MILITARY men are proverbially bad politicians. Our officers have always endeavored to win popular support to projects for strengthening the army, only to fail and sink back into disgruntled forebodings. The military habit of mind appears to be incompatible with the technique of successful persuasion. Just now some of our ablest army men are engaged in compromising an excellent purpose with faulty popular methods. They tell us that we are in imminent danger of invasion; that a hostile army could easily be landed on the Atlantic coast between Boston and Washington, seize our great seaports, cut our industry to pieces, and force us to humiliating terms of national surrender. Perhaps they are right; but the average American believes that they are ludicrously wrong, and therefore is prepared to discount all their opinions, however well based some of them may be. They tell us that there is no chance of securing a sufficient defensive force by voluntary enlistment; we must have some form of universal military training. Perhaps again they are right, but the average American is not prepared to give serious consideration to the plan. The public is favorably disposed toward a moderate strengthening of the army and navy. It would be the part of wisdom for our military propagandists to agree upon the maximum strengthening which looks possible and concentrate upon securing it.

IT is an extreme statement that the Federal government has been doing nothing to aid our domestic and foreign trade development. In his reply to President Ripley, said to be authority for such a statement, Secretary Redfield offers proof that the government has been doing at least something in this direction. By the coöperation of our commercial attachés we have gained for this country the business of melting Bolivian tin; have equipped two cotton mills in China with American machinery; secured the removal of a preferential tax levied by Spain upon our coal; placed an order for 40,000 bales of cotton annually for five years in Russia; obtained an order by an American firm for $200,000 worth of telegraph material; received contracts for railway material and the building of a capitol in Formosa; for the construction of a pipe line in Rumania, and a telephone system in Bergen, Norway. These are achievements not to be ignored; but they are scarcely of such a character as to indicate that our government is addressing itself seriously to the task of coördinating our economic forces for more effective prosecution of commercial interests at home and abroad. The occasional intervention of an American consul or commercial attaché in securing a contract worth a few thousand dollars is only a measure of larger opportunities missed. What we might expect of our government is some contribution toward securing coöperation among producers for export trade; some progress in disentangling the good of combinations from the evil; some conscious policy for the employment of our banking resources to national ends, and the like. But these are matters for which Congress and not our Department of Commerce is responsible.

## Brandeis

ONE public benefit has already accrued from the nomination of Mr. Brandeis. It has started discussion of what the Supreme Court means in American life. From much of the comment since Mr. Brandeis's nomination it would seem that multitudes of Americans seriously believe that the nine Justices embody pure reason, that they are set apart from the concerns of the community, regardless of time, place and circumstances, to become the interpreter of sacred words with meaning fixed forever and ascertainable by a process of ineluctable reasoning. Yet the notion not only runs counter to all we know of human nature; it betrays either ignorance or false knowledge of the actual work of the Supreme Court as disclosed by two hundred and thirty-nine volumes of United States reports. It assumes what is not now and never was the function of the Supreme Court.

The significant matters which come before the Supreme Court are not the ordinary legal questions of the rights of Smith v. Jones. If they were, the choosing of a Supreme Court Justice would be of professional rather than of public interest. In our system of government the Supreme Court is the final authority in the relationship of the individual to the state, of the individual to the United States, of forty-eight states to one another, and of each with the United States. In a word, the Court deals primarily with problems of government, and that is why its personnel is of such nation-wide importance. But though the Court has to decide political questions, it escapes the rough-and-tumble of politics, because it does not exercise power for the affirmative ends of the state. What it does is to define limitations of power. It marks the boundaries between state and national action. It determines the allowable sphere of legislative and executive conduct.

These are delicate and tremendous questions, not to be answered by mechanical magic distilled within the four corners of the Constitution, not to be solved automatically in the Constitution "by taking the words and a dictionary." Except in a few very rigid and very unimportant specific provisions, such as those providing for geographic uniformity or prohibiting the enactment of bills of attainder, the

Justices have to bring to the issues some creative power. They have to make great choices which are determined in the end by their breadth of understanding, imagination, sense of personal limitation, and insight into governmental problems. It is a commonplace of constitutional law, insisted upon by students like David Bradley Thayer, a commonplace to be kept vigilantly in mind, that Justices of the Supreme Court must be lawyers, of course, but above all, lawyers who are statesmen.

To generalize about periods and tendencies in the history of the Supreme Court is to omit many details and qualifications, but that the great problems of statesmanship have determined the character of the Court at different periods in our history there can be no doubt. In the first period, barring a negligible opening decade, the Court under Marshall's great leadership dealt with the structure of government. It gave legal expression to the forces of nationality. Marshall also laid down what may be called the great canon of constitutional criticism by insisting that it is a "Constitution that we are construing, a great charter of government with all the implications that dynamic government means." After Marshall the ever-present conflict of state and national power absorbed attention until the Civil War. Then followed a third period in which national power was ascendant, a period of railroad and industrial development, of free lands and apparently unlimited resources, a period in which the prevailing philosophy was naturally enough *laissez-faire*. It was a period of luxuriant individualism. The Fourteenth Amendment was made the vehicle of its expression, the quality of the Court was exemplified in the sturdy personalities of Justices like Brewer and Peckham. "Liberty of contract" flourished, social legislation was feared, except during the sound but brief leadership in the opposite direction by Chief Justice Waite.

The period of invidualism and fear is over. Occasionally there is a relapse, but on the whole we have entered definitely upon an epoch in which Justice Holmes has been the most consistent and dominating force, and to which Justices Day and Hughes have been great contributing factors. It is the period of self-consciousness as to the true nature of the issues before the Court. It is the period of realization that basically the questions are not abstractions to be determined by empty formula, that contemporary convictions of expediency as to property and contract must not be passed off as basic principles of right. It is this new spirit which led Justice Holmes to say that it was the Court's duty "to learn to transcend our own convictions, and to leave room for much that we hold dear to be done away with, short of revolution, by the orderly change of law."

At present the important field of judicial interpretation is practically restricted to two provisions of the Constitution: the Commerce clause and the Fourteenth Amendment. Around these center the contending forces of state and national action. The Fourteenth Amendment in a word involves an application of the "police power," which extends "to all the great public needs." And so it covers the whole domain of economic and social and industrial facts and the state's response to these facts. The principle of law—that the state cannot exercise arbitrary or unwarranted power—is undisputed. The difficulty is with the application of the principle, and the application involves grasp and imagination and contact with the realities of a modern industrial democracy. Under the Commerce clause we are dealing not with abstract legal questions but the pervasive facts of life, for, as the Supreme Court itself has said: "Commerce among the states is not a technical legal conception but a practical one drawn from the course of business."

To the consideration of these very questions Mr. Brandeis has given his whole life. To their understanding he brings a mind of extraordinary power and insight. He has amassed experience enjoyed by hardly another lawyer to the same depth and richness and detail, for it is the very condition of his mind to know all there is to be known of a subject with which he grapples. Thus he is a first-handed authority in the field of insurance, of industrial efficiency, of public franchises, of conservation, of the transportation problem, of the inter-relations of modern business and modern life.

But his approach is that of the true lawyer, because he seeks to tame isolated instances to as large a general rule as possible, and thereby to make the great reconciliation between order and justice. Mr. Brandeis would extend the domain of law, as he only very recently put it before the Chicago Bar Association, by absorbing the facts of life, just as Mansfield in his day absorbed the law merchant into the common law. This craving for authentic facts on which law alone can be founded leads him always to insist on establishing the machinery by which they can be ascertained. It is this which has led him to create practically a new technique in the presentation of constitutional questions. Until his famous argument on the Oregon ten-hour law for women, social legislation was argued before our courts practically *in vacuo*, as an abstract question unrelated to a world of factories and child labor and trade unions and steel trusts. In the Oregon case for the first time there were marshalled before the Supreme Court the facts of modern industry which reasonably called for legislation limiting hours of labor. This marked an epoch

in the argument and decision of constitutional cases, and resulted not only in reversal of prior decisions, but in giving to the courts a wholly new approach to this most important class of present-day constitutional issues. As advocate Mr. Brandeis has secured the approval of every constitutional case which he has argued—argued always for the public—not only from the Supreme Court of the United States but from the courts of New York, Illinois and Oregon.

We may be perfectly certain, then, that Mr. Brandeis is no doctrinaire. He does not allow formulæ to do service for facts. He has remained scrupulously flexible. While, for example, he has made us realize that there may be a limit to the efficiency of combination, yet he has insisted that the issue must be settled by authoritative data, that such data must be gathered by a permanent non-partisan commission. So Mr. Brandeis helped to give us the Federal Trade Commission. He sees equally clearly that there are limits to the uses of competition, and no man has spoken more effectively against the competition that kills or more vigorously for the morality of price maintenance.

The very processes of his mind are deliberate and judicial—if we mean by deliberation and judicial-mindedness a full survey of all relevant factors of a problem and courageous action upon it. He has an almost unerring genius for accuracy, because his conclusion is the result of a slow mastery of the problem. Events have rarely failed to support his judgments. In the New Haven situation, for instance, the conclusions which Mr. Brandeis had reached and for which he sought quiet acceptance a decade ago were finally vindicated. So of all his public activities—the adoption of a sliding scale in franchise returns, the adoption of a savings-bank insurance, the settlement of industrial disputes, the regulation of conditions of labor, the conservation of our natural resources—in each problem there have been three stages: thorough investigation by and with experts; education of the public to the results of such investigation; and then political action with informed public opinion behind it, either by legislation for the government or by changes in the structure of one of the great groups of the state, such as the trade union or employers' organizations.

Mr. Brandeis says of himself: "I have no rigid social philosophy; I have been too intense on concrete problems of practical justice." A study of his work verifies this analysis. It is true he has a passion for justice and a passion for democracy, but justice and democracy enlist a common fealty. It is by his insistence on translating these beliefs into life, by his fruitful intellectual inventiveness in devising the means for such translation, that Mr. Brandeis is distinguished. One who has brought the agency of a vitalizing peace to the most anarchistic of all industries, the garment trades, and has done it not by magic but by turning contending forces into coöperative forces, has that balance of head and heart and will which constitutes real judicial-mindedness.

It is said of him that he is often not amiable in a fight. There is truth in the statement. The law has not been a game to him, the issues he has dealt with have been great moral questions. He has often fought with great severity. He has rarely lost. His great fights have been undertaken in the public interest. In the course of his career he has made enemies, some of whom were malicious, others honestly convinced that he had wronged them. A number of charges have been made against him, no one of which has been proved, though no one can question that Mr. Brandeis's enemies have spared no pains to prove them. His friends who are in a position to know the details of his career believe in him passionately. They are delighted that so able a committee of the Senate should have undertaken the work of running down every insinuation. They believe that no man's career can stand as much scrutiny as his. They want the insinuations crystallized, examined and disposed of, so that the nation may begin to employ this man who has at once the passion of public service and the genius for it.

# The School Situation in New York

THE complications which have grown out of the discussion of the Gary plan in New York City illustrate the resistiveness which a formalistic and entrenched school system will show when suddenly challenged for an accounting of its stewardship. The existing situation presents a study of how tightly the public schools of a large city may become knotted up with various political, personal, professional and economic interests which must be served before the business of education begins. An organization with over 20,000 employes and an annual disbursement of $40,000,000 presents a formidable front to any change. It has not grown lightly together. It is the result of many years of adjustment to local political conditions, business interests, personal rivalries, racial and religious antipathies. The school system of New York has shaken itself down into the life of the city until it meets the demands of those who serve it, Board of Education, superintendents, principals and teachers. It has provided livelihood for many thousands of people. It has given the semblance of education to 800,000 children a year. Its personnel