the investigation of social workers, a like statute was held to be reasonable and valid. Courts know today that statutes are to be viewed, not in isolation or *in vacuo*, as pronouncements of abstract principles for the guidance of an ideal community, but in the setting and framework of conditions, as revealed by the labors of economists and students of the social sciences in our own country and abroad.⁴⁷

Frankfurter, as well as Pound, focused his vision upon the smooth contours of "community," instead of the rough ridges inherent within it.⁴⁸ Cardozo embraced "the facts" but failed to notice the direction towards which they were pointed.⁴⁹ They both seemingly failed to make explicit the implications of their positions.⁵⁰ The sobering realism of Veblen furnishes a striking contrast: "Whatever policy furthers the commercial gains of those business men whose domicile is within the national boundaries *is felt to be beneficial to all the rest of the population.*"⁵¹ The Brandeis brief as a modernized appeal to a less modern end strikingly coincides with the theory of scientific management. This new business theory was born out of a need to inject new life into what was called "the prostrated industry and trade of the country."⁵² Although the Court has attempted to sever "labor" from the connotations of the term "commodity" in the legal sense, nevertheless in the economic and social sense, the sponsors of scien-

⁴⁷ Nature of the Judicial Process 81 (1922).

⁴⁸ Frankfurter's view of "community" is shared by Prof. MacIver. In his work, *Community* (1928), at 55, MacIver points out: "The growth of sociology since the time of Comte is a witness that men are beginning to realize again that there is a unity of social life, and are seeking to restore the lost synthesis of community." Despite Prof. MacIver's unifying concept of "community," he, however, admits "that there is . . . a vital cleavage in the community, expressed in the antithesis of capital and labor, which can be bridged only by the construction of such a system as makes labor no longer a mere instrument of a productive mechanism, controlled by another class for its own ends. . . ." *Ibid.*, at 273.

⁴⁹ The comments of an eminent historian of the Supreme Court follow a similar pattern: "When in the last decade of the nineteenth century, [the Supreme Court] took the radical step of expanding the old classic phrase defining the objects of the exercise of the police power—'public health, safety and morals'—by interpolating the words 'public welfare,' it advanced far towards acceptance of the theory of modern sociological jurists that the law must recognize the priority of social interests, and that it must start from the premise that 'individual interests are to be secured by law, because and to the extent that they are social interests.'" 2 Warren, *The Supreme Court and the United States* 744 (1937). See also, Lescobier and Brandeis, *History of Labor Legislation* (1935), at 696: "This change . . . marks a recognition of the relation of hours of labor to health and an appreciation that the health of workers is a part of the public health. It further marks a recognition that gross inequality in economic power may make legislative interference in some items of the labor contract a proper exercise of the police power."

⁵⁰ Pound's failure to make the nature of the conflicting interests in our society explicit is noted in Grossman, *The Legal Philosophy of Roscoe Pound*, 44 *Yale L.J.* 605 (1935).

⁵¹ *Theory of Business Enterprise* 289 (1910).

⁵² Lauck, *Industrial Revolution and Wages* 2 (1929).

tific management have continued to regard the laborer primarily as a machine out of which the employer should derive the maximum efficiency.⁵³ High wages are not opposed by the proponents of this theory, but rather are encouraged—as long as they result in lower operating costs.⁵⁴ The following view of an industrial leader on the subject of scientific management carries the same appeal as the Brandeis brief in the “labor-welfare” cases:

On the other hand, aside from the matter of the political and social solidarity of this country, and approaching the question entirely from the viewpoint of materialistic economics, it is of primary importance that labor does not become resentful and suspicious. Low costs are obviously not merely a matter of low or even of reasonable wages. It is much a matter of efficiency as all you who are manufacturers here will recognize. Production standards—the amount of work performed by each unit each day—is a large factor in your costs. In view of the great deterioration in the capital goods of the country since the war, the necessity of increased efficiency is self-evident. Now, of course, the efficiency of labor depends to quite some extent on the state of the labor market,—whether labor is scarce or plentiful. The average man will naturally work harder when he realizes that if he loses his job he cannot get another one. But fortunately, there are other factors in producing efficiency—one of the most important is that of good-will—and we cannot expect to maintain and develop this good-will in the long run if this process of wage readjustment is not tactfully handled.⁵⁵

Likewise, the view of the author of a well-known treatise on scientific management:

We are learning that productivity of labor is not measured alone by hours of work, nor even by the test of physical fatigue in a particular job. What we need to deal with are not the limits to which men may go without physical exhaustion, but the limits within which they may work with zest and spirit and pride of accomplishment. When zest departs, labor becomes a drudgery. When exhaustion enters, labor becomes slavery. Zest is partly a matter of physical condition, but it is also largely influenced by mental reactions.⁵⁶

⁵³ *Ibid.*, at 47.

⁵⁴ “Since the war, however, a new theory has been more and more often advanced, which may be briefly stated as follows: If wages are reduced, the purchasing power of wage-earners is reduced with them. Therefore, considering the industry of the country as a whole, lower wages mean smaller sales, higher wages mean larger sales. In order to find a market for their products, industrial managers must maintain a wage scale which will permit wage-earners in general to buy those products. . . . As a very intelligent lady of my acquaintance remarks, the joke seems to be on the capitalist. After supposing for a century or more that his profits were being cut down by the increasing demands of his workmen, who by trade unions, ‘soldiering,’ and other devilish devices, compelled him to pay them more and more compared to the work done, the capitalist has now discovered that the workmen were right after all, and that the road to bigger profits lies through higher wages.” *Ibid.*, at 208. See also Commons and Andrews, *Principles of Labor Legislation* 215 (1920).

⁵⁵ From a speech of Mr. Sam A. Lewisohn, quoted in Lauck, *op. cit.* supra n. 52 at 72.

⁵⁶ *Ibid.*, at 122.

The proponents of this "new industrial revolution" not only sponsor shorter hours of labor, not only a "living wage,"⁵⁷ not only a "cultural wage,"⁵⁸ but even a "partnership in business."⁵⁹

However genuine the humanistic elements generating this policy, the materialistic impulse should not be overlooked. One frank expression of this impulse merits attention: "Fundamentally, this new policy did not have its origin in any humanitarian considerations, but arose from the realization that if prosperity was to be revived there must be a corresponding expansion of domestic consumption."⁶⁰

A glance at Brandeis' introduction to Gilbreth's work on scientific management,⁶¹ and at the testimony on railroad efficiency which he offered the Committee on Interstate Commerce,⁶² leads one to believe that the appeals to the Court through the medium of the "sociological brief"—are all tributaries of the same stream of thought. They are lectures to the enlightened representatives of the business community that these labor-welfare measures are not only not incompatible with, but are actually beneficial to, their business interests.

Since the Brandeisian episodes, many other "labor welfare" measures have been obliged to undergo similar judicial scrutiny. The strategy of

⁵⁷ Prof. Lauck presents a revealing list of "advantages" resulting from the "living wage" theory (*ibid.*, at 114):

- "1. A more cooperative feeling between employer and employee.
- "2. A more intelligent working class and nation.
- "3. *The unnecessary need of unions* to protect the interests of its members.
- "4. The incentive for every man to do his best, be master of himself, and his environment.
- "5. More capital, more and better homes, improved living conditions, with less immorality and crime.
- "6. A greatly reduced turnover.
- "7. *The natural death of Bolshevism.*"

⁵⁸ *Ibid.*, at 153.

⁵⁹ Note Prof. Lauck's explanation justifying this proposal: "There is another great change going on in thousands of places scattered all over the country, namely, the acceptance by employers of the method of cooperative management, the method which, if it is carried out thoroughly, involves teaching representatives of the employees all about the business in which they are concerned. It does not involve any diminution of authority in the management; but it does involve greater knowledge of the business in superintendents, foremen and the rank and file. And this, to my thinking, is one of the most promising of the present industrial phenomena, likely to lead to a wholesome evolution in the conduct of the industries of other nations; because when employees are persuaded that they are partners with the employer, that the plant is theirs in a true sense, and that it is for their interest to make it as profitable as possible by stopping wastes, effecting economies, and improving discipline, the gain is so enormous that no nation which does not adopt cooperative management will be able to compete with us." *Ibid.*, at 74.

⁶⁰ *Ibid.*, at 200.

⁶¹ Gilbreth, *Primer of Scientific Management* vii (1912).

⁶² *Scientific Management and the Railroads* (1911) (part of a brief submitted to the I.C.C. in 1911). See also Brandeis, *Business, A Profession* 11-12 (1925).

counsel in these cases, especially since the Brandeis technique has become the common property of the profession, is worth noting.

Methods of wage payments.—One of these measures concerned the mode of payment of miners' wages. An Arkansas statute made it unlawful to use screened coal as a basis for paying miners. The object of the law was to prevent fraud to the miner in the determination of the amount of coal actually mined and to substitute what the legislature deemed to be a fairer standard. The issue came to a head in *McLean v. Arkansas*.⁶³ The argument presented to the Court on behalf of McLean was mainly concerned with "freedom of contract." "If the miner gets what he contracts for," it was asked, "what is there that is fraudulent or wrong about it?" "Who can say," counsel continued, "that the men employed do not know better what is to their interests than the wisest legislative assembly that has ever convened on earth?" "And whose business is it, whose right does it invade, what principle of public policy does it violate, wherein is the welfare of *society* impaired?"⁶⁴ To this argument came the reply:

The general public is probably more interested in the great coal fields of the country and the work and development thereof than any other industry of the land. It is the foundation of all other industries. The great railway systems and all manufacturers are dependent upon the supply of coal. Its use for domestic purposes is now almost universal. Without coal the wheels of industry are paralyzed and every branch of society must suffer. . . . *The State is vitally interested in the operation of her coal mines.*⁶⁵

The statute does not prevent the operators from making contracts with their employees for digging coal. It does not attempt to dictate the price of labor, or say how much the operator shall pay. It does not prevent contracts based upon the amount of lump coal taken from the mine. It simply says that there shall be no fraud or deception practiced upon the employee as to the amount of coal he has produced. *If the mine runs high in slack the price can be adjusted accordingly.* The *public* is too deeply interested in the matter to leave it to the operator to say how coal mines shall be worked. The State must see that there are no unnecessary grounds for friction between employers and employees.⁶⁶

The assurance of no interference with "price" and with "pay," and the advice that "friction" is undesirable, were addressed primarily to the operators. The assertion that the "public" is too deeply interested in the matter to permit the operator unbridled freedom is, perhaps, but one way of stating that it is better to acquiesce in a measure that is not actually harmful to the bulk of coal operators than to risk the possibility of injuring other industries dependent upon the production of coal.

⁶³ 211 U.S. 539 (1908).

⁶⁴ Brief for Plaintiff in Error 47.

⁶⁵ Brief for Defendant in Error 45.

⁶⁶ *Ibid.*, at 47.

Rail and River Coal Company v. Yapple,⁶⁷ involved a similar statute prohibiting Ohio coal operators from computing miners' pay on the basis of screened coal. The statute also empowered the Ohio Industrial Commission to ascertain and set the maximum limit of slate, sulphur, and other impurities to be credited to the average of a car-weight of coal mined. In the computation of a miner's pay the operator and miner, within this limit, were free to make any agreement as to the ratio of impurities to the coal mined. In the absence of such agreement, the Industrial Commission was empowered to fix and enforce the ratio. The briefs for both the plaintiff and the defendant in error dealt almost exclusively with the relation of the statute to the *welfare of the operators*, with scarcely any mention as to its effect upon the miners. Counsel for Yapple, defendant in error, seeking to uphold the constitutionality of the statute, argued thus:

How . . . can the *employer* complain of a law which requires of his employees the maximum of efficiency? What more efficacious control *for his own benefit* could he exercise if the law contained no such provision? In what respect is he injured?⁶⁸

Now the orders of the Industrial Commission . . . are manifestly for the protection of the employer.⁶⁹

The conclusion irresistibly follows, that if left to themselves on this point, and given unrestricted "freedom of contract" for their own protection, the operators would not protect their product but their business would appreciably suffer.⁷⁰

The argument of opposing counsel was on the same plane of discourse—pointed to the conclusion that the legislation would militate against the interest of the operators:

It is urged by opposing counsel that these features of the act (which refer to the fixation of the percentage of impurities by the Industrial Commission) are merely incidental to the main purpose; that they are intended to prevent some of the evils to the operator, due to the installation of the mine-run system; that the employee under that system might be tempted to send up from the mine coal containing too much impurity, or too much fine coal. *If, however, the purpose of the regulatory features is to prevent this evil, and thus to protect the operator, then the means employed have absolutely no relation to the end.*⁷¹

*Since when has it been considered appropriate to employ the police power of the state to protect the employer against making unwise contracts?*⁷²

The opinion of the Court presented the problem as if it were one in which concessions were demanded by the miner from the operator:

⁶⁷ 236 U.S. 338 (1915).

⁶⁸ Brief for Defendant in Error 23.

⁶⁹ *Ibid.*, at 29.

⁷¹ Brief for Plaintiff in Error 30.

⁷⁰ *Ibid.*, at 45.

⁷² *Ibid.*

The system of mining [prior to the present statute] was regarded as objectionable by the miners on the ground that they were not paid for mining of a considerable quantity of marketable coal, and there was dissatisfaction because of the wearing of the screens so as to increase the size of the apertures between bars above the standard.⁷³

In the light of the fact that counsel dealt with the legislation in terms of its relation to the interest of *the operators*, it is interesting to note the evaluation of the case appearing in Commons' *History of Labor in the United States*. It was there characterized in terms of a concession to employees:

If the legislature found that the method of payment tended to deprive the employee of his full wages or was otherwise detrimental to him, it was justified in remedying the situation by statute. This series of decisions constituted a recognition by the United States Supreme Court that for the employee, freedom of contract is frequently a legal fiction and that he may need protection against terms of employment which he himself agrees to accept—even though health is only remotely involved.⁷⁴

Workmen's compensation.—The cluster of workmen's compensation cases, involving the constitutionality of statutes abolishing common law defenses and creating a system of liability without fault, offers another interesting chapter in the history of "labor-welfare legislation." The arguments prepared for the Court by counsel opposing the legislation in *New York Central Railroad v. White*,⁷⁵ *Mountain Timber v. Washington*,⁷⁶ and *Southern Pacific Company v. Jensen*,⁷⁷ were charged with an intensity of emotion not present in the cases heretofore discussed. They were warnings to the Court that the collapse of the social order was imminent unless the Court took proper action. In the first of these cases, for instance, the argument took the following turn:

The Teutonic empires of Central Europe were pioneers in enactments of this class. Germany in 1884 and Austria in 1887 were among the earliest to pass such laws. Of the utmost significance is it that in those two countries the theories of Socialism have attained their furthest political development. There, to a much greater degree than elsewhere among the powerful nations of the earth, paternalism has circumscribed the activities of the individual until the whole body politic, outside the governing classes, stands upon substantially the same level. And that level has been established not by the elevation of the indolent, inefficient and dependent, but by keeping down the enterprising, capable and self-sustaining.⁷⁸

Such legislation is merely the entering wedge for the introduction of a vast and com-

⁷³ Rail and River Coal Co. v. Yaple, 236 U.S. 338, 345 (1915).

⁷⁴ Leschier and Brandeis, *History of Labor in the United States* 675 (1935).

⁷⁵ 243 U.S. 188 (1917).

⁷⁶ 243 U.S. 219 (1917).

⁷⁷ 244 U.S. 205 (1917).

⁷⁸ Brief for Plaintiff in Error 4 (*italics theirs*).

prehensive scheme of socialistic laws, passed under the guise of regulating the relation of master and servant in industry, but which have, in effect, as their primary object, the taking of the master's property for the benefit of the servant.⁷⁹

It is the familiar instance, which Professor Sumner used to denounce, of a resolution adopted by A and B that C shall have something done for him, not by themselves, but by D. In other words, the employer is the Forgotten Man whose rights, Sumner declared, are always overlooked in every ill-conceived plan of social amelioration.⁸⁰

Compulsory compensation acts are simply professed devices to increase indirectly the cost of operation to the employer, while in fact they result either in an increase of wages or in a continuance of wages, in whole or in part, without the necessity of rendering service therefor.⁸¹

Arguments such as the following, in the *Mountain Timber* case, suggested that the legislation in question presaged a development not unsimilar to that witnessed abroad:

In the early part of the nineteenth century discussion arose among German philosophers as to what should be the relations of the State to its citizens. Such writers as Fichte and Hegel engaged in the discussion and developed socialist doctrine to a high degree. . . . Following Fichte and Hegel come the socialistic writers, Marx and Lassalle, who developed the paternal idea of government. The first insurance laws sprang into existence as a counter to socialistic activities of a type so subversive as to become a source of anxiety to the German government. Bismarck acknowledged himself a Socialist in the sense of conceding the laborer's right to work and the State's duty to act wisely, generously and positively for his welfare.⁸²

Counsel arguing for the constitutionality of the legislation in question, particularly in the *Jensen* case, urged the Court to discount the dangers alleged to be lurking in such "socialistic schemes." One way chosen to convince the Court that the structure of our society was not endangered was by reference to the experience of other non-socialistic countries throughout the world in abandoning the principle of negligence.⁸³

Another way was to assure the court that:

The employer can easily transfer to the customer the necessary pecuniary equivalent of any risk; that, whatever the primary method of placing the burden, the loss, whether by death or by disablement, will be borne eventually not by the working man, but by society; *that is, that it will be carried over into the selling price of the product.*⁸⁴

⁷⁹ Ibid., at 16.

⁸⁰ Ibid., at 19.

⁸¹ Ibid., at 22.

⁸² Reply brief for the Mountain Timber Company 2.

⁸³ It was shown that the negligence principle was abandoned by Austria in 1887, Norway in 1894, Finland in 1895, Great Britain in 1897, Denmark, Italy and France in 1898, Spain in 1900, Netherlands, Greece and Sweden in 1901, Luxembourg in 1902, Russia and Belgium in 1903, Hungary in 1907, Australia, New Zealand, Transvaal, Canada, Mexico, Venezuela, and Peru in 1911, etc.

⁸⁴ Brief on behalf of Defendant in Error by the Industrial Accident Commission of California 26.

The elimination of "economic waste" was also assured.⁸⁵ In addition, "if the employees are relieved from exhaustion, they may give freer and more efficient service."⁸⁶

In the *Mountain Timber* case, the assurance to the Court took the following form:

It is designed to promote the general prosperity and to *increase the industries of the state*.⁸⁷

The industrial progress of Germany during recent years has been surpassed by that of no other nation. Prussia was the first European nation to recognize the principle of the liability of employers in case of industrial accidents regardless of negligence . . . , with the encouragement of the emperor and his chancellor, Bismarck, a comprehensive system of workmen's compensation was inaugurated.⁸⁸

The language (in *Holden v. Hardy*) emphasizes the changing attitude of courts towards social legislation. The change does not involve the change of any constitutional principle, but merely means the shifting of the emphasis from one element to another.⁸⁹

This last quotation provides a good summation of the nature of the pattern of attack before the Court. It is an argument for judicial tolerance, based on the theory that "change" which does not harm our basic economic structure does not involve a challenge to the basic principles of the Constitution.

That the Court was convinced that the employer would not be harmed, despite the warnings that this legislation constituted a dangerous innovation, is made clear by Mr. Justice Pitney in the *White* case:

If the employer is left without defense respecting the question of fault, he at the same time is assured that the recourse is limited and that it goes directly to the relief of the designated beneficiary. And just as the employee's assumption of ordinary risks at common law presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer and the modified assumption of risk by the employee under the new system, *presumably will be reflected in the wage scale*.⁹⁰

Presumably, too, as an "expense of operation," the opportunity for shifting the cost to the consumer was not without possibility: "This is a loss arising out of the business, and, however it may be charged up, is an

⁸⁵ Brief on behalf of Defendant in Error by the New York Industrial Commission 25.

⁸⁶ *Ibid.*

⁸⁷ Brief for Appellees 26.

⁸⁸ *Ibid.*, at 27. To this could be added the statement of opposing counsel, that such "socialistic" legislation "was accepted by the German government as a means . . . to counteract the discontent of German working classes." Reply brief for Mountain Timber Co. 2.

⁸⁹ *Ibid.*, at 36.

⁹⁰ 243 U.S. 188, 201 (1917).

expense of operation, as truly as the cost of repairing broken machinery or other expense that ordinarily is paid by the employer."⁹¹

The Court's language in the *Mountain Timber* case revealed a similar note of assurance:

Perhaps a word should be said respecting a clause in No. 4 which reads as follows: "It shall be unlawful for the employer to deduct or obtain [sic] any part of the premium required to be by him paid from the wages or earnings of his workmen or any of them, and the making or attempt to make any such deductions, shall be a gross misdemeanor." If this were to be construed so broadly as to prohibit employers, in agreeing upon wages and other terms of employment, from taking into consideration the fact that the employer was a contributor to the state fund, . . . it would be open to serious question whether as thus construed it did not interfere to an unconstitutional extent with their freedom of contract.⁹²

When Veblen in 1910 wrote that "impersonal, collective and limited liability won its way, as against the system of natural liberty in this field [Workmen's Compensation] by sheer force of business expediency,"⁹³ he was in fact summarizing the philosophy appearing seven years later in the arguments before, and judicial opinions of, the Supreme Court in the *White, Jensen*, and *Mountain Timber* cases.

The eight-hour day.—The controversy over the eight-hour day on interstate railroads was brought to a head in *Wilson v. New*.⁹⁴ Although the employees were supposed to benefit as a result of the enactment, nevertheless, in the arguments, concern over their welfare was in direct proportion to the efficiency that such welfare would produce for the railroads. Thus the argument for the government urging the Court to uphold the legislation:

The efficiency and safety of railroad service depend upon the skill and physical fitness of the employees. It is just as necessary to properly care for the employees as to keep in good condition the physical instrumentalities of interstate commerce.

⁹¹ Ibid., at 203.

⁹² 243 U.S. 219, 246 (1917).

⁹³ Veblen, op. cit. supra, n. 51 at 280. Note the corroboration of this theory twenty-nine years later in the language of William Green: "No industries left the state in spite of the fact that there were states with no compensation laws. Instead, as the law continued in operation, the employers saw its advantages and now they stand solidly with the workers for the Ohio Law." Green, *Labor and Democracy* 26-27 (1939). "Impartial studies show the superiority of the state fund in *lower cost for employers*, in freedom from fear of bankruptcy of the fund, and in greater security for the workers because the state fund has no incentive to cheat the workers out of payments due them." Ibid. "Employers . . . once lined up in opposition ranks agree that [the] . . . Workmen's Compensation Law is a great piece of progressive legislation which they would not be without." Ibid., at 29. "Those who have been concerned with social work have seen the disasters of families evicted for non-payment of rent, of overcrowded slum areas breeding disease as unemployment reduces the family to extremes of poverty. *Business men know that the unemployed man and his family are poor customers.*" Ibid., at 63.

⁹⁴ 243 U.S. 332 (1916).

Physical efficiency is impossible without proper living conditions which demand suitable food, clothing, housing, rest and recreation.⁹⁵

Failure to pay fair wages or to fix a fair standard therefor, make slow, costly, unsafe or otherwise inefficient these agencies.⁹⁶

The hours of service are important to the efficiency of the men. No less is the measure of their compensation. These men are human beings; they have family ties; they are entitled to time and rest at their homes. The more contented the servant, the better service.⁹⁷

Rapid transit is called for. All that exists in efficiency must be provided. Service of the highest class is that which is required. Certainty of performance is no small part of the duty owed. To obtain all this, it is necessary to have men alert, contented and willing in the performance of a dangerous occupation. Shorter hours make for efficiency and competency. The better the servant, the greater his compensation. . . . The public is entitled to protection against that inconvenient, delayed and unsafe method of transportation which may result from unsatisfactory wages or cheap help.⁹⁸

The government brief even capitalized on the experience of Henry Ford to emphasize the benefits resulting from industrial efficiency:

Samuel Gompers, President of the American Federation of Labor, said: "A few weeks ago I had occasion to be in Detroit and there I went through the plant of Mr. Ford's automobile factory; I had every facility to observe; the manager accompanied me. I asked him what the result had been of the operation of eight hours a day in his establishment. He told me this, which he has since written me, and I have incorporated what he said in the September issue of the American Federationist. He said: 'As compared with the operation of the plant under the ten-hour workday and now since the introduction of the eight-hour workday, the productive activity of the groups of men with similar tools, similar groups performing similar work, has increased fully 63 per cent.' You may consult any economist; consult any large employer of labor who has had the eight-hour day in operation for a series of years, and you will find like testimony."⁹⁹

⁹⁵ Briefs for the United States 24.

⁹⁷ *Ibid.*, at 61.

⁹⁶ *Ibid.*, at 47.

⁹⁸ *Ibid.*, at 62.

⁹⁹ *Ibid.*, at 77. A striking similarity in the argument is found in Prof. Frankfurter's letter to the Boston Herald, urging the adoption of the Adamson Act, which the Court in *Wilson v. New* upheld: "Experience amply demonstrates that men, women, and children work too long, from the point of view of the quality of the resulting citizenship. The history of the lowering of the standards of military requirement, the serious disclosure in England after the Boer War as to the deterioration of English factory workers, the testimony of General Gorgas—the most successful health administrator of the world—that poverty, rooted in low wages and long hours, is the greatest enemy to health, are all there to read for him who wants to be informed. This is not, however, merely a humanitarian plea; this is not sentimental talk. The experience of money-making business is, that while an eight-hour day may mean increased labor cost, it does not mean an increased unit of labor cost. In other words, experience shows that shorter working hours make for increased production, and therefore more wealth. The apparent paradox is easily explained. Shorter hours result in increased human efficiency, by the reactive effect on the individual; they also provoke inventiveness, all kinds of savings; they secure the stoppage of wastes, just because the utmost value must be obtained from the shorter hours. In a word, they operate as an inducement to greater human competence; they thus increase money values no less than human values." Reprinted in Frankfurter, *Law and Politics* 204 et seq (1939).

The Court evidently reacted favorably to these arguments. Mr. Justice White, in addition to emphasizing the fact that the congealing of the former wage relationship under the eight-hour standard was temporary, i.e., limited to a period of six months, and therefore not as serious a challenge to property rights as the railroads would seem to urge, pointed out that "the employees on the other hand insisted that as the task would be unchanged and would be performed in the shorter hours, there would be no material, or, at all events, no inordinate increase of pay."¹⁰⁰ That it could not possibly be a serious threat to the railroads' security is made more evident by his statement that "the establishment of the eight-hour standard, since that standard was existing . . . on about fifteen per cent of the railroads, had already been established by Act of Congress as a basis for work on governmental contracts, and had been upheld by this Court in sustaining state legislation."¹⁰¹ Mr. Justice McKenna in a concurring opinion had no doubt but that under the act, Congress did not attempt to regulate *wages*, but rather left it to the agreement of the parties. The observation was made that "it has never been supposed that the agitation for an eight-hour day for labor or the legislation which has responded to it, was intended to fix or did fix the rate of wages to be paid."¹⁰²

Minimum wages for women.—The steps leading up to the sanctioning of minimum wage legislation in the *Parrish* case¹⁰³ provide interesting insight into the techniques used by counsel in making this legislation palatable to the Court.

In *Adkins v. Children's Hospital*,¹⁰⁴ counsel for appellants, urging the constitutionality of the minimum wage statute for women, argued forcefully that the legislation in question was not adverse to business interests. Much point was made of the fact that representatives of these interests offered no serious objections to the measure at the time it was enacted:

No one appeared in opposition to the bill. A remarkable circumstance which has probably never occurred in any previous legislative hearings on a measure affecting wage legislation in this country was the appearance of the official organized body of employers—the Merchants' and Manufacturers' Association of the District—who sent their representative to make a statement indorsing the bill and urging its passage.¹⁰⁵

¹⁰⁰ 243 U.S. 332, 356 (1917).

¹⁰¹ *Ibid.*, at 357.

¹⁰² *Ibid.*, at 361. For a penetrating analysis of the *Wilson v. New* decision, see Kales, *op. cit. supra*, n. 40.

¹⁰³ 300 U.S. 379 (1936).

¹⁰⁴ 261 U.S. 525 (1922). Mr. Frankfurter was on the brief.

¹⁰⁵ 1 Brief for Appellants xxii.

In brief, it is overwhelmingly clear that unfair depression in the wages of many women workers has been significantly reduced, without operating adversely to industry and efficiency, and without appreciably diminishing employment for employables.¹⁰⁶

But, necessarily, law is intended for and must be judged by its general operation. And the evidence is overwhelming that the minimum wage laws have made for greater stability for business and increased profits.¹⁰⁷

In our opinion the favorable action of the Merchants' and Manufacturers' Association on this bill is the strongest argument in its favor. This organization is composed of the representatives of 33 different lines of business, including department stores employing 5,000 workers, the 12 largest laundries in the District, cigar manufacturers, etc. After careful consideration of the bill, the secretary of the association was instructed to appear before us and express approval of the measure. This favorable action carries due weight with the committee. Opposition to legislation of this character would naturally come from employers if they believed that it would jeopardize the business interests of the community. The Merchants' and Manufacturers' Association has, on the contrary, gone on record as favoring Senate Bill No. 4548, because they believe it to be a workable measure and that it would tend to benefit business.¹⁰⁸

To this was added thirty pages—headed by the caption, "Industrial Efficiency of Both Employers and Employees Stimulated"—designed to erase whatever doubts the Court was assumed to have as to the effect of the legislative enactment upon "business" welfare.¹⁰⁹ Again, from the business viewpoint, the possible danger of the legislation to the marginal employer was considered. The argument to the Court on this issue emphasized the desirability of safeguarding the interests of the efficient and far-sighted business man.¹¹⁰ It was argued that to permit unlimited freedom to the inefficient marginal employers would hinder the efficient operators of business enterprise:

No industry which fails to supply even the bare minimum living requirements of its own workers can possibly be sound. Such an industry, instead of aiding in the work of supporting life, can be only a burden upon it by precisely the amount of subsidy which it drains from other industries. The fundamental policy represented by this Act is the stimulation of individual enterprise, the prevention of taxation upon sound industries for the artificial support of unsound ones. The aim it encourages is to make industries self-supporting.¹¹¹

¹⁰⁶ *Ibid.*, at xiii.

¹⁰⁷ *Ibid.*, at liv.

¹⁰⁸ *Ibid.*, at 41.

¹⁰⁹ The argument that higher wages will result in greater industrial efficiency is the thesis also of Hobson in *The Evolution of Modern Capitalism* (1910). See particularly at 355-76.

¹¹⁰ See Prof. Beard's comments to the effect that "it is true that minimum wage legislation affected mainly small employers, the owners of laundries, petty concerns, sweatshops; that it touched adversely few powerful business interests." Beard, *America in Midpassage* 286 (1939).

¹¹¹ Brief for Appellants xlix.

The Court was not convinced, however, that the regulation would not harm industrial enterprise. In its rejection of the legislation it made clear what the Court expected in the "labor-welfare" cases:

[The statute] compels [the employer] to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. It therefore undertakes to solve but one-half of the problem. The other half is the establishment of a corresponding standard of efficiency, and this forms no part of the policy of the legislation, although in practice the former half without the latter must lead to ultimate failure, in accordance with the inexorable law that no one can continue indefinitely to take out more than he puts in without ultimately exhausting the supply.¹¹²

In this brief statement is contained the nub of the arguments which counsel have developed in these cases. Inherent in this statement is the assumption that such legislation has little chance of validation if the Court is of the opinion that the benefits will accrue to the employees alone. If, as in *Muller v. Oregon*, "a corresponding standard of efficiency" in work can be demonstrated to the satisfaction of the Court, then the legislation has an opportunity to survive.

*Murphy v. Sardell*¹¹³ brought the minimum wage issue again before the Supreme Court. The brief filed in behalf of the Industrial Commission of California was significant. It in effect warned the Court that unless a more flexible construction were placed upon the fourteenth amendment than was permitted in the *Adkins* case, resort would have to be made to extra-constitutional means:

If the framework of the American government, and particularly the fourteenth amendment, ceases to expand with the growth of the country, a rupture of the constitutional fabric sooner or later by means other than judicial is inevitable. Has the fourteenth amendment lost capacity for further growth by construction to meet new conditions as these arise? Does not the decision in the *Adkins* case, reviving as it does the doctrine of the supposedly overruled *Lochner* case tend towards this result?¹¹⁴

Such inflexibility, it was argued, was certainly not warranted, especially in view of the fact that the legislation was beneficial to industry. Rather than being harmful to the employer,

The payment of higher wages enables the employer to secure a better grade of labor and increased production. Less than fair living wages produces undernourishment, ill-health, discouragement and retardation of physical and mental processes. An increased

¹¹² 261 U.S. 521, 557 (1922).

¹¹³ 269 U.S. 530 (1925). This was a memorandum decision affirming the District Court "upon the authority of *Adkins v. Children's Hospital*."

¹¹⁴ Brief of Amicus Curiae on behalf of the Industrial Commission of California for Plaintiff in Error 56.

wage stimulates competition for employment and greater production of workers, and opens to the employer a higher quality of labor from which to choose. Though some employers are slow to realize it, the cheapest is the least efficient in the long run.¹¹⁵

The additional burden upon the employer may be counterbalanced by the increased efficiency of labor produced by the amelioration of evils under which the workman suffers, and does not disturb the balance of wages to service to any greater extent than approved regulations of other terms of contract.¹¹⁶

The brief continued to emphasize the harmlessness of the regulation to industry:

The value to the employer of the labor is measured in part by the improvement of the product created by the laborer and in part by the price at which the product can be sold. The minimum wage operates uniformly upon all members of the industry affected and *the increase in wages is therefore passed on to the consumer by being added to the cost of production like any other uniform increase in operating cost.* The law itself adds to the value of the product in effect an amount sufficient to raise the fair value of the worker's services to a minimum necessary for his subsistence and the minimum wage becomes the minimum fair value.¹¹⁷

These arguments are important in revealing a significant attitude toward the Court in its dealings with measures touching upon a sensitive nerve of our industrial society. Implicit in them is the assumption that legislation purporting to benefit employees must be justified by showing that the cost of such benefits will be shifted to shoulders other than those of the employers, or that the employers themselves will benefit from the measure.

In *Morehead v. Tipaldo*,¹¹⁸ counsel wanted to make it clear at the outset that this measure was quite different from that considered in the *Adkins* case. They stressed the fact that it contained an additional standard—one which would assure the employer that no wage would be set which was not commensurate with the value of the services rendered:

The "fair wage" [as a standard in the statute in the *Tipaldo* case] means a wage *fairly and reasonably commensurate with the value of the service or class of service rendered.* This definition obviously *does not* contemplate the "cost of living" as a factor (as in the *Adkins* case). . . . The fair minimum wage, by its very definition and method of calculation, can never exceed the reasonable value of services rendered.¹¹⁹

The statute does not interfere with the payment of a wage that represents the fair value of the services rendered, *even if it be lower than the minimum cost of health subsistence.* In fact, that is precisely the question at bar. Obviously, the object was to demonstrate to the Court that the statute in question represented a shift from an employee standard of "cost of living" to an employer standard of "value of service."¹²⁰

¹¹⁵ Ibid., at 52.

¹¹⁸ 298 U.S. 587 (1935).

¹¹⁶ Ibid.

¹¹⁹ Appellant's brief on the law 11.

¹¹⁷ Ibid., at 70.

¹²⁰ Ibid., at 12.

Counsel continued in the same vein, showing the necessity of preserving a plane of "fair" competition in businesses employing women as laborers. The emphasis upon employee welfare was subdued:

The immediate end is the establishment of a wage for women and minors which is reasonably and fairly commensurate with the value of the services rendered. *The Legislature*, in addition, by means of a minimum wage, *endeavored to protect industry from the evils of unfair competition which undoubtedly accompany the exploitation of employees by the least conscionable group of employers*. No one can quarrel with the legitimacy of the ends sought.¹²¹

The legislative determination to attempt, by means of the minimum wage, to protect industry from one source of unfair competition, has a large and familiar foundation in such statutes as the Federal Trade Commission Act, Clayton Act, and the Interstate Commerce Act. These statutes all have as their purpose the elimination of unfair competitive tactics. An employer who regularly pays less than a "fair wage" would have a definite and unfair advantage over his less grasping competitor were it not for the equalizing effect of such a statute. . . . The New York statute involved in the case of *Nebbia v. People*, *supra*, is another example of judicial approval of a statute *designed to prevent unfair competition and thus assist and indeed save industry*.¹²²

To give assurance to the Court that the proposed legislation had the support of the industrial groups involved, the brief pointed out that:

In the instant case, "fair minimum wage" has been *unanimously approved and determined by representatives of the laundry industry*, as well as by representatives of the public and the workers. No protest has been heard as to its fairness in the public hearings, and none was made in arguments below.¹²³

That the industry was well able to absorb the wage increases effected by the mandatory order is seen from the fact that 94 per cent of laundries throughout the State were complying with the terms of the mandatory order in November, 1935; 58 per cent were paying more than half their women and minor employees wages higher than the established minimum rates.¹²⁴

The same emphasis was apparent in the special brief prepared for the warden, Tiplado, the petitioner in the controversy:

The Legislature, in addition, by means of a minimum wage, endeavored to protect industry from the evils of unfair competition which accompany the exploitation of employees by the least conscionable group of employers. *An employer who regularly pays less than a "fair wage" would have a definite and unfair advantage over his less grasping competitor were it not for the equalizing effect of such a statute*.¹²⁵

The purpose of the statute in the Adkins case *was to guarantee a wage based solely upon the necessities of the workers, without regard to earning power*. It applied to all vocations. It was exclusively a price-fixing statute, with the "vague variable standard"

¹²¹ *Ibid.*, at 17.

¹²² *Ibid.*, at 13.

¹²³ *Ibid.*, at 20.

¹²⁴ *Ibid.*, at 47.

¹²⁵ Argument for the Warden, 298 U.S. 587, 589 (1935).

of the "cost of living," with no relationship between the wage set and the work done. It did not consider the industry's ability to pay.¹²⁶

Mr. Justice Butler's opinion was in effect a holding that the "fair value of the services" standard was inoperative, and that the presence of the other standard, i.e., "less than sufficient to meet the minimum cost of living necessary for health," was too much of a threat to the security of the business groups involved.¹²⁷ The opinion quoted with approval the statement in the *Adkins* case to the effect that "... the declared basis is not the value of the service rendered but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals."¹²⁸

To both Chief Justice Hughes and Mr. Justice Stone, who wrote dissenting opinions, this was an unduly strained construction of the legislation. The Chief Justice recognized, among other things, that "the constant lowering of wages by unscrupulous employers reduces the purchasing power of the workers and threatens the stability of the industry,"¹²⁹ and that it was the unconscionable, inefficient employer against whom the regulation was intended.¹³⁰ Mr. Justice Stone took cognizance of the fact that "a wage insufficient to support the worker does not visit its consequence upon him alone; that it may affect profoundly the entire economic structure of society. . . ."¹³¹ To Mr. Justice Stone, the regulation was merely a requirement that "industry . . . bear the subsistence cost of the labor which it employs . . . ,"¹³² an argument that won the approval of both the Court and industrial leaders in the Workmen's Compensation cases.¹³³

In *West Coast Hotel v. Parrish*,¹³⁴ a minimum wage statute identical

¹²⁶ *Ibid.*, at 592-93.

¹²⁷ Interestingly enough, the opinion quotes the following from the "factual background" of the Act in question: "In the absence of any effective minimum fair wage rates for women and minors, the constant lowering of wages by unscrupulous employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers (a large proportion of the population of the state), and threatens the stability of industry." 298 U.S. 587, 616 (1935). But this did not soften the conviction that the legislation was "arbitrary."

¹²⁸ 298 U.S. 587, 612 (1935).

¹²⁹ *Ibid.*, at 626.

¹³⁰ *Ibid.*, at 631.

¹³¹ *Ibid.*, at 635.

¹³² *Ibid.*

¹³³ See the analysis of the arguments in *New York Central Railway v. White*, and *Mountain Timber Co. v. Washington*, etc., stressing the fact that these costs are ultimately to be shifted to the consumer, *supra*, at notes 75 et seq.

¹³⁴ 300 U.S. 379 (1936).

with the one invalidated in the *Adkins* case was before the Court. Here the standard, unlike the one in the *Tipaldo* case, was merely the "minimum cost of living necessary to health." There was no additional safeguard of "fair value of the services." The brief filed by the Attorney General for the State of Washington had at least one major object in view—that of pointing out to the Court that there was no showing on the part of the employer involved that any hardship or harm had been suffered by him.¹³⁵ Counsel for the hotel, with the weight of the *Tipaldo* case behind them, simply assured the Court that, inasmuch as the minimum wage might be established without regard to the value of the services rendered, "it condemns it beyond question,"¹³⁶ and was therefore void on its face.

The Court's reversal of the *Adkins* holding was in effect a recognition that the apprehension over the injury to business was unfounded. Mr. Justice Hughes, writing for the majority, agreed with the *amicus curiae* that there was no showing that the employer in the immediate case was harmed.¹³⁷ It was pointed out that, despite the fact that the statute in question was identical with the one challenged in the *Adkins* case (i.e., utilized as a standard the minimum cost of living necessary to health), it was "safe to assume that women will not be employed at even the lowest wages allowed *unless they earn them*, or *unless the employer's business can sustain the burden*."¹³⁸ "The legislature," the opinion continued, "was entitled to adopt measures to reduce the evils of the 'sweating system,' the exploitation of workers at wages so low as to be insufficient to meet the bare cost of living, *thus making their very helplessness the occasion of a most injurious competition*."¹³⁹ In this latter statement can be seen the adoption of the argument of counsel in the *Tipaldo* case urging the validation of the statute on the ground that it would "protect industry from the evils of unfair competition which accompany the exploitation of employees by the least conscionable group of employers."¹⁴⁰

¹³⁵ Brief of amicus curiae (State of Washington) 23.

¹³⁶ Answer of appellant to the brief of amicus curiae 16.

¹³⁷ 300 U.S. 379, 386 (1936).

¹³⁸ *Ibid.*, at 397.

¹³⁹ *Ibid.*, at 398.

¹⁴⁰ *Supra* n. 121, at 89. Compare Millis and Montgomery, *Labor's Progress and Some Basic Labor Problems* 280 (1938): "the minimum wage movement has had underlying it the assumption that . . . concentration of production within those firms able to pay decent wages would not be undesirable. In industries where comparatively little capital is necessary to start a small-scale establishment, a large number of irresponsible, 'fly-by-night' firms are chronically to be found—firms whose chief source of survival capacity is low labor cost. If minimum wage legislation pushes these firms across the marginal line and production is concentrated in a smaller number of larger and more efficient plants, the result to be expected would be a higher wage

The labor injunction.—"The most significant instance of the use of the injunction by labor"¹⁴¹ is the characterization that has been ascribed to the famous *Railway Brotherhood* case in 1929.¹⁴² In this controversy the labor organization sought and obtained an injunction restraining a railroad from using a company union as an instrument for employee control. The philosophy which underlay the Railway Labor Act of 1926 was particularly embodied in the brief presented for the Brotherhood by Donald Richberg and John Crooke. Their evaluation of the Act was principally in terms of its effect upon the efficiency and welfare of the railroads. The elaboration of the benefits to the railroad employees resulting from "self-organization" was not considered essential for its justification. They, for instance, cited from Director General Hines's work, *War History of the American Railroads*:

Any studied consideration of this matter must lead to the conclusion that despite the numerous reasons why the productiveness of railroad employees might easily have been greatly impaired during Federal Control, the general average of railroad efficiency in that period makes an extremely favorable comparison with pre-war efficiency and compares with post-war efficiency fully as well as does industrial war-time efficiency with post-war efficiency.¹⁴³

The brief made special note of the acquiescence by the National Industrial Conference Board in the principle of employee self-organization. Before the Court, therefore, there was evidence of a respected industrial spokesman's confidence that to permit employees to organize in bargaining groups without interference or restraint would not militate against the interests of the employer:

American doctrine authoritatively stated by the Anthracite Coal Strike Commission with the approval of representatives of both employers and unions included in its

bill for the entire industry without necessarily higher—or at least without proportionately higher—cost per unit of product." "Other consequences of minimum wage legislation in this country can be summarized with a fair degree of definiteness. . . . That fair employers were protected against the competition of 'shoestring capitalists' who continually attempted to cut costs by depressing wages, is evidenced by the change of attitude on the part of the majority of employers. Originally the majority were bitterly opposed to this type of state interference, but experience demonstrated to them—as it had in Australia and England—the benefits of a standardized minimum wage. The 'shoestringers' remained enemies of the legal minimum wage, but there is abundant evidence that the more responsible employers came to favor the plan. There is little evidence that business has been injured, and probably the minimum wage has had only limited effect in starving out marginal or submarginal producers and in forcing mechanization of industry." *Ibid.*, at 314.

¹⁴¹ Frankfurter and Green, *The Labor Injunction* 110 (1930).

¹⁴² 281 U.S. 548 (1929). Although this case does not come within the category of the labor-welfare "enactments," it nevertheless furnishes additional corroborative data in support of the general thesis of this paper.

¹⁴³ Brief for Respondent 29.

membership and commended as the basis of industrial adjustments by Presidents Roosevelt, Taft and Wilson: *That no person shall be refused employment or in any way discriminated against on account of membership or non-membership in any labor organization.*

*It should be again emphasized that the foregoing was the recommendation made by an outstanding, national and thoroughly representative organization of employers.*¹⁴⁴

Additional assurance was provided by reference to the reports of Congressional committees on the Railway Labor Act of 1926:

The reports of the committees of both houses of Congress laid emphasis on the fact that the bill (for the Railway Labor Act of 1926) under consideration represented the agreement of railway managements operating over 80 per cent of the railway mileage and railroad organizations representing an overwhelming majority of the railroad employees (House Report on H.R. 9463). *The Senate Report stated that when the bill was submitted to a meeting of the Association of Railway Executives, 52 roads representing 167,915 miles favored it; 20 roads representing 36,564 miles opposed it; 32 roads representing 18,134 miles were absent.*¹⁴⁵

The Court's reaction to these arguments was favorable. Although the opinion of Chief Justice Hughes recognized "that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work,"¹⁴⁶ nevertheless, it was made clear that this did not prohibit the "exercise of the right of the carrier to select its employees or to discharge them."¹⁴⁷

Prison labor.—In *Whitfield v. Ohio*,¹⁴⁸ the Court had under consideration the Federal Hawkes-Cooper Act and an Ohio statute, the effect of both being to prohibit the sale in the Ohio open market of goods manufactured in the prisons of other states. The decision of the Court upholding the legislation was couched in terms of benefit to "free labor":

The view of the State of Ohio that the sale of convict-made goods in competition with the products of free labor is an evil, finds . . . support in fact and in the similar legislation of a preponderant number of other states. . . . All such legislation, state and federal, proceeds upon the view that free labor, properly compensated, cannot compete successfully with the enforced and underpaid convict labor of the prison.¹⁴⁹

Emphasis in the brief for the State of Ohio, however, was upon the serious competition faced by Ohio manufacturers operating with "regular" labor.

¹⁴⁴ *Ibid.*, at 30.

¹⁴⁵ *Ibid.*, at 36 (italics supplied only in second paragraph).

¹⁴⁶ 281 U.S. 548, 570 (1929).

¹⁴⁸ 297 U.S. 431 (1935).

¹⁴⁷ *Ibid.*, at 571.

¹⁴⁹ *Ibid.*, at 439.

The following is indicative of this approach:

Indeed, the inevitable result of the situation confronting the state would be to enable the prisons and their agents or distributors to so concentrate in their own hands the production and sale in the general markets of particular commodities, thereby driving out of business the legitimate manufacturer of similar articles. . . . For it cannot be challenged that certain prisons were rapidly approaching the position of sole producers of certain commodities previously produced by independent manufacturers. The facts were not mere accidental developments, but were clearly the result of the freedom from restriction which prison-made commodities enjoyed.

*There was grave danger that they [might], if left uncontrolled and free from the rules of normal trade, dominate the entire business of the country in any commodity as they have already done with respect to some commodities. If they can threaten the general welfare and prosperity of a state by the destruction of private industry with regard to twine, shirts, brooms, stoves, hollow-ware, etc., what is to prevent their invasion of any commercial field?*¹⁵⁰

The controversy over the prohibition of prison-made goods through the channels of interstate commerce was again presented to the Court in the *Kentucky Whip and Collar* case.¹⁵¹ Here, as in the *Whitfield* case, although concern was shown for the preservation of "freedom of labor,"¹⁵² the briefs of counsel urging the Court to uphold the legislation demonstrated again what the continuance of prison-made goods in the market would mean to private manufacturers, who still produced the bulk of the commodities. The brief for the State of New York made constant use of such phrases as "public welfare" and "general welfare."¹⁵³ The brief for the federal government referred to the fact that "if convict labor is hired from the state by a private contractor who sells the products of that labor on the open market, the contractor receives what amounts to a subsidy, because labor, and other factors of production, are furnished at less than cost to private industry."¹⁵⁴

The brief for the American Federation of Labor, also as *amicus curiae*, was even more clear in formulating this attitude:

More than 19 million work shirts (as against 13 million 800 in 1923) were manufactured in prisons and sold in open market in 1932 in competition with approximately 62 million work shirts made by free labor; 7 million pairs of pants were produced in

¹⁵⁰ Brief for Respondent 62.

¹⁵¹ 299 U.S. 334 (1936). The *Whitfield* case was concerned with a Congressional act which made convict goods transported to a state subject to the operation of state laws, despite arrival in the "original package." The immediate case was concerned with a Congressional act which outlawed the shipment of convict goods before arrival in the states.

¹⁵² Again, as in the *Whitfield* case, the Court made reference to the fact that "Congress in exercising the power confided to it by the Constitution is as free as the states to recognize the fundamental interests of free labor." *Ibid.*, at 352.

¹⁵³ Brief of the State of New York as *amicus curiae* 7, 11.

¹⁵⁴ *Ibid.*, at 10.

prisons and sold upon the open market in competition with 27 million pairs of work pants made in private factories and, in addition, some 640,000 pairs of overalls were produced in prison factories during the same period.¹⁵⁵

[The President appointed a special committee to investigate the relation between the competition of the products of prison labor with the products of the cotton garment industry:] This committee on November 26, 1934, made public its report, after a thorough investigation of the effect of the sale in the commerce of the United States of convict-made goods. The Committee in its conclusions stated: "It has been impossible in the past for the *industry* to achieve stability, to improve its standards, because of the lower costs of prison manufacture. The prison manufacturer had the advantages of free rent, light, and heat, of low labor costs, and of a controlled labor force."¹⁵⁶

Unemployment compensation.—The arguments over the constitutionality of the New York Unemployment Compensation Act¹⁵⁷ afford additional insight into the social values to which counsel in the labor-welfare cases made their appeal. Counsel for those urging the invalidation of the act, interestingly enough, characterized the approach of the opposition as one in which it was assumed that "labor, like plant and machinery, is a chattel owned and controlled by employers."¹⁵⁸ The brief for the State of New York carried strong assurances that *industry* would be the actual beneficiary of the legislation. It contained quite a painstaking demonstration of the fact that "labor" is a cost, which can be shifted to the consuming public, and at the same time result in greater industrial efficiency and greater profits:

The economic effect of a tax on payrolls to be paid by employers is obviously to increase their costs of production. An increase in wage or interest rates, higher prices for raw materials, or any other increase in costs of production would have the same immediate effect. Other changes in costs, approaching or even exceeding in size the maximum immediate cost of this payroll tax, continually take place in the different stages of the business cycle. In general, the reaction of employers to increased costs of doing business is always the same; they try to pass on the increase to consumers through higher prices or they attempt to recoup by reducing their expenses. Consequently, it is to be expected that the payroll tax will immediately induce employers to try either one or both methods of adjustment. When employers find that prices can be increased without a proportionate decline in the volume of sales, the increased cost will usually be passed on to consumers in the form of higher prices.¹⁵⁹

If this course is not open, adjustments in expenses will be attempted which may take the direction of the elimination of uneconomical practices, the introduction of technological improvements, which would require less *expenditure for labor*, in the fu-

¹⁵⁵ Brief of the American Federation of Labor as amicus curiae 8.

¹⁵⁶ *Ibid.*, at 9.

¹⁵⁷ *Chamberlin v. Andrews*, 299 U.S. 515 (1934). This was a per curiam decision upholding the validity of the legislation.

¹⁵⁸ Brief for the Appellants 57.

¹⁵⁹ Economic Brief of Appellees 129.

ture, or a reduction in the wage which is offered to applicants for jobs. In some cases, employers may find it more economical to absorb all or part of the additional cost rather than to attempt to pass it on, but it is reasonable to suppose that they will adopt this course only as a last resort. It is unlikely that a small uniform levy on payrolls alone will offer more of an obstacle to business men than they are in the habit of meeting in the every day struggle to remain in business. The exact procedure by which the adjustment is made and the length of time required to make it will vary with the economic conditions in each industry. Since the cost and market conditions are subject to continual change, it is impossible to predict accurately what the precise outcome will be in each particular case, but *it is the consensus of opinion that in most cases the cost will ultimately be shifted.*¹⁶⁰

A hypothetical argument is sometimes advanced that the payroll tax will be paid by buyers out of their profits and that a contribution rate of only three (3) per cent of payrolls will amount to a much larger sum in terms of net earnings. Such comparisons are invalid. Of necessity, they relate the estimated amount of contributions to the past profits of concerns *before* the imposition of the tax (although profits, being a residuum, are the net outcome of a given *past* combination of income and cost factors) and *assume that none of the cost would have been shifted.* We are then led to believe that the payroll tax is really confiscatory because it will amount to a large proportion of profits. The fallacy of such an argument is apparent.¹⁶¹

Finally, it should be emphasized that the incidence of the tax falls upon the employer only in the first instance. As the Economic Brief demonstrates, ultimately the greater share of the cost will be shifted either to wage earners, in the form of lower wages, or to consumers, in the form of higher prices [*Ec. Br.*, pp. 129-34]. Thus, in the end the cost will be borne not by industry alone, but by the whole community. This was pointed out by Judge Crane, writing for the majority in the Court below:

"Instead of solely taxing all the people directly, it has passed a law whereby employers are taxed for the help of the unemployed, the sums thus paid being cast upon the public generally through the natural increase in the prices of commodities. Whether relief under this new law of the Legislature or under the dole system, the public at large pays the bill."¹⁶²

The "business man's" standard was, of course, also adopted by counsel for the opposition:

Besides taking no account of differences in unemployment due to differing conditions inherent in different businesses, the statute takes no account of differences in the efforts and competence of particular businessmen. . . . Under this statute the appellant, Associated Industries, which has a "record of substantially no unemployment experience for more than fifteen years last past," is more onerously burdened by the exactions of this statute than the business of the same size which is run spasmodically, and with a large labor turnover.¹⁶³

The statute does [not] make any distinction between businesses which are profitable because of good management and those which are failing because of incompetence of management or obsolescence or other defect of product.¹⁶⁴

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Brief for Defendant in Error 32.

¹⁶³ Brief for Appellants 38.

¹⁶⁴ Ibid., at 40.

Here, clearly, is a plan wholly arbitrary on its face. Here, clearly, is gross and confessed discrimination.¹⁶⁵

Instead of placing the greatest burden, and hence the greatest inducement to correction, upon those employers following methods resulting in the largest and most pronounced unemployment, it does precisely the opposite and *increases* the burden of the employer who increases or stabilizes employment, and *decreases* the burden of the employer who cuts employment or who follows spasmodic methods of operation.¹⁶⁶

Here the employer is compelled to contribute to the support of total strangers, and the weight of his contribution is not measured by the amount of his own unemployment or of that in his industry or industrial group. He is compelled to contribute even though he never has any unemployment, and the burden of his contributions increases in direct ratio to his success in eliminating unemployment.¹⁶⁷

Collective bargaining.—The tensile strength of the collective bargaining provisions of the Railway Labor Act was tested by the Supreme Court in the *Virginian Railway* case.¹⁶⁸ Briefly, the major issue was whether the injunctive process could be used to compel the railway management to confer or "treat with" representatives of the employees during a period of industrial strife. Not only questions of interpretation of the statute were involved, but considerations of constitutionality as well. Counsel for the railroad argued, of course, that the device chosen by Congress to regulate industrial disputes was violative of property rights. Counsel for the Federation attempted to demonstrate that, whatever benefit the employees derived, the primary purpose of the Railway Labor Act provisions was not to destroy or curtail rights of "property," but rather to safeguard and insure them:

Congress has sought to minimize or eliminate these losses through a long course of legislation whose basic purpose has been and is to provide the means whereby these labor disputes may be settled *before they attain proportions sufficient to jeopardize the carrying on of the commercial process.*¹⁶⁹ In dealing with numerous employees scattered over the many miles of a railroad's system it has been considered necessary *by carriers* that they negotiate general agreements defining the rights of whole classes or crafts of employees as units. If a carrier is prevented from treating with regard to the negotiations of such agreements with other parties, its *own economic self-interest* dictates that it treat for that purpose with the certified representative of the employees.¹⁷⁰

The Railway Transportation Act of 1920 marked, as this Court said in the *New England Division Case* (261 U.S. 184), a change from a prohibitory attitude of the Government toward the railroads to *an affirmative effort to help the roads* and to help the conditions that might interfere with the continuity of transportation.¹⁷¹

Speaking first of the affirmative part of the decree requiring collective bargaining, we do not see that there is any deprivation of liberty or property by requiring merely

¹⁶⁵ *Ibid.*, at 41.

¹⁶⁷ *Ibid.*, at 53.

¹⁶⁶ *Ibid.*, at 50.

¹⁶⁸ 300 U.S. 515 (1936).

¹⁶⁹ Oral argument of Respondent, Sen. Doc. No. 52, 75th Cong., 1st Sess., 25 (1937).

¹⁷⁰ *Ibid.*, at 31.

¹⁷¹ *Ibid.*, at 34.

negotiation and collective bargaining *without a requirement of an ultimate conclusion or agreement*. From the point of view of the petitioners, the contention must be that merely to require an employer to sit at the same table with his employees and to enter into business negotiation with persons with whom he does not care to is a deprivation of liberty or a deprivation of right of property that is forbidden by the Constitution of the United States. Of course, the employer has *the right to operate his business free of dictation*. *There is neither disposition to, nor authority or reason for raising any question as to that right.*¹⁷²

From a simple railroad operating standpoint, it would be quite impracticable for two groups, majority and minority of the same craft or class of employees, jointly constituting one operating or service organization, to function efficiently under two divergent sets of labor rules. . . . The accounting complications arising in themselves would be expensive. The majority and minority employees would become known, with the result, considering the controversial nature of the situation as a whole, that all kinds of disturbances growing out of proselyting [*sic*] and favoritism would ensue to impair the morale of the labor forces.¹⁷³

It has been the experience in the past that interstate commerce is subject to delays and interruptions which have their source in disputes between carriers and employees, members of the public. Congress has sought to minimize or eliminate these losses through a long course of legislation whose basic purpose has been and is to provide the means whereby these labor disputes may be settled before they attain proportions sufficient to jeopardize the carrying on of *the commercial process*.¹⁷⁴

The safeguarding of the "commercial process" by elimination of the hazards of industrial peace was also the basis upon which the Court found justification for sanctioning the collective bargaining machinery under the act. Mr. Justice Stone pointed out:

Experience had shown, before the amendment of 1934, that when there was no dispute as to the organizations authorized to represent the employees, and when there was willingness of the employer to meet such representative for a discussion of their grievances, amicable adjustment of differences had generally followed and strikes had been avoided. On the other hand, a prolific source of dispute had been the maintenance by the railroads of company unions and the denial by railway management of the authority of representatives chosen by their employees.¹⁷⁵

Where the obstruction of the company union is removed, the meeting of employers and employees at the conference table is a powerful aid to industrial peace.¹⁷⁶

The arguments in the cases involving the constitutionality of the National Labor Relations Act add much to the articulateness of the "labor-welfare" cases. In the oral argument in the *Jones-Laughlin* case,¹⁷⁷ Mr. Stanley Reed, for the Government, made it clear that the primary purpose of the act was not to regulate labor:

¹⁷² Oral argument on behalf of the U.S. as amicus curiae, Sen. Doc. No. 52, 75th Cong., 1st Sess., 39 (1937).

¹⁷³ Argument for Respondent, 300 U.S. 515, 530 (1936).

¹⁷⁴ Oral argument for Respondents 25.

¹⁷⁵ 300 U.S. 515, 545 (1936).

¹⁷⁶ *Ibid.*, at 551.

¹⁷⁷ *N.L.R.B. v. Jones-Laughlin Steel Corp.*, 301 U.S. 1 (1936).

I do, however, wish to make this comment—that collective bargaining is not the ultimate end of this act. It is phrased, of course, as a regulation of commerce. It is, from our point of view, a regulation of commerce. It deals with labor relations as they directly affect commerce.¹⁷⁸

Well, if we were undertaking to defend this act on the ground that Congress had the power to regulate labor conditions as such, I would fully agree with what Your Honor has said, but our contention is that Congress is not undertaking to regulate labor conditions as such; that it is undertaking to protect interstate commerce from situations that develop from those labor conditions, and that the causes which lead to these strikes with intent, and to strikes with the necessary effect, to interfere with interstate commerce are within the regulatory power of Congress.¹⁷⁹

Its major purpose, so it was maintained, was to safeguard commercial enterprise and industry:

Of course, the Court is thoroughly familiar with the seriousness of the strike situation. We might expect that because we have a serious situation we would find that the Government has power to provide a remedy. We need to go farther than that. Consequently, there has been a long continued interest of the Federal Government in the strike situation, and in the industrial situation as a whole, that reaches back to the Industrial Commission of 1898 and comes on down to the National Industry Recovery Act. A typical result of those continuous investigations will be found on page 65 of our brief, where we refer to the report of the President's Industrial Conference of 1918. All of these matters were before Congress. Not only were members of Congress as familiar as we are with the constant research and investigation into the strike situation, but they held prolonged hearings in which they discussed the problem of the strike, *its effect upon the industry and the commerce* of the country and the steps which might be taken to remedy the situation.¹⁸⁰

It is our view that the interferences with the rights of employers which are implicit in this act are interferences which, under the doctrine of due process so frequently declared by this Court, are reasonable and proper in their character and are not capricious. They are aimed at a situation which is within the power of Congress to control in protecting the commerce of the country from these recurring and huge dislocations arising from the various strikes that afflict the Nation.¹⁸¹

The paralyzing effect on the Interstate Commerce industrial disputes in enterprises similar to that of respondent is a matter of common knowledge. *A strike or lock-out ordinarily means the complete cessation of business.* No materials flow in; no finished products flow out. Effects are immediately felt in other enterprises dependent upon the plant where the dispute occurs for their materials or semi-finished parts. The markets are disrupted; no business commitments can be made.¹⁸²

The pages of *Iron Age*, the standard business publication of industry, reveal the effect of the dispute upon the iron and steel mill operations and the market. In the issue of Sept. 22, 1919, published three days after the strike began, it was reported that the "general effect" of the strike "was to paralyze the iron and steel market." Not knowing just what they had to face, some mills directed their representatives to

¹⁷⁸ Oral argument of Petitioner 118.

¹⁷⁹ *Ibid.*, at 120.

¹⁸¹ *Ibid.*, at 130.

¹⁸⁰ *Ibid.*

¹⁸² Brief for the N.L.R.B. 21.

cease taking orders and under no circumstances to promise definite deliveries against contracts or specifications.¹⁸³

The particular industry here is a striking example of recurring labor difficulties. The great steel strike of 1919 and 1920 is still fresh in our minds with the stoppage of transportation; the stoppage of production of steel and iron; and the inability of the factories and industries which depended upon the steel industry for their raw materials to draw from their usual source of supply.¹⁸⁴

Here we feel that this act is brought forward for the purpose of protecting, just as directly, that great commerce from the interruptions of labor activities and controversies which have caused losses of staggering amounts, which of course have an effect upon commerce enormous in its magnitude and in its difficulties, and which we believe are sufficiently within the connotation of the word "direct" to justify this Court in reversing the decision of this case.¹⁸⁵

It was also made clear that whatever rights the Act will accord to labor will not impair the "natural rights" of the employer:

We leave the employer all the natural rights which he needs to regulate and operate his business. He is not forbidden to discharge an employee. He is forbidden to discharge him [for] only one thing—his labor relations. The employer has great powers, of course. The employee has been permitted, and I believe that this Court has approved, unionization and collective bargaining and ordinary labor activities. The workman has been found to have rights—rights of organization to protect himself against the overwhelming material force of the employer. To ask the employer to give up but a trifle of the power which he has, to compel him to keep his hands from the labor organizations of his workmen, is, in our view, not a deprivation of any liberty or property which is beyond a reasonable interpretation of due process.¹⁸⁶

The arguments of counsel for the Jones-Laughlin Steel Corporation further illustrate the nature of the issue before the court.

Now it cannot be said that Congress in the Norris-LaGuardia Act was trying to prevent the interruption of commerce by strikes, nor in [the] Bankruptcy Act. *The real purpose of Congress, as shown by the attempt to hitch those matters onto the Norris-LaGuardia Act was that Congress was trying to regulate labor relations*, and that is what they are trying to do here, and it is merely a matter of verbiage to try to hitch on to them the theory that it is really to remove obstructions to commerce.

Did that indicate a purpose on the part of Congress to free commerce from obstruction? Nothing of the kind. It indicates the congressional purpose to force national unions upon industry, and the act is sweeping in its language. It purports to cover all industry, and it is exactly what was intended.¹⁸⁷

In the *Friedman-Marks* case¹⁸⁸ the arguments were also keyed to the problem of the effect of the legislation upon industry. Counsel for respondent proceeded in the following vein:

¹⁸³ Ibid., at 26.

¹⁸⁶ Ibid., at 141.

¹⁸⁴ Ibid., at 125.

¹⁸⁷ Oral argument on behalf of the Jones-Laughlin Corp. 131.

¹⁸⁸ Ibid., at 131.

¹⁸⁸ N.L.R.B. v. Friedman-Harry Marks Co., 301 U.S. 58 (1936).

Over our objection . . . the Board admitted into evidence and based its decisions upon—and we have noted our exceptions to that—the most amazing mass of testimony that can be conceived within 400 printed pages. I shall not labor the argument by detailing that testimony. Some of it has been referred to in other cases, some of the same kind of testimony, but it contained opinions of statisticians, of economists, of officers of union affiliations, of labor managers, and others, with respect to—not a thing with respect to what went on in our plant, not a thing with respect to how we produced or shipped our merchandise—and we have reserved our exceptions to every bit of this in the record—but with respect to the manufacture and distribution of men's clothing generally, opinions, as to the validity of this act, as to the value of collective bargaining, testimony by Mr. Hillman, the president of the union, and letters from President Roosevelt congratulating him upon *what he had done for industry* and what he was doing for the N.I.R.A., references by him and others to the fact that even a justice—and they made a great point of it—that one of the Justices of this Court had sat as an arbitrator in a labor dispute in some other industry, and discussions by great economists as to the evils flowing from the inequality of wages and working hours in all kinds of industries not related to us and not related particularly even to this industry.¹⁸⁹

And of course I shall not stop to argue that we think that that decision that we cannot discharge is tantamount to depriving the employer, . . . of all control in its management of its labor relations and of its internal business, in the promotion and the disciplining and the demoting of its employees, and substitutes the management of this National Labor Relations Board for the management of this company.¹⁹⁰

The government brief emphasized the fact that the experience of industrial leaders confirms the notion that collective bargaining is beneficial to industry:

In the period from 1910 to the present time the industry has been characterized by the gradual acceptance of the procedure of collective bargaining. The Chicago area, for example, suffered from constant labor controversies; only one firm, that of Hart-Schaffner and Marx, which had entered into a collective bargaining agreement in 1911 which had been continued to the present time, escaped strikes and lockouts. However, in 1919 the remainder of the industry in that area entered into an agreement recognizing the rights of organization and collective bargaining similar to the existing agreement with Hart-Schaffner and Marx. As a result, the burdens upon commerce resulting from industrial strife have been eliminated in that area.¹⁹¹

In the *Associated Press* case,¹⁹² counsel for the government again proceeded to demonstrate the fact that enlightened industrial leaders have found collective bargaining beneficial to industry:

The application of the principles of freedom of organization, freedom of association, and freedom of representation, has been consistently recommended by every commission of inquiry which has considered the problem.¹⁹³

¹⁸⁹ Oral argument on behalf of Friedman-Harry Marks Co. 165.

¹⁹⁰ *Ibid.*

¹⁹¹ Brief for the Government 16(f) 7.

¹⁹² *The Associated Press v. N.L.R.B.*, 301 U.S. 103 (1936).

¹⁹³ Oral Argument on behalf of the N.L.R.B. 80.

More recently, in 1934, a Federal commission of inquiry headed by Governor Winant has recommended the same course, and . . . experts engaged by the Commonwealth Fund have come to the same conclusion.¹⁹⁴

These principles have been and can be applied outside of the railroad industry. Your Honors will recall that during the period of the war [the] co-chairmanship of Chief Justice, then Mr. Taft, and Mr. Frank P. Walsh, applied these principles.¹⁹⁵

More recently in 1933 and 1935, these principles were applied by the N.L.R.B. under the chairmanship of Senator Wagner and including in its membership such people as *Walter Teagle*, *Pierre duPont*, *Louis Kirslein*, and *Gerald Swope* as well as other industrial and labor leaders.¹⁹⁶

To all of which Mr. John W. Davis took issue:

The confusion between compulsory collective bargaining and voluntary arbitration was deliberately fostered by the proponents of the National Labor Relations Act, but, on analysis, it reveals how hopelessly contradictory the evidence in favor of collective bargaining is. Thus it is declared in Section 1 of the Act and frequently has been asserted that "Experience proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce." Experience has proved no such thing.¹⁹⁷

As in other "labor-welfare" cases, the arguments were posed to answer two questions: (1) Whether the government should regulate this phase of industrial relations *for the benefit of industry*, or (2) whether industry should be free to work the problem out by itself. The benefit to *labor*, without more, was not made the prime concern of either the plaintiff or defendant arguing before the Court.

In the Court's opinions, however, the relation of the legislation to the welfare of employees was given more stress:

Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.¹⁹⁸

They also reveal the assurance that the legislation will result in greater industrial peace without damaging the interests of the employers:

Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This

¹⁹⁴ *Ibid.*, at 81.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*, at 84.

¹⁹⁷ Brief for the Associated Press 75.

¹⁹⁸ N.L.R.B. v. Jones & Laughlin, 301 U.S. 1, 33 (1936).

is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances.¹⁹⁹

The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. . . . The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel. . . . The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them.²⁰⁰

Today the Amalgamated has collective agreements with clothing manufacturers and contractors employing the greater number of the clothing workers in the United States. These collective agreements have brought peace to that portion of the industry that has entered such agreements. . . . Since the signing of the collective agreement for the New York area, the New York Clothing Manufacturers Exchange, Inc. and the Amalgamated have handled jointly a total of 21,193 complaints and disputes. In only 898 of these cases, or slightly over 4 per cent, was a resort to arbitration required because of inability to agree. Of these 898, 30 per cent were settled by the impartial chairman acting as a mediator; in the remainder he sat as an arbitrator and rendered a decision. . . . The President of the New York Clothing Manufacturers Exchange, Inc., . . . has stated that the "organization of collective bargaining machinery . . . has been perhaps the largest single contributing factor to the lasting peace and harmony that have characterized those clothing markets where the Amalgamated Clothing Workers of America was the other contracting party to the collective agreement."²⁰¹

IV

The fact that there is such a cluster of cases as those extending from *Holden v. Hardy* to *N.L.R.B. v. Jones-Laughlin*—the fact that the arguments of counsel are drawn in a certain direction, as if by magnetic force—is but another way of stating that both the decisions and the arguments in the cases are generated by and bear the congenital stamp of the dominant social forces inherent within the American industrial society of the twentieth century. Perhaps this is what Mr. Justice Holmes had in mind in his reference to the ". . . natural outcome of a dominant opinion,"²⁰² or what Brooks Adams revealed in his statement: "The dominant class, whether it be priests or usurers or soldiers or bankers, will shape the law to favor themselves."²⁰³ Applied to an industrial society, it is not difficult to ascribe this dominance to the leaders of business and industry, and to find in their values the roots from which the law in this field has drawn some of the juices of life.

In appealing to the Court to sustain the "welfare legislation," the tend-

¹⁹⁹ *Ibid.*, at 42.

²⁰⁰ *Ibid.*, at 45.

²⁰¹ *N.L.R.B. v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 74 (1935).

²⁰² *Lochner v. New York*, 198 U.S. 45, 76 (1905).

²⁰³ Adams, *Centralization and the Law* 64 (1906).

ency on the part of counsel has been to make the conflict appear as one between two segments of the business community, the more enlightened against the less enlightened, instead of one between management and labor. In the language of Professor Kales, this assumes the Court's role to be that of ascertaining from the best available evidence what the more "enlightened opinion" of the "managing class" is, and then to impose this opinion upon some of the "short-sighted" members.²⁰⁴ The briefs which are planned to win "benefits" for the employees often resemble huge book-keeping devices, in which such "welfare" measures as the regulation of hours of labor, minimum wages, the installation of safety machinery, elimination of scrip, collective bargaining, etc., are placed upon a ledger sheet and translated into terms of business efficiency, business profits, or threats to the stability of the business structure if the employee groups are not appeased. To use the language of Werner Sombart, it is made to appear as if "heaven and earth [are] a large business concern in which everything that lives and moves is registered in a gigantic ledger in terms of its money value."²⁰⁵ Veblen observed many years ago that this may be due to the "settled habit of seeing all of the conjectures of life from the business point of view," and "because the management of the affairs of the community at large falls by common consent into the hands of business men and is guided by business considerations. . . . So that whatever policy furthers the commercial gains of those business men whose domicile is within the national boundaries is felt to be beneficial to all the rest of the population."²⁰⁶

²⁰⁴ See Kales, *op. cit. supra*, n. 40: "What the court obviously has to do is to balance these opposing tendencies of any given legislation and to determine its predominant effect. If its predominant effect is that of correcting the mistakes of persistent stupidity and short-sighted selfishness on the part of the managers, it should be valid. If its predominant effect is that of reversing some fundamental principle upon which the social order rests, it should be void." For an analysis of Kales' thesis, see 2 Boudin, *Government by Judiciary*, c.XL (1932). See also, Witte, *Labor Legislation and the Law*, 8 *Encyc. Soc. Sci.* 666: "Certain employers moreover came to support specific labor legislation to compel uniform standards and to equalize competitive conditions, strengthened by the conviction that better working conditions, whether granted voluntarily or imposed by legislation, tended to increase efficiency and productivity. Much labor legislation represents merely the compulsion of certain employers to adopt standards which a large part of the industry has already adopted; progressive employers are always ahead of legal requirements, and although they may favor self-government in industry they deem legislation to be necessary to bring laggards into line and deprive them of competitive advantages. Such motives were supplemented by the desire to assure peaceful relations between labor and capital." Prof. John B. Andrews in the introduction to his *Labor Laws in Action* xiii (1938), expresses substantially the same point of view.

²⁰⁵ Sombart, *Capitalism*, 3 *Encyc. Soc. Sci.* 197.

²⁰⁶ Veblen, *op. cit. supra* n. 51 at 285, 289. And more from Veblen: "for there is a naïve, unquestioning persuasion abroad among the body of the people to the effect that, in some occult way, the material interests of the populace coincide with the pecuniary interests of the populace who live within the scope of the same set of governmental contrivances. This persua-

The language of the Court in these cases does not always reveal the extent to which it has given consideration to the "business point of view." The fact that it is operative, however, may be gleaned from the nature of the arguments of counsel. If one appeals to a source of power for relief, e.g., counsel appealing to a Court, the very nature of the appeal, i.e., the argumentative techniques used, not only would seem to disclose the nature of the ends sought, but also would reveal something of the nature of the institution wielding the power. An analogy will make this point clear: If the medicine man in appealing to the gods for succor assures them that it should be granted because the first-born have without exception been sacrificed, one gains insight into the values which motivate the gods. If the prevailing notion of those arguing for the validity of labor-welfare legislation were that the Court is not influenced by the "business point of view," then one would expect to find counsel arguing for the validity of the "welfare legislation" primarily on the ground that such legislation would improve the lot of employees. However, if counsel arguing for the validity of the legislation repeatedly weave into the maze of arguments the proposition that, no matter how much the employee is benefited, the cost of the "benefit" will not be borne by the employer, or the employer will actually profit as a result of the "welfare" measures, then it may be reasonably assumed in these cases that the "business point of view" is an integral part of the Court's mental makeup.

Obviously, there are motivating considerations other than the purely economic, operative in the complex judicial mind. To maintain that economic factors constitute the *sole* motivating force in these cases would be sheer folly. Although as Mr. Justice Holmes has said, "there is in all men a demand for the superlative," there is no desire in this study to place one's self in the category of "the poor devil who has no other way of reaching it than by getting drunk." That these factors constitute an impressive strain, however, would also be sheer folly to deny, in the light of the available evidence. That the strain does not appear too articulate in the language of the Court's decisions is of no moment. Like men in all walks of life, many who are articulate in the formulation of opinions are often inarticulate in formulating for themselves their own scheme of values. It is the atmosphere in which they live and work—the things which they take for granted, the values which they absorb almost instinctively—which often impel them to their conclusions.

sion is an article of popular metaphysics, in that it rests on an uncritically assumed solidarity of interests, rather than on an insight into the relation of business enterprise to the material welfare of these classes who are not primarily business men." *Ibid.*, at 285.