NEW METHODS IN DUE-PROCESS CASES[1]

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In addressing the court in due-process cases one should not commence with the usual salutation "May it please the Court." Instead, one should say "My Lords." Backed by and charged with the enforcement of the due-process clause of the fifth and fourteenth amendments, the Supreme Court of the United States is the American substitute for the British house of lords. It constitutes the real and only conservative second chamber of the federal government. It is a second conservative chamber for each of the state governments.[2]

The time has come when the political scientists of the country should recognize, in the decisions of the United States Supreme Court under the due-process clause, the functioning of a second chamber, organized to defeat the popular will as expressed in legislation when that will appears to endanger what the court may regard as a fundamental requirement of the social structure itself.

Like all conservative second chambers, the Supreme Court and the due-process clause are in a hopeless dilemma. If the popular will were frustrated as often as the dissenting opinions of Mr. Justice McReynolds indicate that it should be, the second chamber function of the court would be assailed by the recall of judicial decisions. If the court bowed to the popular will as often as the dissenting opinions of Mr. Justice Holmes indicate that it should, the second chamber function of the court would cease to be exercised. The success of the United States Supreme

[1] A paper read before the American Political Science Association, Philadelphia, December 27, 1917.

[2] *Unpopular Government in the United States*, University of Chicago Press, 1914. Chap. XVI.

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Court as a second chamber consists in its being able to live while still subject more or less continuously to varying degrees of unpopularity.

These preliminary observations are not made by way of criticism of the court's second chamber function (for such a function is desirable and necessary), but because it is important that counsel in a due-process case should keep always before him the true character of the tribunal he addresses.

Having saluted the court as "My Lords," counsel appearing against the act in the usual case involving so-called "social legislation"—as hours of labor laws, minimum wage acts and prohibitions upon such a business as employment agencies—has a comparatively easy task. On the face of the record it will appear that by the act the managers of business are deprived of liberty or property or both. A *prima facie* case is thus made against the validity of the act, and counsel opposing it may safely rest until the other side has been heard in justification of it. After that, counsel opposing the act should join issue on the broad question of whether a justification has been established.

The principal burden of the argument falls upon counsel supporting the act. He must justify the taking of liberty or property which plainly appears. "Due process" in this class of cases is merely justification.

1. It is all out of fashion to attempt to justify by incantations to the "police power." The judges are quite alive to the fact that you get nowhere along that line till you classify and define police power, and by that time you might as well have classified and defined the possible means of justification.

2. The law teachers, following what is generally supposed to have been the teaching of the late Professor J. B. Thayer, have attempted to translate "justification" or "due process" into this general formula: The act which deprives one of property or liberty is justified if that deprivation has a substantial and rational or reasonable relation to the promotion of the health, safety, morals or general welfare of the public or any part of the public.

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An essential part of this formula in the hands of the professors of law has been the administrative rule[3] that no act is to be declared unconstitutional unless it is clearly so "beyond a reasonable doubt" or, as some courts have said, beyond a "rational doubt."[4] This has been declared to mean that the "violation of a constitutional right ought to be as obvious to the comprehension of every one as an axiomatic truth, as that the parts are equal to the whole;"[5] and that "the validity of a law ought not to be questioned unless it is so obviously repugnant to the Constitution that, when pointed out by the judges, all men of sense and reflection in the community may perceive the repugnancy."[6]

One has only, however, to look at the Lochner case,[7] the Adair and Coppage cases,[8] Smith v. Texas,[9] the Upper Berth case,[10] and the recent Washington Employment Agency case,[11] to find that acts, which intelligent dissenting judges could regard as falling within the formula of the law teachers, were held invalid. This demonstrates the futility of the formula, and a legal formula which does not work in a close case is not of much use to counsel.

3. The attempted legalistic formulae which the court itself uses are the most obvious frauds.

In C. B. & Q. R. R. Co. v. McGuire,[12] Mr. Justice Hughes,

[3] J. B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harvard Law Review*, 129, 138–142.

[4] Ex Parte M'Collum, 1 Cow. (U. S.) 550, 564; Sinking Fund Cases, 99 U. S. 700.

[5] Grunball v. Ross, Charlton (Ga.) 175.

[6] Administrators of Byrne v. Admrs. of Stewart, 3 Des. (S. C.) 466.

[7] Lochner v. N. Y., 198 U. S. 45 (1905) where the New York ten-hour law for bakers was held void.

[8] Adair v. U. S., 208 U. S. 161 (1908); Coppage v. State of Kansas, 236 U. S. 1 (1915), which held void acts which forbade employers to discharge employees because they belonged to a union.

[9] 233 U. S. 630 (1914), where an act was held void which prohibited any person from acting as a conductor on a railroad train without having for two years prior thereto either worked as a brakeman or conductor on a freight train.

[10] Chi. Mil. & St. Paul R. R. v. Wisconsin, 238 U. S. 491 (1915), where an act was held void which required the Railroad Company to leave the upper berth up when it had not been disposed of and the lower berth was occupied.

[11] Adams v. Tanner, 244 U. S. 590, holding void an act which in effect prohibited certain employment agencies from doing business.

[12] 219 U. S. 549 (1911).

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speaking for the court, and after reviewing cases involving the question of "due process," where the act had been sustained, says:

"The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review."

This statement says nothing until it has been determined what is meant by "a purpose which it is competent for government to effect," and by "within the governmental authority."

In McLean v. Arkansas,[13] Mr. Justice Day, speaking for the court said:

"If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail."

A critical examination of the first part of this statement shows it to be quite as meaningless and useless as a reference to the "police power." The court says the act must be sustained, if a condition of affairs existed (1) concerning which the legislature of the state might pass the law, (2) in the exercise of its conceded right to enact laws for the protection of the health, safety, or welfare of the people. Now who would doubt that, with these conditions and premises assumed under which the law must be valid, it would be sustained? Take the second half of the above statement. The act must fail (1) if such action was an arbitrary interference with the right to contract or carry on business, (2) and having no just relation to the protection of the public within the scope of legislative power. Who can doubt that an act

[13] 211 U. S. 539, 548 (1909).

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about which all these self-proving assertions are true would be invalid? Such statements reveal nothing.

The opinions of the court are replete with statements as circular and meaningless as these.

4. Mr. Justice Holmes gave us a revealing flash when, in his dissenting opinion in the Lochner case, he said:

"The decisions will depend on a judgment or intuition more subtle than any articulate major premise."

This is no announcement of a legal theory by a dissenting judge. It is a bit of psycho-analysis of the mental operations and visceral sensations of judges who decide due-process cases. It is testimony by a direct observer that the judges achieve a certain freedom of action in curbing the legislature by abandoning the rigid formulae of law and acting, like juries and legislatures themselves, upon judgment or intuition—something more subtle than any articulate premise—an admirable basis, certainly, for the exercise by the court of its constitutional function as a conservative second chamber.

The police power, the law professor's formula (divorced from the administrative rule noted), the circular formulae of the judges, and the inarticulate major premise, all come to this: The court stands between the popular will and certain fundamentals of the social order. It condemns acts of the legislature as the house of lords might refuse its approval of an act adopted by the commons.

5. Counsel arguing in support of the act had, therefore, better proceed at once to demonstrate that the legislation in question is not inimical to those fundamentals of the social order which the court protects; or, better yet, that the act is necessary in order to improve and preserve the social order.

To make such an argument, counsel needs to know what are the fundamentals of the social order which the court protects. No attempt is here made to formulate those fundamentals,[14] because to do so one must be more than a lawyer. In passing, however, one may deplore that so much speculation is to be

[14] See however, "Due Process, the Inarticulate Major Premise, and the Adamson Act," 26 *Yale Law Journal*, 527–529.

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easily found concerning social orders and the fundamentals of social orders that do not exist, and so little information about those that do.

Then counsel appearing in support of the act need evidence in order to demonstrate by proofs that the act in question is not inimical to the fundamentals of the social order. This is where counsel supporting the act most often fail.

(a) In many cases they do not produce any evidence of actual conditions to which the statute applies. They do not even collect any general information for the court to take judicial notice of. Instead, they rely upon presumptions in favor of the act based upon the further presumption (often notoriously contrary to fact) that the legislature made a full and complete investigation and found a suitable justification for the act in question.

Such presumptions make the weakest kind of a case. If the court really founded its judgments upon such presumptions it would largely abrogate its function as a conservative second chamber. As a matter of fact, such presumptions are apparently effective only when the court takes judicial notice of the state of opinion or of facts and circumstances which furnish a justification. Thus, it has never been necessary to put in evidence in order to justify the prohibition of the liquor business, or the sale of cigarettes, or gambling in futures in grain, or stocks. But when it comes to prohibiting or regulating in a burdensome manner what appear to be legitimate and useful, if not necessary, businesses, the presumption of justification fails. This indicates that it never was really effective.

(b) Mr. Brandeis in the eight-hour law for women case,[15] Mr. Frankfurter in the ten-hour law for men[16] and minimum wage act for women[17] cases, and, very recently, Mr. Justice Brandeis in his dissenting opinion in the Washington Employment Agency case,[18] presented to the court an elaborate collec-

[15] Muller v. Oregon, 208 U. S. 412 (1908).
[16] Bunting v. Oregon, 243 U. S. 426 (1917).
[17] Stettler v. O'Hara, 243 U. S. 629 (1917).
[18] Adams v. Tanner, 244 U. S. 590 (1917).

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tion of information, of which the court was asked to take judicial notice for the purpose of furnishing evidence to justify the acts in question.

This course appears to be effective when the court is convinced that the data presented has been generally accepted as true and may be relied upon as showing the general verdict of those entitled to speak with authority concerning the facts. This has obviously been the case in the more recent hours of labor cases.

On the other hand, when the court is not convinced that the data collected has been generally accepted as containing a general verdict on the issues of fact and opinions presented, but consists merely of *ex parte* statements advocating a particular view, it is quite ineffective as the basis of evidence upon which to found a justification.

This came out in the argument in the Oregon minimum wage case when the Chief Justice picked up Mr. Frankfurter's fat collection of data on minimum wage laws and declared that he could produce twice as much material to show that the institution of private property was all wrong and should be abolished.

When the recent Washington Employment Agency act was before the court Mr. Justice Brandeis' data concerning the evils of employment agencies, which the act in question sought to cure by prohibiting the business entirely, proved utterly ineffective because the majority of the court evidently regarded it as a collection of *ex parte* statements and opinions which, for all the court could tell, might be offset by equally potent facts and opinions on the other side.

That the majority of the court in the Washington Employment Agency case was unwilling to take the data put forward by Mr. Justice Brandeis as the final word upon the facts appears from the following language of the opinion of the court:

"Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible

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practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest."

The court evidently had in mind that if an act abolishing the legal profession came before it and one side collected in many volumes all the harsh things that have been said *ex parte* about lawyers, and all the opinions which have advocated their complete suppression, the act would not be justified because, in spite of the volume of such data, it had not been authenticated by general acceptance.

In the same way, an act abolishing the steel industry could hardly be justified because an enormous amount of data might be collected showing the vast loss of life in the business, and the way in which it used up the vitality and energy of human beings, even when their lives were not taken by accidents.

How can any one say that the court, in the Washington Employment Agency case, was wrong? Certainly it has not yet been generally accepted in the United States that the employment agency business is necessarily and inherently bad for the community, like the liquor business or like gambling. It may be that we shall come to such a state of opinion, but we are not there yet. Hence the *ex parte* statements and investigations of specialists have not been authenticated by general acceptance. Since they were not, in the particular case, authenticated by special proofs by witnesses subject to cross-examination, they cannot properly be used as the basis for the justification of an act prohibiting such agencies.

In a few years perhaps such data may become authenticated by general public acceptance. Then the court will act upon that evidence and will sustain the legislation.

If the Washington Employment Agency case was rightly decided on the ground stated, we have the key to the decision in the Lochner case—which, in spite of all that has been said, stands and is not overruled. In that case the dissenting judges relied only on data of which the court was asked to take judicial notice. The majority, however, did not regard such data as having been authenticated by any general public acceptance. It remained,

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so far as it was applicable to the baking industry, merely the *ex parte* views of the advocates of a particular thesis.

The difference between the Lochner case and the Oregon ten-hour law for men case is that the record of evidence in the two cases is different. In the Oregon case the court took notice of the fact that the data produced had been authenticated by general public acceptance, so that the court could safely proceed on the supposition that the investigations and data produced were true.

(c) The only way to meet the skepticism of the court towards such data as Mr. Justice Brandeis relied upon in his dissenting opinion in the Washington Employment Agency case, is to build up a record of evidence in the trial court, by witnesses produced for cross-examination—witnesses who will testify to the facts and opinions upon which a justification may be based, and will establish their conclusions as those which, if not already generally accepted, are nevertheless certain to be accepted. Such a method of putting in a case for the act challenges the opponents to produce evidence on their side. If they fail to do so the basis is laid for the contention in the Supreme Court that they must take the consequences of their default, and that the court cannot, in the face of full and uncontroverted proofs, ignore in the particular case before it facts and data which, if true, show a justification for the legislation in question.

Counsel seeking to justify an act taking liberty and property has these three points to consider:

First: Can he rely, for the facts which make the justification, upon what the court takes judicial notice of without any particular data being brought to its attention—as that liquor sales, gambling, insanitary practices, the failure to use prophylactic health measures and safety appliances, are inimical to the welfare of society?

Second: If not, can he still rely upon data which, when brought to the attention of the court, will be effective because the court will recognize it as embodying generally accepted facts and conclusions—as in the recent hours of labor cases?

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Third: If not, then counsel must build up his case in the trial court by the testimony of witnesses subject to cross-examination. He must put in evidence his data as to facts and opinions, and then authenticate it completely by testimony which will show that the conclusions reached must become generally accepted, and by challenging those who appear against the act to produce any evidence to the contrary on their side.

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LEGISLATIVE NOTES AND REVIEWS

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Absent-voting Laws, 1917. Beginning with the Vermont law of 1896, twenty-four states, comprising not far from one-half the population of continental United States, now have legislation in force which permits duly qualified electors to vote at general or primary elections, or both, outside of the election precinct in which they reside.

There are two main classes of absent-voting laws; those which expressly apply to persons engaged in the military service of the state or nation; and those which are designed primarily for the benefit of civilians, although most of them are not in terms expressly restricted to that class of voters. Only the Oklahoma law of 1916 and the laws enacted in 1917 which come in the last division will be considered here.

Although differing in details, these laws in their general features follow more or less closely two general types, namely, the Kansas and the North Dakota types.[1] There are now ten states with laws similar to the Kansas act of 1911[2] and fourteen states with laws resembling the North Dakota act of 1913.[3]

All of the thirteen laws now under consideration,[4] with three excep-

[1] For summaries of absent-voting legislation enacted before 1917, see *American Political Science Review*, VIII, 442, (1914), X, 114, (1916), XI, 116, 320, (1917); *National Municipal Review*, III, 733, (1914); *Case and Comment*, XXIII, 358, (1916).

[2] Colorado, Kansas, Missouri, New Mexico, Nebraska, Oklahoma, Oregon, Vermont, Washington, Wyoming.

[3] Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, North Carolina, North Dakota, Ohio, South Dakota, Tennessee, Texas, Virginia, Wisconsin.

[4] *Laws of Illinois, 50th General Assembly*, (1917), pp. 434 ff. *Laws of the State of Indiana, 70th Regular Session*, (1917), pp. 317 ff. *General Election Laws of Minnesota*, (1917), pp. 137 ff. *Laws of Montana, 15th Regular Session*, (1917), pp. 352 ff. *Public Laws of North Carolina*, (1917), pp. 78 ff. *New Mexico Session Laws, of 1917*, pp. 956 ff. *Primary and General Election Laws of the State of Oklahoma*, (1917), pp. 16 ff. *Election Laws of the State of Ohio*, (1917), pp. 132 ff. *Laws of South Dakota*, (1917), pp. 317 ff. *General Laws of Texas, 35th Legislature*, (1917), pp. 62 ff. *Session of Laws of the State of Washington, 15th Session*, (1917), pp. 712 ff. *Wisconsin Session Laws*, (1917), pp. 956 ff. *Digest of the Election Laws of Tennessee*, (1918), ch. 8.

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