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HOLMES AND BRANDEIS: COMPANIONS IN DISSENT*

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I

Writing to Justice Holmes from Cambridge on January 13, 1918, Harold J. Laski registered a complaint about Brandeis. "Pound and I agreed yesterday that if you could hint to Brandeis that judicial opinions aren't to be written in the form of a brief it would be a great relief to the world. Pound spoke rather strongly as to the advocate in B. being over-prominent in his decisions just as in his general philosophy."[1]

Replying to Laski on January 18, Holmes wrote: "What you say about the form of Brandeis' opinions had been remarked on by me before you wrote, if you refer to the form in a strict sense—the putting in of headings and footnotes—and on one occasion I told him that I thought he was letting partisanship disturb his judicial attitude. I am frank with him because I value him and think he brings many admirable qualifications to his work."[2]

In the 1920's, the words "Justices Holmes and Brandeis dissented" had become a familiar refrain in discussions about the work of the Supreme Court. This affinity between two men so unlike each other in background and method naturally puzzled the observers, and the effort to explain their relationship has produced two mutually contradictory theories. One view holds that though the two jurists approached problems differently, they usually arrived at the same conclusion because they shared a common philosophy on all really basic issues. "Oliver Wendell Holmes and Louis Dembitz Brandeis," a contemporary press comment read, "have achieved a spiritual kinship that marks them off as a separate liberal chamber of the Supreme Court. On the great issues that go down to the fundamental differences in the philosophy of government these two are nearly always together; often they are together against the rest of the court."[3]

On the other hand, there were those who suspected that Holmes was at heart a social conservative and that his "liberalism" was largely the product of Brandeis' influence on him. "Holmes had his

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1. 1 HOLMES-LASKI LETTERS 127 (Howe ed. 1953) (hereinafter referred to as HOLMES-LASKI).
2. *Id.* at 128.
3. Charles G. Ross in the St. Louis Post-Dispatch, June 19, 1927, quoted in DILLIARD, MR. JUSTICE BRANDEIS, GREAT AMERICAN 14 (1941).

education in the essential economic facts of life from Brandeis, and he was sometimes a reluctant pupil. But when the immense marshalling of facts by his younger colleague failed to interest him, the character of Brandeis convinced him."[4] A much more plausible theory has been advanced by one of Holmes' law secretaries. It may well be, Mark DeWolfe Howe has suggested, that Brandeis' influence in keeping Holmes on the liberal side in the 1920's was exerted indirectly. The young secretaries who came to Holmes were probably more sympathetic to the ideas for which Brandeis stood. They no doubt helped to refresh the Justice's thinking and thus contributed to Brandeis' influence.[5]

Judging from Taft's private correspondence, it would seem that the Chief Justice was partly responsible for nurturing the myth of Holmes' complete dependence on Brandeis. In a letter to Henry L. Stimson in May, 1928, Taft wrote about Holmes: "I am very fond of the old gentleman, but he is so completely under the control of Brother Brandeis that it gives to Brandeis two votes instead of one. He has more interest in, and gives more attention to his dissents than he does to the opinions he writes for the Court, which are very short and not very helpful."[6]

Granted that Taft's frustration over his failure to dominate the Court led him to exaggerate Brandeis' mischief, it nevertheless is becoming increasingly clear that the younger Justice's habit of urging his "elder brother to speak out in dissent" had its intended effect. Nor did Holmes hesitate to acknowledge Brandeis' pressure on him, especially in the early years, as the following comments in his letters to Laski show:

> [U]nless I let Brandeis egg me on to writing a dissent in advance . . . .
> On that day came down an opinion that stirred the innards of Brandeis and me and he spurred me to write a dissent.
> [W]hen I can get calm I am catspawed by Brandeis to do another dissent on burning themes . . . .
> Brandeis . . . reminded me of a case argued last term in which he said I should have to write a dissent.
> But meantime a dissent that the ever active Brandeis put upon my conscience waits untouched.[7]

Taft thought that he discerned the chief factor in Brandeis' effect on Holmes when he commented in 1923: "I think perhaps his age makes him a little more subordinate or yielding to Brandeis, who is his constant companion, than he would have been in his prime."[8]

4. Louis M. Lyons in the Boston Daily Globe, Oct. 6, 1941. *Id.* at 18.
5. Interview with Professor Howe, at Harvard, April 6, 1951.
6. 2 PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 969-70 (1939).
7. 1 HOLMES-LASKI at 148, 157, 176; 2 *id.* 1192, 1347.
8. 2 PRINGLE, *op. cit. supra* note 6, at 969.

Yet when one stops to consider the fact that by the time Brandeis became his colleague, Justice Holmes had already been sitting in judgment on the "burning themes" for more than thirty years and had developed a distinct and mature philosophy of his own, it is hard to accept the picture of Holmes being led astray by a younger even if respected and persuasive associate. After all, we have Taft's own word as to the undiminished vigor of Holmes' intellectual powers at age eighty-two. "Association with Justice Holmes," Taft wrote to Learned Hand on March 3, 1923, "is a delight. He is feebler physically, but I cannot see that the acuteness of his mind has been affected at all. . . . In many ways he is the life of the court. . . ."[9]

Brandeis' presence on the Court may have been of decisive importance in getting Holmes to appreciate the extent to which their conservative colleagues were unaware of the conditions and issues of the day. However, it must not be forgotten that there was much in Holmes' own prior record to explain the general direction of his constitutional philosophy in the 1920's. The basic presuppositions—"appercus" Holmes liked to call them—of the two men may have diverged and their thought processes may have been different, but a close look at their behavior as judges during this period will demonstrate that the affinity between them is neither mysterious nor the product of personal ascendancy.

II

As the exchange between Holmes and Laski reprinted at the beginning of this chapter suggests, Brandeis revealed at the very outset of his judicial career that his handling of constitutional cases was going to be different, if not unique. Though he found himself disagreeing with the majority in five cases during his first term on the Court,[10] he submitted formal dissents in only two, prefacing each opinion with the apology that it was the "importance of the question involved" which had induced him "to state the reasons" for dissenting. The first of these dissents—in *New York Central R.R. v. Winfield*,[11] decided May 21, 1917—is the one Holmes had in mind when he agreed with Laski as to the form of Brandeis' opinions: "In one case when he [Brandeis] wrote a long essay on the development of employers' liability, I told him that I thought it out of place and irrelevant. . . ."[12] Holmes was with the majority in this case, and Brandeis had the support only of Justice Clarke.

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9. *Ibid.*

10. During his first year on the Bench, Brandeis was the Court's spokesman in twenty-two cases. He dissented for the first time when he concurred in the opinion of Justice Pitney in Louisville & N.R.R. v. United States, 242 U.S. 60, 75 (1916).

11. 244 U.S. 147, 154 (1917).

12. 1 HOLMES-LASKI at 128.

The *Winfield* case involved a rather knotty question of legislative intent, more specifically, the effect of the Federal Employers' Liability Act upon state workmen's compensation systems. Justice Van Devanter's opinion for the Court held that when Congress in 1908 made interstate railroads liable for their negligence resulting in personal injuries to their employees, it intended to keep the states from dealing with the legal liability of interstate railroads for injuries suffered by their employees. As applied in the circumstances of the particular case—and this is the aspect which evoked Brandeis' sharp dissent—the ruling meant that a state might not require compensation for railway employees engaged in interstate commerce for injuries which were not the fault of the railroad. The federal law provided no remedy for injuries not attributable to the negligence of the railroad.

Brandeis came to the opposite conclusion, namely, that the limited effect of the Employers' Liability Act was to impose liability for negligence, and that the states were left free to regulate the obligation of interstate carriers for accidents arising from other causes. The final sentence of his opinion sums up his position: "I find no justification for imputing to Congress the will to deny to a large class of persons engaged in a necessarily hazardous occupation and otherwise unprovided for the protection afforded by beneficent statutes enacted in the long-deferred performance of an insistent duty and in a field peculiarly appropriate for state action."[13] Examination of the ground he traversed in arriving at this conclusion suggests that Holmes may have misjudged his junior colleague's purpose.

It is obvious that Brandeis did not share Holmes' view that "the only question" was "whether Congress had dealt with the matter so far as to exclude state action."[14] To him the more important consideration—and the one which he thought the majority was ignoring—was the impact of the decision upon state workmen's compensation laws and the ends they were meant to serve. He examined the "world's experience" with industrial accidents in order to indicate the considerations which led to the development of employer liability. One cannot read his searching survey of the origin, purposes and methods of employer liability laws without appreciating that this was no idle display of erudition; nor was it merely the product of the impulse of the "advocate." It was his way of showing the Court that the issue before it could not be adjudicated without regard to social consequences. After summarizing the common law precepts respecting liability,[15] he went on to speak of the injustice which the traditional

13. 244 U.S. at 169-70.
14. 1 HOLMES-LASKI at 128.
15. "By the common law as administered in the several States, the employee, like every other member of the community, was expected to bear the risks necessarily attendant upon life and work; subject only to the

approaches to the question of liability in industrial employment had produced. His blunt language deserves to be recalled:

> In an effort to remove abuses, a study had been made of facts; and of the world's experience in dealing with industrial accidents. That study uncovered as fiction many an assumption upon which American judges and lawyers had rested comfortably. The conviction became widespread, that our individualistic conception of rights and liability no longer furnished an adequate basis for dealing with accidents in industry. It was seen that no system of indemnity dependent upon fault on the employers' part could meet the situation; even if the law were perfected and its administration made exemplary. For in probably a majority of cases of injury there was no assignable fault; and in many it must be impossible of proof.[16]

With his attention fixed on the need for protecting workers against the hazards of modern industry, it is not surprising that Brandeis should have construed the Federal Employers' Liability Act as leaving the States entirely free to provide relief for injuries not covered by Federal legislation. Not the technicalities as to the employer's fault but the social effects of the "employee's misfortune" must be of primary interest to government. Expressing concern over the impact of industrial accidents upon the community as a whole, he stressed the fact that under the American federal system it is the States which have the responsibility for alleviating individual misery:

> It is the State which is both primarily and ultimately concerned with the care of the injured and of those dependent upon him; even though the accident may occur while the employee is engaged directly in interstate commerce. Upon the State falls the far heavier burden of the demoralization of its citizenry, and of the social unrest, which attend destitution and the denial of opportunity. Upon the State also rests under our dual system of government the duty owed to the individual to avert misery and promote happiness so far as possible.[17]

Brandeis finished his first year on the Court by writing a dissenting opinion with which even Justice Holmes was able to agree. In his

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right to be indemnified for any loss inflicted by wrongdoers. The employer, like every other member of the community, was in theory liable to all others for loss resulting from his wrongs; the scope of his liability for wrongs being amplified by the doctrine of *respondeat superior*. The legal liability, which in theory applied between employer and employee as well as between others, came, in course of time, to be seriously impaired in practice. The protection it provided employees seemed to wane as the need for it grew. Three defenses—the doctrines of fellow servant's negligence, of assumption of risk and of contributory negligence—rose and flourished. When applied to huge organizations and hazardous occupations, as in railroading, they practically abolished liability of employers to employees; and in so doing they worked great hardship and apparent injustice." 244 U.S. at 159-60.

16. *Id.* at 164-65.

17. *Id.* at 166.

dissent in *Adams v. Tanner*[18] may be seen, perhaps more so than in the *Winfield* case, both the attitude and techniques which were to become the hallmarks of the Brandeis opinions in cases concerned with the constitutional validity of social legislation. He was taking exception to the decision of the Court, arrived at by a vote of five-to-four, setting aside a measure which the voters of the State of Washington had adopted by means of an Initiative Petition prohibiting employment agencies from taking fees from workers for placing them in jobs.

The glaring contrast between Brandeis' discussion of the problem posed by the case and Justice McReynolds' treatment of it was symptomatic of the great schism within the Court which was only to be intensified in the coming years. Defending the reasonableness of the law, the lawyers for the State of Washington had argued that the business of private employment agencies was "economically . . . nonuseful, if not vicious, because it compels the needy and unfortunate to pay for that which they are entitled to without fee or price, that is, the right to work." Justice McReynolds, who spoke for the Court, rejected this sweeping condemnation of private employment agencies. If there were abuses in the business, he said, they might justify regulation, whereas the prohibition of fees would bring about its destruction. To forbid the agencies to collect fees for a legitimate service was, therefore, both "arbitrary and oppressive."

Brandeis thought that the majority had rested its decision on a false distinction. He began his elaborate dissent by speaking of the "seriousness" of the power to invalidate a state's laws and by borrowing from Holmes' first Supreme Court opinion. He recalled Holmes' observation that courts were not to interfere with a state's exercise of its police power unless they were convinced that it was "a clear, unmistakable infringement of rights secured by the fundamental law."[19] Tested by this yardstick—judicial presumption of constitutionality—it did not matter whether the method for protecting the public was one of regulating or prohibiting altogether the calling or activity sought to be curbed. Brandeis' statement of the factors to be taken into account by courts when they are passing on the constitutionality of social legislation helps explain why the rest of his opinion reads like a brief. He wrote:

> Whether a measure relating to the public welfare is arbitrary or unreasonable, whether it has no substantial relation to the end proposed is obviously not to be determined by assumptions or by *a priori* reasoning. The judgment should be based upon a consideration of relevant facts, actual or possible—*Ex facto jus oritur*. That ancient rule must prevail in order that we may have a system of living law.[20]

18. 244 U.S. 590, 597 (1917).
19. Quoted by Brandeis from Otis v. Parker, 187 U.S. 606, 609 (1903), which Holmes had quoted from Booth v. Illinois, 184 U.S. 425, 429 (1902).
20. 244 U.S. at 600.

He then asked a series of questions: "What was the evil which the people of Washington sought to correct? Why was the particular remedy embodied in the statute adopted? And, incidentally, what has been the experience, if any, of other States or countries in this connection?"[21]

Before turning to the materials which he thought ought to govern the answer to these inquiries, Brandeis made it clear that his object was not to determine whether the legislation under attack was "wise" or even to ascertain what the facts were. The wisdom of public policy "lies with the legislative branch of Government," he observed. His "sole purpose" was to determine whether in view of the known facts of the situation, the action of the State of Washington was so "arbitrary or unreasonable" as to violate fundamental rights.

What were the facts? They indicated that the evils with which the state was dealing were serious and widespread. Quoting from numerous publications of federal and state agencies in the labor field and the findings of official as well as private investigations, Brandeis pointed out that the experience with private employment agencies had revealed the existence of such grave abuses as exorbitant fees, discrimination, "fee-splitting" with foremen who discharged men in order to hire others, and misrepresentation of terms and conditions of employment. Following extensive public hearings, the United States Commission on Industrial Relations had concluded in 1914 that even the properly conducted private agencies only congest the labor market, increase irregularity of employment, and make the poorest class of wage earners pay "the largest share for a service rendered to employers, to workers, and to the public as well."

Washington was not the first state to attempt to regulate the private employment agencies. As many as twenty-four states had sought to cope with the problem either by statute or municipal ordinances, and in nineteen of them municipal employment offices were established to compete with private agencies. These various experiments proved to be unsatisfactory, so that the conviction grew, Justice Brandeis stated, that "the evils of private agencies were inherent and ineradicable, so long as they were permitted to charge fees to the workers seeking employment." In Washington, as in the other Pacific States, the situation was accentuated by the lack of staple industries and the frequent shifting from job to job due to the seasonal nature of much of the work. Moreover, the low cost of the municipally-operated labor offices in several of Washington's cities had only served to show that the way to protect those seeking jobs was to prohibit fees for the service. In view of these facts and circumstances, it was not unreasonable for the people of Washington to believe that the collection

21. *Ibid.*

of fees from employees was a "social injustice" and that its prohibition might lessen chronic unemployment—"perhaps the gravest and most difficult problem of modern industry."

III

We learn from his biographer that Brandeis' early dissents were soon recognized as launching an innovation in judicial technique. Brandeis was using the dissenting opinion, writes Professor Mason, "as an educational device to explore and illumine not only the law but also the relations which law governs . . . in a persuasive demonstration of what the law ought to be in terms of social justice."[22] He adds that since the Supreme Court was at the time "reactionary" in both outlook and temperament, Brandeis "was fated to write his most notable opinions in dissent."[23]

To what extent did this situation on the Court also help to cast Justice Holmes in the role of "the great dissenter"? The more one observes the pervasive strain of skepticism in his thought, the more convinced one must become that the intransigence and dogmatism of many of his colleagues may well have been the principal force moving Holmes to protest, as it may also account for his coming ever closer to Brandeis. Certainly any suggestion that the two Justices found themselves at war with their colleagues most of the time would completely misrepresent their position on the Court. As the late George W. Kirchwey said of Holmes in 1929, "He is not a voice crying in the wilderness. While he has not hesitated on occasion to stand alone, this has rarely been his fate . . . the opinions in which he has given expression to the judgment of the Court or in which he has concurred in its judgment far out-number, in the ratio of eight or ten to one, those in which he has felt it necessary to record his dissent."[24]

The same is true of Justice Brandeis. Moreover, some of the most significant decisions from which they dissented had been reached by a bare majority of the Court, and increasingly their dissents came to be shared by one or two other Justices. Nevertheless, there is intellectual peril in using dissenting opinions as a vehicle for assessing the distinctive thought and methods of men who were members of an institution whose chief importance in the polity is as a collective body. The dissenter, too, must bend his utterance to the requisites of his office and even to the vagaries of the majority's pronouncement. Especially in the case of Justice Holmes, there is considerable evidence that he strove rather conscientiously to adjust his criticisms to the

22. MASON, BRANDEIS: A FREE MAN'S LIFE 518 (1946).

23. *Ibid.*

24. Foreword to THE DISSENTING OPINIONS OF MR. JUSTICE HOLMES x (Lief ed. 1929).

views of his colleagues. "When I am going to dissent," he wrote to Laski in 1920, "I almost always prepare my opinion at once—and then when the majority speaks, simply make such adjustments as to bring our discussion *ad idem*—which I think is the decent way, but which is not practiced."[25]

Yet as compared with the necessity for subordinating individuality when speaking for the Court, the dissenting opinion is a far more reliable guide to the distinctive thought of the judge than is "the opinion of the Court." In the very nature of things, the dissent, since it is the product of conflict and has been occasioned by disagreement which makes silence intolerable, is obviously useful in revealing fundamental differences among men whose dominant professional impulse should be to speak with one voice. It is an excellent vehicle through which the combatants may register, deliberately or unwittingly, the ideas and values motivating the struggle and at the same time appeal to the judgment of posterity. "I wish a lawyer would measure the development of law by dissents," a learned and experienced judge once wrote, and he added: "In a court not subject to sudden change, able and continued dissent delimits and accentuates decisions; it reveals far more than does the majority opinion the intellectual differences of the council table."[26]

If it is true, as Holmes himself has said, that "the place for a man who is complete in all his powers is in the fight,"[27] then surely the dissenting opinions of two such powerful intellects as Holmes and Brandeis may be assumed to embody their most deeply felt precepts about the American constitutional system. What Felix Frankfurter wrote about Holmes in 1927 is equally true of Brandeis, "some of his weightiest utterances are dissenting opinions—but they are dissents that record prophecy and shape history."[28]

But many a commentator has insisted that the reputation of Holmes and Brandeis as dissenters has been greatly exaggerated, because their dissents were few compared with the number of times they concurred in the actions of the Court. This is a misleading criterion. Evaluation of a phenomenon of profound intellectual and historical significance ought not to be made on the basis of mere statistics. The quantitative sticklers, that is to say, are not reckoning sufficiently with the fact that the dissents by Holmes and Brandeis were directed to a condition on the Supreme Court which was not only, as future events proved, socially explosive, but one which afforded dramatic demonstration

25. 1 HOLMES-LASKI at 240.
26. Hough, *Due Process of Law—To-day*, 32 HARV. L. REV. 218 (1919). Hough was a United States District Judge for the Southern District of New York between 1906 and 1916 and Judge of the United States Circuit Court of Appeals, Second Circuit, 1916-1926.
27. HOLMES, COLLECTED LEGAL PAPERS 224 (1920).
28. MR. JUSTICE HOLMES 116 (Frankfurter ed. 1931).

of the major paradox in America's experiment with democratic government. Robert H. Jackson was not guilty of special pleading, but was merely recording accurate history, when he pointed out in 1941 that President Roosevelt's 1937 plan for reorganizing the Supreme Court "was the political manifestation of a long smouldering intellectual revolt" against the Court's constitutional philosophy.[29] Long before political leaders made the Court's conservatism an issue of public debate, Justices Holmes and Brandeis had come to be looked upon as spokesmen for the growing protest against the abuse of judicial power.

Ever since our earliest constitutional debates, the relation of a non-elective judiciary—possessing the power to negate the policies of the other branches—to the processes of representative government has been the fundamental but unresolved issue in American constitutionalism. The fear of unbridled majority rule and the search for political stability largely explain the ease with which the Constitutional Convention of 1787 adopted the provisions establishing an appointive judiciary, whose members were to serve for life. One need only follow the forthright discussion in the *Federalist Papers* of the elaborate scheme of checks and balances embodied into the Constitution to appreciate that judicial supremacy was probably the inevitable by-product of the grand design of republican government. "This very system of checks and balances, which is undeniably the essential element of the Constitution," Charles A. Beard has written, "is built upon the doctrine that the popular branch of the government cannot be allowed full sway, and least of all in the enactment of laws touching the rights of property."[30]

Alexander Hamilton—whose ideas proved to be too extreme for most of the delegates—urged the Convention to establish an "hereditary" chief magistrate, representing the "permanent will" of society and capable of curbing the "turbulent and uncontroulling disposition" of democracy. But seeing no chance for the adoption of his proposals, he soon became a convert to constitutional checks as the most practicable means for giving effect to his conviction that "there ought to be a principle in government capable of resisting the popular current."[31] It is not surprising, therefore, that Hamilton should have

29. "The Court Reorganization Message of President Roosevelt was the political manifestation of a long smouldering intellectual revolt against the philosophy of many of the Supreme Court's decisions on constitutional questions. This protest was led by outspoken and respected members of the Court itself. Among its most influential spokesmen were those in our universities distinguished for disinterested legal scholarship. It counted among its followers many thoughtful conservatives and practically all liberal and labor leadership." JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 1, preface (1941).

30. BEARD, THE SUPREME COURT AND THE CONSTITUTION 95 (1938).

31. 1 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 299, 309, 310 (Rev. ed. 1937).

become a vigorous supporter of judicial supremacy long before John Marshall succeeded in making it an accomplished fact. No more enlightening revelation of the purposes ultimately to be served by judicial review is to be found that in his "Examination of the Judiciary Department."[32]

Hamilton candidly acknowledged that the courts "were designed to be an intermediate body between the people and the legislature" and that they were meant to be "the bulwarks" of the Constitution "against legislative encroachments." His defense of judicial authority is accompanied by repeated invocation of the need for protecting society against "legislative invasions" of the Constitution "instigated by the major voice of the community." By way of bolstering his argument for permanent tenure of judicial offices, he maintained that the independence of judges was an "essential safeguard" against those "ill-humors in society" which may injure "the private rights of particular classes of citizens, by unjust and partial laws." He expected the judiciary to be a force "in mitigating the severity and confining the operation of such laws." Yet he denied that the authority to control the legislative department made the judiciary superior to the legislature, and thereby he furnished Marshall with the chief rationalization for reconciling the power assumed by the Supreme Court "to say what the law is"[33] with the traditional notion of popular sovereignty. Hamilton wrote:

> Nor does this conclusion [the authority of courts "to ascertain" the "meaning" of the Constitution] by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.[34]

32. THE FEDERALIST No. 78, at 519 (Heritage Press ed. 1945) (Hamilton).

33. "It is, emphatically, the province and duty of the judicial department, to say what the law is." Chief Justice Marshall, in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

34. THE FEDERALIST *supra* note 32, at 523. Marshall's logic on the same matter went as follows: "That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. . . . The principles, therefore, so established, are deemed fundamental: and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

"This original and supreme will organizes the government, and assigns different departments their respective powers. . . .

". . . The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? . . .

"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and,

Before concluding his case for judicial control of legislative action, Hamilton remarked that this function was "calculated to have more influence upon the character of our governments than but few may be aware of."[35] This is but one of Hamilton's many prophetic judgments which justified Parrington in calling him "the most modern—and the most American of our eighteenth century leaders."[36] While Hamilton might have been baffled by the intense aversion to vigorous government shared by men who considered themselves to be his intellectual heirs, he would have understood the behavior of a George Sutherland or a Pierce Butler in their special roles as judges. Their use of the judicial veto to restrain legislative majorities from tampering with rights they deemed to be fundamental was, after all, within his conception of the courts as "faithful guardians of the Constitution."[37]

In the face of overwhelming evidence that certain basic transformations in the character of American society were precipitating governmental regulation in the public interest, members of the Supreme Court were clinging to presuppositions which no longer corresponded to the realities of life in the twentieth century. Their stubborn adherence to old dogmas led them to espouse legal doctrines which were convincing more and more people that the Constitution was a barrier to social progress. It was this unabashed use of judicial power to frustrate necessary experiments with considered remedies for pressing economic and social problems which induced Holmes and Brandeis to speak out in dissent so often.

One of the factors which stimulated resentment against the trend of the Court's thinking in the post-war years was the fact that it actually represented a step backward. No amount of summoning of ineluctable constitutional mandates could hide the fact that the Court itself was changing its own prior meanings of the Constitution. The reversion has been sketched by Felix Frankfurter in a few telling sentences:

> His [Holmes'] influence was powerful in arresting the tide which reached its crest in the *Lochner* case. There followed a period of judicial recession, of greater tolerance towards the exercise of legislative discretion. Between 1908 and the World War, the Court allowed legislation to prevail which in various aspects curbed freedom of enterprise and withdrew phases of industrial relations from the area of individual bargaining. In the period between Muller v. Oregon,[38] in 1908 and Bunting v.

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consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." 5 U.S. (1 Cranch) at 176-77.

35. THE FEDERALIST, *supra* note 32, at 526.

36. 1 PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT 306-07 (1927).

37. THE FEDERALIST, *supra* note 32, at 525.

38. 208 U.S. 412 (1908).

> Oregon,[39] in 1917, Mr. Justice Holmes' views prevailed. But those who had assumed a permanent change in the Court's outlook were to be disappointed. . . . Change in the Court's personnel, and pressure of post-war economic and social views soon reflected themselves in decisions.[40]

Although this resurgence of judicial conservatism was manifest in the Court's attitude toward almost all constitutional questions, it was felt most acutely in the cases concerned with the constitutionality of social legislation. On this major battleground of constitutional controversy in the years following World War I, Holmes and Brandeis were together in resisting what they regarded as too aggressive an exercise of judicial power. Building on Holmes' own theory that "A great man represents . . . a strategic point in the campaign of history" and that "part of his greatness consists in his being there,"[41] it might well be argued that one reason for the importance of Holmes and Brandeis as dissenters is that they were on the scene at a fateful moment in the life of the Court as a coordinate institution of government. They were destined to play a vital role in evolving attitudes and doctrines the ultimate effect of which was to rescue the Court from self-destruction.

And yet one of the really complex—some would say mystifying—facets of that period of sharp judicial conflict is the kinship between two such diverse temperaments as Holmes and Brandeis. How can one account for the fact that most of the time they agreed with each other when they were disagreeing with the rest of their colleagues? "A judge will be estimated," Judge Learned Hand has suggested, "in terms of his outlook and his nature."[42] No two men then serving on the Supreme Court were more different in outlook and nature than were Holmes and Brandeis.

Holmes—by instinct a scholar and philosopher, whose cynicism about man and society made him contemptuous of the "upward and onward" impulse of the reformer—was found, in crucial divisions of the Court, in the company of the colleague whose moral fervor and scheme of values had given him the reputation of a social crusader. Brandeis—by nature a fighter for causes, whose faith in the possibilities of social regeneration stemmed from his belief that through the use of intelligence men can learn to control their fate—was at home with the Justice whose detachment and skepticism at times bordered on social apathy. "In him the lawyer's genius was dedicated to the prophet's vision," one of his law secretaries has said of Brandeis,

39. 243 U.S. 426 (1917). The decision in this case sustained Oregon's ten-hour law for industrial establishments. No doubt because of his previous association with the litigation, Justice Brandeis disqualified himself from participating in the case.

40. MR. JUSTICE HOLMES 80-81 (Frankfurter ed. 1931).

41. HOLMES, *John Marshall,* in COLLECTED LEGAL PAPERS 267 (1920).

42. Hand, *Mr. Justice Holmes at Eighty-Five,* in MR. JUSTICE HOLMES 122-23 (Frankfurter ed. 1931).

adding, "and the fusion produced a magnificent weapon for righteousness."[43] Though they differed radically in their conceptions of the good society and employed radically different methods as judges, skeptic and crusader usually arrived at the same conclusions in matters of constitutional law.

One student of Brandeis' judicial approach has found that he used the "technique of the advocate" in order to serve "the ends of social justice";[44] another has frankly stated that Justice Brandeis did not make "too ascetic a dissociation between his views of public policy and his opinions."[45] The opposite, of course, has been said of Justice Holmes. Thus, just a few years before the end of Holmes' service on the Supreme Court, Judge Learned Hand placed him in that school of constitutional interpretation which demands of the judge a "temper of detachment" and "counsel of scepticism." We were cautioned not to read Holmes' opinions as "indicating his own views on public matters," but rather as signifying the Justice's "settled belief that in such matters the judges cannot safely intervene."[46] The question is, it may be repeated, what explains the affinity between two jurists as dissimilar in outlook and approach as were Holmes and Brandeis? This is the crucial problem, but the answer must rest, in the end, on a close analysis of the occasions when they concurred in each other's conclusions though dissenting from the position of the majority.

IV

Shortly after Brandeis became a member of the Supreme Court, Justice Holmes wrote a dissent, concurred in by Brandeis, which may be seen as presaging the kinship between the two jurists on constitutional questions. His opinions in the *Child Labor* case[47] contains ideas which help explain why he and Brandeis so often reached the same results though not sharing each other's social philosophy. When the Supreme Court overruled the decision almost a quarter of a century later, Justice Stone, spokesman for a unanimous Court, in effect adopted Holmes' dissent, which he characterized as "powerful and now classic."[48] Nor were these words a mere expression of homage; they quite accurately described both the force and effect of the dissent. Not only did Holmes explode the entire basis for the majority's ruling in *Hammer v. Dagenhart,* but he set down a view of the judicial

43. Freund, *Proceedings in Memory of Mr. Justice Brandeis,* 317 U.S. ix, xvii (1942).
44. Hamilton, *The Jurist's Art,* 31 COLUM. L. REV. 1073, reprinted in MR. JUSTICE BRANDEIS 188 (Frankfurter ed. 1932).
45. Lerner, *The Social Thought of Mr. Justice Brandeis,* in IDEAS ARE WEAPONS 83.
46. Hand, *supra* note 42, at 124.
47. Hammer v. Dagenhart, 247 U.S. 251, 277 (1918).
48. United States v. Darby, 312 U.S. 100, 115 (1941).

function which, by sheer reiteration, was itself to become both a tradition and a school. No finer example of the conscious effort to be guided by the self-denying inhibition of the constitutional judge is to be found among his dissents.

In *Hammer v. Dagenhart* a bare majority of the Court, led by Justice Day, held that Congress had overstepped its constitutional bounds when it passed in 1916 a law prohibiting the interstate shipment of goods produced with the aid of child labor. Relying on the formula which classified the conditions existing within the industrial plant as necessarily local, it found that under the pretex of regulating interstate commerce, Congress was attempting to control a matter which was within the exclusive domain of the states. "The production of articles, intended for interstate commerce, is a matter of local regulation." If the child labor law were sustained, the majority concluded, the American system of dual governmental powers might be "practically destroyed."[49] However, this note of impending doom was somewhat premature, to say the least. It struck the minority—Holmes, McKenna, Clarke and Brandeis—as entirely inconsistent with the Court's quiet recent rulings upholding the right of Congress to bar from interstate channels lottery tickets,[50] impure food and drugs,[51] women being transported for immoral purposes,[52] and intoxicating liquors.[53]

It was these applications of the settled doctrine that regulation by Congress may take the form of outright prohibition which gave the majority in the *Child Labor* case its chief trouble. Justice Day sought to reconcile the decision with the earlier cases by creating a quite artificial distinction. The Child Labor Law, he argued, was designed to exclude from interstate commerce articles in themselves harmless and incapable of spreading any evil to the "state of destination." The evil, if any, was in the "state of origin," where the children were employed. Justice Day wrote:

> In each of these instances [the earlier cases] the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.
>
> This element is wanting in the present case. . . . The Act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods shipped are of themselves harmless. . . . When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended

49. 247 U.S. at 276.
50. Champion v. Ames, 188 U.S. 321 (1903).
51. Hipolite Egg Co. v. United States, 220 U.S. 45 (1910).
52. Hoke v. United States, 227 U.S. 308 (1913).
53. Clark Distilling Co. v. Western Maryland Ry., 242 U.S. 311 (1917).

> for interstate commerce transportation does not make their production subject to federal control under the commerce power.[54]

Justice Holmes found this view of the limits of Congress's powers altogether without foundation. Through a close examination of the precedents, he showed that Congress's authority to deal with an evil never depended on whether it existed before or after interstate transportation had been resorted to. "I should have thought that the most conspicuous decisions of this Court," he summarized, "had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State."[55] Though he preserved the customary politeness of his differences with colleagues, there is no mistaking the inference that a majority of them in this case had been unduly influenced by their disapproval of the ultimate purpose of the Child Labor Law.

After all, Justice Day's suspicion that the Child Labor Law was designed to "standardize" or equalize industrial conditions is in a class with Justice Pitney's condemnation in *Coppage v. Kansas* of the use of the police power to achieve a more equitable distribution of wealth.

Holmes' dissent in *Hammer v. Dagenhart* is primarily an argument against the injection into judicial decisions of such personal views of social policy. Significantly, he quoted the assertion by Chief Justice Chase from a fifty-year-old decision that "the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers."[56] Was Holmes not implying that in order to vindicate the constitutional powers of a coordinate branch of the government, the judiciary must curb its own will to power?

"The first step in my argument," he wrote, "is to make plain what no one is likely to dispute—that the statute in question is within the power expressly given to Congress if considered only as to its immediate effects and that if invalid it is so only upon some collateral ground."[57] The "collateral ground" for the invalidation of the Child Labor Law was, of course, its alleged impact on the internal economy of the States. To Holmes this was an irrelevant consideration, since it was agreed that Congress's commerce power was broad enough to permit it to prohibit shipments in interstate and foreign commerce. The integrity and scope of national power were to him the decisive issues:

> The Act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as

54. 247 U.S. at 271-72.
55. *Id.* at 278.
56. Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 548 (1869).
57. 247 U.S. at 277.

> they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they have upon the activities of the States. Instead of being encountered by a prohibitive tariff at her boundaries the State encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. . . . The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all means at its command.[58]

This vision of the Constitution as an organic instrument of effective government Holmes was to express even more majestically two years later in his opinion for the Court in *Missouri v. Holland,* an opinion which has grown in stature and importance with the passage of time.[59] Characterized by one legal historian as "a paragraph which has become a classic in constitutional law,"[60] the sentences in which this view is delineated reveal Holmes at his best as an exponent of constitutional interpretation imbued with a sense of history:

> [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been

58. *Id.* at 281.

59. Missouri v. Holland, 252 U.S. 416 (1920). This is the opinion in which Holmes suggested that it may be constitutional for the Federal Government to enter fields as the result of its adherence to a treaty on which it would not be permitted to legislate in the absence of a treaty. He stated this possibility in these words: "It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found." *Id.* at 433. America's greatly increased international obligations have obviously enhanced the implications of Holmes' dictum. Thus, in its search for constitutional bases for federal protection of civil rights, the committee named by President Truman in 1946 to survey civil rights had this to say:

"In its decision in Missouri v. Holland in 1920, the Supreme Court ruled that Congress may enact statutes to carry out treaty obligations, even where, in the absence of a treaty, it has no other power to pass such a statute. This doctrine has an obvious importance as a possible basis for civil rights legislation.

"The United Nations Charter, approved by the United States Senate as a treaty, makes several references to human Rights. Articles 55 and 56 are of particular importance." *To Secure these Rights,* REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 110-11 (1947). It is perhaps no exaggeration to say that the principle enunciated by Holmes in *Missouri v. Holland* is a major source of anxiety for the proponents of the so-called "Bricker Amendment," but they have overlooked some reassuring words by Holmes himself: "We do not mean to imply that there are no qualifications to the treaty-making power." 252 U.S. at 433.

60. Hurst, *The Role of History,* in SUPREME COURT AND SUPREME LAW 56 (Cahn ed. 1954).

> foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. . . . We must consider what this country has become in deciding what that Amendment [the Tenth] has reserved.[61]

In the *Child Labor* case, Holmes insisted that the Justices were not "at liberty" to concern themselves with the motives of legislation. His call for judicial objectivity was stern and even sardonic:

> The notion that prohibition is any less prohibition when applied to things now thought evil I do not understand. But if there is any matter upon which civilized countries have agreed—far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused—it is the evil of premature and excessive child labor. I should have thought that if we were to introduce our own moral conceptions where in my opinion they do not belong, this was preeminently a case for upholding the exercise of all its powers by the United States.
>
> But I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone and that this Court always had disavowed the right to intrude its judgment upon questions of policy or morals. It is not for this Court to pronounce when prohibition is necessary to regulation if it ever may be necessary—to say that it is permissible as against strong drink but not so against the product of ruined lives.[62]

The emotion-packed words just quoted are obviously the utterance of a man who had been deeply stirred by the controversy, and it is easy to understand why to some they prove that Holmes was a great humanitarian. He himself would have disclaimed any such motivations. It is likely that he would have accepted the judgment of a fellow Bostonian as nearer to the truth: "No deep perception of the great pain and pathos of life nor strong compassion for the lot of the average man ever took any powerful hold on his mind."[63] In any case, we do know that Holmes was "mighty sceptical of hours of labor and minimum wages regulation,"[64] a sentiment he voiced just a year before writing his *Child Labor* opinion. As a judge, however, he tried to free himself of any such subjective considerations. Esoteric though it may appear, the view of Holmes' approach propounded by one who had observed him for many years from the other side of the Supreme Court lectern is essentially correct—"He seemed to be without prejudice or fear as to the consequence of a decision, and the one

61. 252 U.S. at 433-34.

62. 247 U.S. at 277, 280.

63. Farnum, *Holmes—The Soldier-Philosopher,* 2 AMERICAN LAWYER 9 (1939).

64. 1 HOLMES-LASKI 51.

question of concern to him was: 'What is the law?' Whether he liked it or not, he so declared it."[65]

Thus did the social conservative become the liberal judge. This happened, it has been remarked, because he had "the detachment to refuse to substitute his judgment for that of the legislature."[66] Holmes' judicial liberalism stemmed from a willingness to give constitutional sanction to the developing forces of society, and it was this attitude of forbearance which was bound to produce the common ground between him and Justice Brandeis. While Holmes may have doubted the utility or wisdom of the schemes of social control to which he saw no legal objection, Brandeis was in many instances deeply convinced of the necessity of the legislation. Holmes was no champion of the underdog; but neither was Brandeis, in any sentimental sense. As Paul A. Freund has noted—after examining some of the evidence showing that Brandeis was an "unsentimental" judge —"Brandeis was prepared to reject the claims, almost literally, of a workman, a widow and an orphan in pursuance of what seemed to him to be a more harmonious federalism."[67] But it is also true that his general social philosophy rested on a genuine desire to strengthen the democratic community by improving the conditions under which the great mass of ordinary men and women lived and worked. Holmes was not so sure of the goal or of the means for reaching it, but he joined Brandeis in deploring the action of courts in aborting the efforts of legislators to further the public good.

V

That it was their common approach to the judicial task which brought about the harmonious relationship between Justices Holmes and Brandeis is strikingly illustrated in the labor cases which found them together in dissent. Both men acknowledged that the exercise of judicial power is in its results essentially legislative in character. "I recognize without hesitation," Holmes declared in one of his best known dissents, "that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."[68] A few years later, while speaking of the divergent judicial attitudes toward labor's weapons of self-defense, Brandeis had this to say: "Judges being thus called upon to exercise a quasi-legislative function and weigh relative social values, naturally differed in their conclusions on such questions."[69]

65. Beck, *Justice Holmes and the Supreme Court,* Fed. B.J. March, 1932, pp. 36, 38.

66. Llewellyn, *Holmes,* 35 COLUM. L. REV. 485 (1935).

67. FREUND, ON UNDERSTANDING THE SUPREME COURT 67 (1949).

68. Southern Pac. R.R. v. Jensen, 244 U.S. 205, 218, 221 (1917).

69. Dissenting in Truax v. Corrigan, 257 U.S. 312, 354, 365 (1921).

Such candid discussion of the role of judges raises a troublesome question: How is the power they exercise to be "confined"? More simply, when are judges exercising their authority properly and when are they guilty of the abuse of their power? The dissents by Holmes and Brandeis develop at least a partial answer to this question. Regardless of the nature of the case—whether they were differing with their colleagues over the pertinence of common law principles, the meaning of statutes, or the effect of constitutional limitations—these two Justices usually put into their opinions some animadversions on the judicial process itself.

It was to be supposed that Brandeis' understanding of the labor struggle would bring him into conflict with colleagues with a less sympathetic view. The expected began to happen very soon. It ought to be remembered, however, that many of the cases concerned with the legal rights of labor involved issues toward which Holmes had revealed a progressive and enlightened view as long ago as his days in Massachusetts. Thus, impressive as is Brandeis' first opinion directed against yellow dog contracts and court injunctions in labor disputes,[70] it rested on a philosophy which Holmes had done much to crystallize.

The employees of the Hitchman Coal Company had signed individual agreements promising not to join any union. When the United Mine Workers of America launched a drive to unionize the company's West Virginia mine and thus force it to end these contracts, the company obtained a court order restraining the union's agents from continuing their organizing activities. In sustaining the lower court's decree, Justice Pitney's opinion for a majority of the Supreme Court held that the company had a right to operate a non-union shop and that the organizers were seeking by illegal means to compel the company to change its system of labor relations. The fact that the Union organizers did not resort to violence did not make their activities legal. "In our opinion," Pitney wrote, "any violation of plaintiff's legal rights contrived by defendants for the purpose of inflicting damage, or having that as its necessary effect, is as plainly inhibited by the law as if it involved a breach of the peace. A combination to procure concerted breaches of contract by plaintiff's employees constitutes such a violation."[71]

Brandeis argued in dissent that this conclusion was basically at variance with the legally recognized right of workingmen to form unions, to invite others to join their ranks, and to safeguard the power of their associations. Since the United Mine Workers union was a lawful organization and not in itself a conspiracy, the issues in the case reduced themselves to the question as to how far it might go in strengthening its position in the bargaining struggle. Brandeis pointed

70. Hitchman Coal and Coke Co. v. Mitchell, 245 U.S. 229, 263 (1917).
71. *Id.* at 257.

out that the non-union mines of West Virginia were competing with the union mines of the adjoining states and that the union was merely seeking to protect itself. Hence, whatever "coercive" effect the activities of the organizers might have was justified by a legitimate aim. In other words, granted that the efforts of the U.M.W. to persuade the Hitchman workers to become members of the Union, if successful, would interfere with the company's methods for dealing with its employees, the interference was legal since it was "for justifiable cause." Brandeis pleaded for greater equality in the labor-management contest for power:

> [C]oercion in a legal sense, is not exerted when a union merely endeavors to induce employees to join a union with the intention thereafter to order a strike unless the employer consents to unionize his shop. . . . The employer is free either to accept the agreement or the disadvantage. Indeed, the plaintiff's whole case is rested upon agreements secured under similar pressure of economic necessity or disadvantage. If it is coercion to threaten to strike unless plaintiff consents to a closed union shop, it is coercion also to threaten not to give one employment unless the applicant will consent to a closed non-union shop.[72]

The dissenter in *Vegelahn v. Guntner*[73] and *Plant v. Woods*[74] had no hesitation, it may be assumed, in supporting Brandeis' position in the *Hitchman* case, as did also Justice Clarke. Both of them joined Brandeis four years later in dissenting against another decision of the Court inimical to the interests of organized labor.[75] For Holmes, however, the issue in the *Duplex* case must have been more perplexing than for Brandeis, and for the reason that it put to the test his conception of consistency in the judicial process. In the well known *Danbury Hatters'* case,[76] decided in 1908, Holmes had joined in the unanimous opinion of the Court holding that a secondary boycott, conducted for the purpose of compelling a manufacturer of hats sold in other states to unionize his plant, was an illegal restraint of interstate commerce in violation of the Sherman Act. And seven years later, he wrote the Court's decision holding the officers of the United Hatters responsible for the acts done in the name of the union.[77]

72. *Id.* at 271.
73. 167 Mass. 92, 104 (1896).
74. 176 Mass. 492, 504 (1900).
75. Duplex Printing Press Co. v. Deering, 254 U.S. 443, 479 (1921).
76. Loewe v. Lawlor, 208 U.S. 274 (1908).
77. Lawlor v. Loewe, 235 U.S. 522 (1915). Holmes summarized the controversy as follows: "The substance of the charge is that the plaintiffs were hat manufacturers who employed non-union labor; that the defendants were members of the United Hatters of North America and also of the American Federation of Lahor; that in pursuance of a general scheme to unionize the labor employed by manufacturers of fur hats (a purpose previously made effective against all but a few manufacturers), the defendants and other members of the United Hatters caused the American Federation of Labor to declare a boycott against the plaintiffs and against all hats sold by the plaintiffs to dealers in other States and against dealers who should deal in them;

"It requires more than the blindness of justice," he had there observed, "not to see that many branches of the United Hatters and the Federation of Labor, to both of which the defendants belonged, in pursuance of a plan emanating from headquarters made use of such lists [lists of 'unfair dealers'], and of the primary and secondary boycott in their effort to subdue the plaintiffs to their demands."[78]

Unless it be that Holmes was ultimately persuaded—possibly as the result of Brandeis' prodding—that the Clayton Act, which had been adopted by Congress in the intervening years, deprived the federal courts of jurisdiction over the controversy, it would be difficult to reconcile the part he played in the *Danbury Hatters'* cases with his concurrence in the dissent by Justice Brandeis in the *Duplex* case.[79] The Duplex Printing Press Company, a manufacturer of newspaper printing presses in Michigan, applied to a United States District Court for an injunction to restrain the New York local of the International Association of Machinists from interfering with its business in violation of the Sherman Anti-Trust Act. It complained that the union was waging a campaign intended to keep the company's customers from buying its presses and the employees of the customers from handling and installing them. But before the district court could hear the case, the Clayton Act was adopted by Congress. Section 20 of the new law forbade federal courts to grant injunctions in cases "between an employer and employee . . . involving or growing out of, a dispute concerning terms or conditions of employment." On the basis of this provision, the two lower courts declined to issue the injunction. However, a majority of the Supreme Court, again speaking through Justice Pitney, held that Section 20 of the Clayton Act did not bar the granting of such an injunction. "Congress had in mind particular controversies, not general class war," Pitney declared. Section 20 of

and that they carried out their plan with such success that they restrained or destroyed the plaintiff's commerce with other States." *Id.* at 533.

Relying on a case in which he himself had written the Court's decision—Eastern States Retail Lumber Dealers' Association v. United States, 234 U.S. 600 (1914)—he stated the governing principle in one sentence: "Whatever may be the law otherwise, that case establishes that, irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of 'unfair dealers,' manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers combined with a view to joint action and in anticipation of such reports, is within the prohibitions of the Sherman Act if it is intended to restrain and restrains commerce among the States." *Id.* at 534.

78. 235 U.S. 522, 534.

79. In an effort to explain the "seeming inconsistency" between Holmes' position in the *Danbury Hatters'* cases and the later interstate boycott cases in which he dissented, it has been suggested that the fact that the boycott inspired by the hatters was prosecuted by a national labor organization may have led Holmes to conclude that there was "a clear and present danger of tyrannous labor domination." Nelles and Mermin, *Holmes and Labor Law*, 13 N.Y.U.L.Q. REV. 517, 546-47 (1936). The authors of this article did an excellent job in tracing and assessing the "impressive recognition" accorded to what they call 'Holmes' theory of justification" as applied to the industrial struggle.

the Clayton Act merely removed the taint of illegality from certain of labor's acts,[80] but the permitted activities had to do with the relation between an employer and his own employees and not with a controversy between an employer and workingmen not in his employ. Pitney thought that it would distort the meaning of the exemption embodied in Section 20 were it to be extended beyond "the parties affected in a proximate and substantial, not merely a sentimental or sympathetic, sense by the cause of dispute." By organizing sympathetic strikes and boycotts against the companies which used Duplex presses, the machinists' union was guilty of conspiring to restrain interstate trade.[81]

Without bluntly saying so, Justice Brandeis clearly implied in his dissent that he attributed the Court's decision to the failure of the majority to reckon with the facts of the situation which had led to the trouble. His simple summary of the circumstances culminating in the strike and boycott set the stage for his argument that there are times when economic coercion may be justified by self-interest:

> There are in the United States only four manufacturers of such presses; and they are in active competition. Between 1909 and 1913 the machinists' union induced three of them to recognize and deal with the union, to grant the eight-hour day, to establish a minimum wage scale and to comply with other union requirements. The fourth, the Duplex Company, refused to recognize the union; insisted upon conducting its factory on the open shop principle; refused to introduce the eight-hour day and operated for the most part, ten hours a day; refused to establish a minimum wage scale; and disregarded other union standards. Thereupon two of the three manufacturers who had assented to union conditions, notified the union that they should be obliged to terminate their agreements with it unless their competitor, the Duplex Company, also entered into the agreement with the union, which, in giving more favorable terms to labor, imposed correspondingly greater burdens upon the employer. Because the Duplex Company refused to enter into such an agreement and in order to induce it to do so, the machinists' union declared a strike at its factory, and in aid of that strike instructed its members and the members

80. 254 U.S. 433, 472. Section 20 of the Clayton Act provides that no restraining order or injunction granted by any federal court or judge "shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike, benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." 38 STAT. 738 (1914), 29 U.S.C.A. § 52 (1956).

81. 254 U.S. at 472.

> of affiliated unions not to work on the installation of presses which plaintiff had delivered in New York.[82]

Brandeis accepted the union's contention that the refusal of the Michigan firm to deal with the machinists threatened not only their own continued existence but the interest and standards of the union members employed by the company's competitors. Hence, whatever damage was suffered by the Michigan employer as the result of the boycott against its product had been inflicted not "maliciously" but in self-defense. Brandeis' basic attitude would seem to have been revealed by a rhetorical question asked by him: "May not all with a common interest join in refusing to expend their labor upon articles whose very production constitutes an attack upon their standard of living and the institution which they are convinced supports it?"[83]

From beginning to end, Brandeis' thesis in the *Duplex* case has as its "major premise" the complaint that the rights of labor have depended too much upon the private prejudices of judges. It was because of a "better realization of the facts of industrial life" that courts came to view strikes as legal though they were illegal at common law. At first, strikes were deemed to be lawful only when called for the purpose of raising wages or reducing hours, but in time some judges "because they viewed the facts differently" began to see that the same sort of "self-interest" justifying such strikes also made lawful the injury inflicted on an employer by a strike to unionize his shop. Everything depended on how judges appraised the economic system of the country:

> When centralization in the control of business brought its corresponding centralization in the organization of workingmen, new facts had to be appraised. A single employer might, as in this case, threaten the standing of the whole organization and the standards of all its members; and when he did so the union, in order to protect itself would naturally refuse to work on his materials wherever found. When such a situation was first presented to the courts, judges concluded that the intervention of the purchaser of the materials established an insulation through which the direct relationship of the employer and the workmen did not penetrate; and the strike against the material was considered a strike against the purchaser by unaffected third parties. . . . But other courts, with better appreciation of the facts of industry, recognized the unity of interest throughout the union, and that, in refusing to work on materials which threatened it, the union was only refusing to aid in destroying itself.[84]

The machinists and those from whom they sought cooperation had a common interest which the Duplex Printing Press Company threatened. Brandeis argued that unlike the boycott condemned in the

82. *Id.* at 479-80.
83. *Id.* at 481.
84. *Id.* at 482.

Danbury Hatters' cases, the cooperation sought by the machinists was from unions which were united with them by common interest rather than merely sympathy. "It is lawful for all members of a union by whomsoever employed to refuse to handle materials whose production weakens the union."

Taking sharp issue with the majority over Congress's purpose in adopting the Clayton Act, Brandeis insisted that it was meant to assure greater equality in the relations between employers and employees by keeping the federal courts from injecting themselves prematurely into the struggle. Reminding his colleagues that the statute was "the fruit of unceasing agitation" lasting more than twenty years, he undertook to show that it was "designed to equalize before the law the position of workingmen and employer as industrial combatants." One sentence from his summary of the discontent which led to the legislation adopted in 1914 gives the crux of the matter as he saw it: "Aside from the use of the injunction, the chief source of dissatisfaction with the existing law lay in the doctrine of malicious combination, and, in many parts of the country, in the judicial declarations of the illegality at common law of picketing and persuading others to leave work." The state of the law was both confused and uncertain, since some concerted activities by labor organizations were held to be lawful—as phases of "trade competition"—and others were condemned as "malicious" and therefore illegal. Those who sought remedial legislation believed that the outcome in labor struggles depended entirely on whether or not judges considered the purposes of the particular recourse by labor to be "socially or economically harmful." Brandeis put it this way: "It was objected that, due largely to environment, the social and economic ideas of judges, which thus became translated into law, were prejudicial to a position of equality between workingman and employer; that due to this dependence upon the individual opinion of judges great confusion existed as to what purposes were lawful and what unlawful; and that in any event Congress, not the judges, was the body which should declare what public policy in regard to the industrial struggle demands."[85]

His study of the background of the Clayton Act convinced Brandeis that it was the intention of Congress to immunize certain of labor's activities, regardless of their effect on others, against "judicial declarations" of illegality.[86] Judges were no longer to be free to determine

85. *Id.* at 485.

86. "The resulting law set out certain acts which had previously been held unlawful, whenever courts had disapproved of the ends for which they were performed; it then declared that, when these acts were committed in the course of an industrial dispute, they should not be held to violate any law of the United States. In other words the Clayton Act substituted the opinion of Congress as to the propriety of the purpose for that of differing

"according to their economic and social views" whether the harm inflicted on the employer in an industrial dispute was lawful because an incident in trade competition or an illegal injury. Yet before concluding his opinion Brandeis made it clear that he had no desire to endow his own views with any kind of higher moral or constitutional authority. This disclaimer, combining as it does a theory of political obligation with an insistence upon judicial restraint, is in the best tradition of the precepts we associate with Justice Holmes:

> Because I have come to the conclusion that both the common law of a State and the statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat.[87]

An even sharper note of bitterness and irony was struck by Justice Brandeis when he dissented, along with Holmes, six years later in a similar case.[88] To Sutherland, who wrote the Court's decision in this case, it appeared that the ruling in the *Duplex* case "might serve as an opinion in this case." Brandeis, on the other hand, tried to distinguish the earlier case in order to show that it did not apply to the struggle between the Journeymen Stone Cutters' Association and the Bedford Cut Stone Company.

In its drive to organize the Bedford Cut Stone Company and twenty-three other producers of Indiana limestone, the Association called on the members of all its local unions not to handle stone on which work had been done by non-union labor. These companies had had contracts with the Association, but after the contracts lapsed they began to employ men not affiliated with the Journeymen. All efforts to renegotiate the working agreements had proved fruitless.

Though the Journeymen Stone Cutters' Association and its general purposes were lawful, said Sutherland, its action in organizing strikes against the limestone companies threatened "to destroy or narrow

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judges; and thereby it declared that the relations between employers of labor and workingmen were competitive relations, that organized competition was not harmful and that it justified injuries necessarily inflicted in its course." *Id.* at 486.

87. *Id.* at 488.

88. Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37, 56 (1927).

petitioners' interstate trade." Brandeis thought that the restraint on interstate trade was entirely reasonable, because it sprang from the Journeymen Association's use of a perfectly legitimate instrument of "self protection." Observing that "the propriety of the unions' conduct can hardly be doubted by one who believes in the organization of labor," he stressed that in their "struggle for existence" workingmen may cooperate even if in doing so "the interstate trade of another is thereby affected." This was also the position of the two lower federal courts, which had declined to issue the injunction sought by the employers. Brandeis maintained that the only "serious question" on which the Supreme Court was divided in the *Duplex* case was whether the Clayton Act had forbidden Federal courts to issue injunctions in the type of controversy involved in that case. And so he proceeded to enumerate the respects in which the conduct of the Stone Cutters differed from that of the machinists: "There was no attempt to seek the aid of members of any other craft, by a sympathetic strike or otherwise. The contest was not a class struggle. It was a struggle between particular employers and their employees."[89]

Despite his painstaking effort to differentiate the two cases, it was apparent that Justice Brandeis was primarily interested in safeguarding the rights and weapons of workers as combatants in industrial conflict. He spoke of the power and great financial resources of the employers, organized in a trade association and together controlling seventy per cent of all the cut stone in the United States, and of the relatively weak position of each of the one hundred and fifty union locals, which could easily be destroyed by "scabs" brought in from other cities. Justice Brandeis ended his dissent by calling on the Court to be consistent and allow labor the right to combine and cooperate even as it had permitted business so to do:

> If, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman Law and the Clayton Act an instrument for imposing restraints upon labor which reminds one of involuntary servitude. The Sherman Law was held in *United States v. United States Steel Corporation,* 251 U.S. 417, to permit capitalists to combine in a single corporation 50 per cent of the steel industry of the United States dominating the trade throughout its vast resources. The Sherman Law was held in *United States v. United Shoe Machinery Co.,* 247 U.S. 32, to permit capitalists to combine in another corporation practically the whole shoe machinery industry of the country, necessarily giving it a position of dominance over shoe-manufacturing in America. It would, indeed, be strange if Congress had by the same Act willed to deny to members of a small craft of workingmen the right to cooperate in simply refraining from work, when that course was the only means of self-protection against a combination of militant and powerful employers. I cannot believe that Congress did so.[90]

89. *Id.* at 60.
90. *Id.* at 65. It may be of interest to recall that Justice Brandeis had

VI

The growing resistance to "government by injunction" summarized by Justice Brandeis in the *Duplex* case was not confined to the halls of Congress. But state statutes outlawing labor injunctions fared no better before the Supreme Court than did Section 20 of the Clayton Act. Indeed, less than a year following the *Duplex* decision, an almost identical measure adopted by the first legislature of Arizona in 1913 was set aside.[91] It prohibited the State's courts from issuing injunctions in cases growing out of labor disputes unless necessary to protect property against violence. It was obviously intended to keep the courts from interfering with peaceful picketing and boycotts. Claiming that the statute was unconstitutional, Truax, the owner of a restaurant in Bisbee, Arizona, sought an injunction to restrain the strikers from continuing the activities that had resulted in a drastic decline of his business. The strikers had proclaimed their grievances in the usual ways—by handbills, pickets, and banners informing the public that the restaurant was "unfair" to union labor.

William Howard Taft, who but recently had been named to the Chief Justiceship on the death of Edward D. White, led the Court in holding the Arizona law to be an infringement of the Fourteenth Amendment. For Taft the fundamental consideration appeared to be that the business of the restaurateur was a property right and that "free access" to the restaurant was an "incident" of that constitutionally protected right. Under the compulsion of this premise, the final judgment naturally depended on the evaluation of the conduct of the strikers. Once again the fate of public policy was apparently determined by judicial distaste for an isolated set of facts. Taft's conclusion that the activities of the strikers constituted "moral coercion by illegal annoyance and obstruction" followed logically from his view that the methods used to bring the employer to terms were unlawful. "The real question," he said, was: "Were the means used here illegal?" The continuous patrolling of the premises, the loud appeals of the pickets at the entrance to the restaurant, the abusive epithets, threats, and libelous attacks—these things convinced him that the union had set out to win its demands not by peaceful persuasion but by a campaign of force. So a majority of the Supreme Court found that by legalizing acts intrinsically unlawful, the Arizona statute violated due process of law. It also held that by barring relief by injunction only in cases arising from controversies over terms or conditions of employment, Arizona was resorting to a discrim-

refrained from participating in both *United States v. United States Steel Corp.* and *United States v. United Shoe Machinery Co.* Thus did the foe of bigness in business keep himself from discussing the issue whether mere size is an offense under the Sherman Act.

91. Truax v. Corrigan, 257 U.S. 312 (1921).

inatory classification and was therefore denying to employers equal protection guaranteed by the Fourteenth Amendment.

This five-to-four decision of the Supreme Court was described by Felix Frankfurter in a contemporary editorial comment as "fraught with more evil than any which it has rendered in a generation."[92] Professor Frankfurter was particularly critical of the Chief Justice for his failure to reckon with the realities of modern industrial conflict, all the more surprising, he thought, in view of Taft's service on the War Labor Board. The Chief Justice's approval of the court injunction in labor controversies was so firm, it was suggested, that he was led by a "process of self-delusion" to sanctify it with constitutional authority, forgetting that the use of injunctions in such cases was at the time only thirty years old. For Chief Justice Taft "there never was a time," Professor Frankfurter wrote, "when injunctive relief was not the law of nature. For him the world never was without it, and therefore the foundations of the world are involved in its withdrawal."[93]

Curiously enough, even conservative Mahlon Pitney—who dissented in this case, along with Justices Holmes, Brandeis and Clarke —found Taft's position too reactionary. "I cannot believe," he observed, "that the use of the injunction in such cases—however important—is so essential to the right of acquiring, possessing and enjoying property that its restriction or elimination amounts to a deprivation of liberty or property without due process of law, within the meaning of the Fourteenth Amendment." Since there was always the redress of the criminal law and suits for damages, it could not be said that property was left unprotected. Nor was it arbitrary for the legislature to deny to a particular class of litigants the injunctive remedy in the courts, not so long as all employers "similarly circumstanced" were treated alike. The majority's view of equal protection, Pitney continued, would "transform the provision of the Fourteenth Amendment from a guaranty of the 'protection of equal laws' into an insistence upon laws complete, perfect, symmetrical."[94]

At one point in his elaborate refutation, Justice Pitney strongly implied that a majority of his colleagues were disregarding the principle that within certain limits, it was for the states themselves to determine "their respective conditions of law and order, and what kind of civilization they shall have as a result."[95] This criticism, along with comments on related themes in the opinions by Taft, Holmes and Brandeis, only served to substantiate the inference that the Justices were not

92. *The Same Mr. Taft,* New Republic, Jan. 18, 1922, reprinted in LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER 44 (MacLeish and Prichard ed. 1939).
93. *Id.* at 47.
94. 257 U.S. at 344, 351.
95. *Id.* at 349.

unaware that the deeper issue in *Truax v. Corrigan* was the effect of the judicial veto upon necessary social adjustments. "The Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual," Chief Justice Taft stated categorically.[96]

Both Holmes and Brandeis reacted rather vigorously against the use of such absolutes in the discussion of practical constitutional problems. Holmes might well have been tempted to quote one of his own aphorisms to describe the hazard inherent in the Chief Justice's intellectual process in this case: "To rest upon a formula is a slumber that, prolonged, means death."[97] For he politely suggested in his short dissent that the Court had been led into error by too rigid a conception of property rights. Once again he deplored "delusive exactness" in the application of constitutional provisions, insisting that it was "a source of fallacy throughout the law." He thought that the case in hand illustrated both the confusion and the dangers inherent in a too easy reliance on abstract formulas.

> By calling a business "property" you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed. An established business no doubt may have pecuniary value and commonly is protected by law against various unjustified injuries. But you cannot give it definiteness of contour by calling it a thing. It is a course of conduct and like other conduct is subject to substantial modification according to time and circumstances both in itself and in regard to what shall justify doing it a harm.[98]

Taft's objection to the Arizona law as discriminatory because it restricted the power of courts to grant injunctions in employer-employee controversies only struck Holmes as equally unreal. "Legislation may begin where an evil begins," he remarked, adding, "If, as many intelligent people believe, there is more danger that the injunction will be abused in labor cases than elsewhere I can feel no doubt of the power of the legislature to deny it in such cases."[99] Holmes ended his opinion with what he called a "general consideration" but it is in the nature of a quite specific rejoinder to Taft's sweeping shibboleth about experimentation. It has become one of the most widely quoted clues to the core of Holmes' constitutional philosophy. "There is nothing I more deprecate," the Justice wrote, "than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experi-

96. *Id.* at 338.
97. Holmes, *Ideals and Doubts,* in COLLECTED LEGAL PAPERS 306 (1920).
98. 257 U.S. at 342-43.
99. *Id.* at 343.

ments may seem futile or even noxious to me and to those whose judgment I most respect."[100]

The wisdom of not using the Constitution to stifle social experiments may be said to have been fully documented by Justice Brandeis in his massive dissent. His opinion in this case is fundamentally a plea for recognizing the essentially tentative character of governmental efforts to deal with social problems. Particularly in the difficult field of labor relations, it would only aggravate the struggle among the contending parties if government were stopped from trying out new methods for dealing with it. "The rules governing the contest necessarily change from time to time. For conditions change; and, furthermore, the rules evolved, being merely experiments in government, must be discarded when they prove to be failures."[101] Judged by existing rules, practically every change in the legal relation between employers and employees necessarily curtails to some degree the liberty or property of one of the parties, but that fact in itself does not make the modification unconstitutional. The basic question is whether such changes in the law are arbitrary or unreasonable, and it can be answered satisfactorily only if the Court would take a close look at the nature and history of the problem with which the legislature was concerned. Justice Brandeis therefore proceeded once again to summarize the guides to informed decision:

> Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary, can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial and political, of the community to be affected thereby. Resort to such facts is necessary, among other things, in order to appreciate the evils sought to be remedied and the possible effects of the remedy proposed. Nearly all legislation involves a weighing of public needs as against private desires; and likewise a weighing of relative social values. Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly, when the public conviction is both deep-seated and widespread and has been reached after deliberation.[102]

In the context of such an inquiry, the elaborate historical survey that followed seems almost unavoidable. The experience with both the judicial and legislative treatment of conflicts between employers and employees in Great Britain, its Dominions and the United States is sketched and the reasons for the opposition to the labor injunction are sympathetically set forth. To Brandeis the fluctuations in the conceptions of liberty and property which this history revealed were the best of reasons for not declaring a particular law to be

100. *Id.* at 344.
101. *Id.* at 354-55.
102. *Id.* at 356-57.

arbitrary and unreasonable "merely because we are convinced that it is fraught with danger to the public weal, and thus to close the door to experiment within the law." This is one of those occasions when, as Walton Hamilton has said of Brandeis' dissents generally, after reading "the opinion of the Court" and turning to the Brandeis dissent, one "finds himself in another intellectual world."[103]

To meet the objection that the ban on injunctions invaded property rights, Justice Brandeis pointed out that "the real motive" in seeking an injunction was ordinarily not to protect property but "to endow property with active, militant power which would make it dominant over men."[104] Moreover, the labor injunction gives to the employer the benefits deriving from criminal penalties while curtailing the personal liberty of the employee without affording him the protection of the Bill of Rights.[105] Under the guise of protecting property, a single judge by means of the injunction is putting the "sovereign power" of the community on the side of the employer; the prohibition on injunctions would merely equalize the industrial struggle. Again and again, Brandeis referred to the great diversity of opinion to be found in both legislation and judicial decisions concerned with labor disputes, thus underscoring his conviction that "pending the ascertainment of new principles to govern industry, it was wiser for the State not to interfere in industrial struggles by the issuance of an injunction."[106] He saw the Arizona law as being simply an exercise of the legislature's prerogative to control the equity jurisdiction of courts. One of his concluding remarks is in itself a key to the difference between Brandeis and his more conservative colleagues: "[R]ights of property and the liberty of the individual must be remoulded, from time to time, to meet the changing needs of society."[107]

103. Hamilton, *The Jurist's Art,* in MR. JUSTICE BRANDEIS 178 (Frankfurter ed. 1932).

104. 257 U.S. at 368.

105. "In America the injunction did not secure recognition as a possible remedy until 1888. When a few years later its use became extensive and conspicuous, the controversy over the remedy overshadowed in bitterness the question of the relative substantive rights of the parties. . . . The equitable remedy, although applied in accordance with established practice, involved incidents which, it was asserted, endangered the personal liberty of wage-earners. The acts enjoined were frequently, perhaps usually, acts which were already crimes at common law or had been made so by statutes. The issues in litigation arising out of trade disputes related largely to questions of fact. But in equity issues of fact as of law were tried by a single judge, sitting without a jury. Charges of violating an injunction were often heard on affidavits merely, without the opportunity of confronting or cross-examining witnesses. Men found guilty of contempt were committed in the judge's discretion, without either a statutory limit upon the length of the imprisonment, or the opportunity of effective review on appeal, or the right to release on bail pending possible revisory proceedings. The effect of the proceeding upon the individual was substantially the same as if he had been successfully prosecuted for a crime; but he was denied, in the course of the equity proceedings, those rights which by the Constitution are commonly secured to persons charged with a crime." *Id.* at 366-67.

106. *Id.* at 368.

107. *Id.* at 376.