THE WAGNER ACT DECISIONS AND FACTUAL TECHNIQUE IN PUBLIC LAW CASES

RALPH F. FUCHS† AND WALTER FREEDMAN‡

I.

In an epoch-making group of decisions, the Supreme Court, on April 12, 1937, sustained the constitutionality of the principal features of the Wagner Labor Relations Act[1] as applied to manufacturing industry which receives raw materials and ships products in interstate commerce and to the gathering and dissemination of news.[2] In effect, the Court departed far from the view of the scope of the federal power which was expressed in three of the principal earlier New Deal decisions.[3] To the strict precedents of 1935 and 1936 in regard to the scope of the commerce power[4] there are now added these recent liberalizing decisions, together with broad judicial utterances which go far to counteract the severely restrictive statements contained in the previous New Deal cases.[4a]

---

† Professor of Law, Washington University.
‡ Editor-in-chief, Washington University Law Quarterly.

1. 49 Stat. 449, 29 U. S. C. A. sec. 151 (1935).

2. National Labor Relations Board v. Jones & Laughlin Steel Corp., 57 S. Ct. 615 (1937); same v. Friedman-Harry Marks Clothing Co., 57 S. Ct. 645 (1937); Associated Press v. National Labor Relations Board, 57 S. Ct. 650 (1937); National Labor Relations Board v. Fruehauf Trailer Co., 57 S. Ct. 642 (1937). The validity of the Act as applied to a company operating an interstate bus line was sustained in Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board, 57 S. Ct. 648 (1937). Involved in the cases presented to the Court were Section 8, subdivisions (1) and (3), and Sections 10 and 11 of the Act. The former stigmatize as "unfair labor practices" the coercion of employees by employers in respect to the right of self-organization; the latter provide for the enforcement of the Act's prohibitions by proceedings in the National Labor Relations Board and before the courts. Orders of the Board, requiring the respondents to "cease and desist" from unfair practices, to reinstate certain discharged employees, and to pay back wages during periods of unemployment resulting from the discharges, were upheld.

3. A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837, 79 L. ed. 1570 (1935); Carter v. Carter Coal Co., 298 U. S. 238, 56 S. Ct. 855, 80 L. ed. 1160 (1936); United States v. Butler et al., 297 U. S. 1, 56 S. Ct. 312, 80 L. ed. 477 (1936).

4. U. S. Const. art. 1, sec. 8: "Congress shall have power . . . [clause 3] To regulate Commerce . . . among the several States . . ."

4a. The Schechter case held that the federal power did not extend to regulating labor relations and commercial practices in the wholesale handling of products that had moved in interstate commerce. Fuchs, A Postscript—The Schechter Case (1935) 20 ST. LOUIS LAW REVIEW 297. The

The Court's most recent attitude is, of course, not a new one. There have been two lines of authority in regard to the scope of the commerce power. According to the one, the conduct of manufacturing industry, even where the product moves in interstate commerce, does not have a sufficiently direct effect upon interstate commerce to justify its control by acts of Congress, either directly or by regulation of shipments.[5] According to the other, Congress may regulate various aspects of the conduct of enterprises engaging in production for interstate commerce, wherever there is a demonstrable connection between the matters regulated and commerce itself.[6] The actual decisions in these two lines of cases are irreconcilable in only a few instances.[7] The

---

Butler case held that the raising of agricultural products for shipment in interstate commerce could not be subjected to federal control with respect to the quantities produced. The Carter Coal Co. case held that wages and working conditions in the bituminous coal industry cannot be regulated by act of Congress. Reconciliation of the latter decision with those in the National Labor Relations cases must be accomplished by one or both of two distinctions—the distinction between an extractive industry and one which receives supplies as well as ships products in interstate commerce, and the distinction between regulating labor conditions on the one hand and legislatively securing the right to collective bargaining on the other hand. The Government's briefs in the National Labor Relations cases necessarily and properly stress these distinctions. The latter is based upon the allegedly greater tendency of workers to strike for the right to organize and bargain collectively than to resort to the same means of enforcing wage demands. Hence the continuity of interstate commerce is more seriously threatened by denial of the right to organize than by unsatisfactory wages and working conditions. It is well that the Court was afforded this means of overcoming the effect of its earlier stand. One suspects, however, that few impartial observers would accept the distinctions thus momentarily introduced into the law as particularly significant.

5. United States v. E. C. Knight Co., 156 U. S. 1, 15 S. Ct. 249, 39 L. ed. 325 (1895); Hammer v. Dagenhart, 247 U. S. 251, 38 S. Ct. 529, 62 L. ed. 1101 (1918).

6. Hipolite Egg Co., v. United States, 220 U. S. 45, 31 S. Ct. 281, 55 L. ed. 364 (1911); Coronado Coal Co. v. United Mine Workers, 268 U. S. 295, 45 S. Ct. 551, 69 L. ed. 963 (1925); Pittsburgh Melting Co. v. Totten, 248 U. S. 1, 39 S. Ct. 3, 63 L. ed. 97 (1918); United States v. Doremus, 249 U. S. 86, 39 S. Ct. 214, 63 L. ed. 493 (1919).

7. Compare United States v. E. C. Knight Co., 156 U. S. 1, 15 S. Ct. 249, 39 L. ed. 325 (1895) with Northern Securities Co. v. United States, 193 U. S. 197, 24 S. Ct. 436, 48 L. ed. 679 (1904) as to the federal power in regard to combinations of ownership. In Hammer v. Dagenhart, 247 U. S. 251, 38 S. Ct. 529, 62 L. ed. 1101 (1918), the Court attempted to differentiate between prohibition of shipments in order to regulate practices which affect the quality of products moving in interstate commerce and similar efforts to reach practices which have no effect. It ignored the economic consequences of competition in the sale of commodities which have moved in interstate commerce after their manufacture under sub-standard labor conditions. Recently, where a state has evidenced by legislation its desire to

Court's view of the power of Congress, however, as expressed in numerous opinions, clearly cannot be reduced to consistency.[8]

Public discussion following upon the Wagner Act decisions has concerned itself largely with the possible bearing of the election returns of 1936 and of the administration's proposal to Congress for re-organizing the Supreme Court upon the judicial attitude.[9] Without minimizing the extent to which the Court, consciously or unconsciously, may be moved by political considerations and by subtle psychological forces, it is possible to point to other factors, more closely related to the lawyer's craft, which may have contributed to the changed judicial attitude. The Wagner Act litigation received an incomparably better presentation at the hands of the Government than the earlier New Deal cases.[10] This presentation involved elements of legal strategy extending far back into the proceedings which later reached the

---

control such competition within its borders, the Court has approved Congressional prohibition of shipments that would nullify the effort. See Kentucky Whip and Collar Co. v. Illinois Central R. R., 57 S. Ct. 277 (1937); Note, Child Labor Amendment or Alternative Legislation? (1937) 22 WASHINGTON U. LAW QUARTERLY 401.

8. Corwin, *Commerce Power versus States Rights* (1936) *passim;* Brant, *Storm Over the Constitution* (1936); compare the statements made in Kidd v. Pearson, 128 U. S. 1, 20, 21, 22 (1888), United States v. E. C. Knight Co., 156 U. S. 1, 12, 13 (1895), Coe v. Errol, 116 U. S. 517, 526 (1886), Heisler v. Thomas Colliery Co., 260 U. S. 245, 259-260 (1922), and Chassaniol v. Greenwood, 291 U. S. 584, 587 (1933) with those in Swift & Co. v. United States, 196 U. S. 375, 399 (1905), Stafford v. Wallace, 258 U. S. 495, 516 (1922), and Northern Securities Co. v. United States, 193 U. S. 197, 335, 336 (1904).

9. On Feb. 5, 1937, President Roosevelt sent a message to Congress urging a reorganization of the federal judiciary. N. Y. Times, Feb. 6, 1937, p. 1; St. Louis Post-Dispatch, Feb. 5, 1937, p. 1. The message was accompanied by a bill submitted by the Attorney-General. *Inter alia,* the bill provides that if a Justice of the Supreme Court upon reaching the age of 70 does not retire, the President shall be empowered to name an additional justice, with the result that the Court will be permanently enlarged. The number of additional justices, however, is limited to six. Since the plan is concededly designed to procure a more "liberal" bench some have expressed the view that the recent "liberal" decisions are prompted by a desire on the part of the Court to forestall the enactment of the proposed measure. See editorials in the following newspapers (all March 13, 1937): St. Louis Star-Times, New York Post, Washington (D. C.) Star. But see (also under same date) St. Louis Post-Dispatch, New York Times, Philadelphia Inquirer. Cf. Pound, Spurious Interpretation (1907) 7 Col. L. Rev. 379, 385: "If the dominant political force for the time being may, or thinks it may, amend the constitution off-hand by procuring judicial spurious interpretation, it is evident that pressure is bound to be brought to bear upon the courts to adjust constitutional provisions to the exigencies of current policy."

10. Fuchs, A Postscript—The Schechter Case (1935) 20 ST. LOUIS LAW REVIEW 297, at pp. 301-302.

Supreme Court. Probably by design, the cases selected for presentation to the courts were carefully chosen for the purpose of bringing out as dramatically as possible the interstate ramifications of productive processes. The directions of the National Labor Relations Board for the conduct of its hearings had already been so framed as to bring about the development in the administrative hearings of the facts relating to these ramifications. The Board's findings, made on the basis of the evidence so adduced, were explicit and well-written.[11] Incorporated into the record of the *Jones & Laughlin* case were the proceedings of a week's hearings before the Board, at which impressive "oral and written evidence tending to lend further support to the findings made by Congress in Section 1 of the Act" was adduced. The evidence reviewed the history of national efforts to deal with the problem of industrial disputes through legislation, the extent to which such disputes had affected interstate commerce, and the interstate ramifications of the steel industry.[12] In the presentation of the case to the courts, the record before the Commission and its findings were buttressed by carefully-prepared briefs, in which legal and economic considerations were skillfully interwoven, and in whose preparation a staff of economists collaborated with the Board's lawyers.[13]

Whether the judicially-inflicted disaster which overtook the New Deal program in 1935 could have been avoided by similar skill and care in the presentation of the earlier cases is, of course, a matter about which it is useless to speculate. Neither can it be said that poor preparation of the Wagner Act cases would have brought about similar disaster in 1937. It is entirely clear, however, that the Federal courts, in cases such as these, are dealing with the constitutional significance of complicated factual situations. Because of the conflicting lines of decision in relation to the litigated clauses of the Constitution,[14] there is no gui-

11. 1 N. L. R. B. Rep. 687-694, 69-80, 790-800, 413-429, 434-451, 771-780 (1936).

12. National Labor Relations Board, Bulletin No. 1, Governmental Protection of Labor's Right to Organize (1936).

13. Government Brief in The Associated Press v. National Labor Relations Board, 45; Brief in National Labor Relations Board v. Jones & Laughlin Steel Corp., 20, acknowledging the services of David J. Saposs, Chief Economist, George S. Wheeler, Associate Economist, George Brooks and Louis R. Becker, Assistant Economists, and Jean M. Paton, Jacob Karrs, and Elizabeth T. Bliss, Junior Economists.

14. Consult cases cited in note 5. Compare Adkins v. Children's Hospital, 261 U. S. 525 (1923) with West Coast Hotel Co. v. Parrish, 57 S. Ct.

dance for the courts in reaching sound results except their own judgments of policy, which are arrived at in the light of the available facts. The completeness and the realism with which these facts are laid before the courts, together with their apprehension by the judges, constitute the very heart of the judicial process in constitutional cases. The same statement can be made with regard to important anti-trust cases and many cases involving judicial review of the acts of administrative agencies.

In all three classes of cases the significant facts are of a broadly economic and social nature. In the anti-trust cases their relevance is clearly apparent, and their presentation to the courts has resulted in the evolution of a high order of legal art.[15] Similarly the administrative agencies and counsel for private interests in proceedings before them have built up impressive records in regard to the facts which bear upon the situations confronting them.[16] In cases involving the constitutionality of statutes, the presentation of pertinent social and economic facts has at times assumed impressive proportions.[17] A considerable literature has

578 (1937); Tyson & Bro. v. Banton, 273 U. S. 418 (1927) with Nebbia v. New York, 291 U. S. 502 (1934); United States v. Butler et al., 297 U. S. 1 (1936) with McCray v. United States, 195 U. S. 27 (1904).

15. The Sugar Institute, Inc., v. United States, 297 U. S. 553, 571, 56 S. Ct. 629, 80 L. ed. 859 (1936) (record of 10,000 typewritten pages); Appalachian Coals, Inc., v. United States, 288 U. S. 344, 361-370, 53 S. Ct. 471, 77 L. ed. 825 (1933); Standard Oil Co. v. United States, 221 U. S. 1, 30, 31 S. Ct. 502, 55 L. ed. 619 (1911) (record of 12,000 pages). It is remarkable that significant data concerning the operation of the American business system are available almost exclusively in regard to those industries which have been made subjects of investigation for purposes of litigation or by governmental agencies. Apparently the "problem" approach of lawyers and officials to economic phenomena is more productive of scientific data than the "scientific approach of those engaged in other social studies. In the following works much of the relevant data is collected from the briefs of counsel or reports of government commissions: Seager & Gulick, *Trust and Corporation Problems* (1929); Lyon et al., *The National Recovery Administration* (1935) 903; Lyon and Abramson, *The Economics of Open Price Systems* (1936) 54; National Industrial Conference Board, *Mergers and the Law* (1929) 85; Handler, Industrial Mergers and the Anti-Trust Laws (1932) 32 Col. L. Rev. 179, 188 at n. 34, 197 at n. 68, 208 at n. 108, 219 at n. 141.

16. This is well illustrated in the recent case of St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 56 S. Ct. 720, 80 L. ed. 1033 (1936). The Secretary of Agriculture conducted a hearing on the question of the rate to be charged for certain services rendered by a stockyards company. The abstract of the record made before the Secretary consisted of 1648 printed pages, besides 111 exhibits. See 298 U. S. at p. 86.

17. The brief submitted by Mr. (now Mr. Justice) Brandeis in the case of Muller v. Oregon, 208 U. S. 412, 28 S. Ct. 324, 52 L. ed. 551 (1908) consisted of 610 pages (see at p. 419 for importance placed upon it by the court).

grown up in regard to the presentation of factual material in such proceedings.[18]

Thus the common-law case technique, in its application to modern public-law litigation, has resulted in a vastly enriched method of procedure. The tribunalistic solution of problems of statecraft, while perhaps questionable on the ground of its essential lack of democracy,[19] may evolve into an effective means of

---

See also the briefs submitted in the following cases: Adkins v. Children's Hospital, 261 U. S. 525 43 S. Ct. 394, 67 L. ed. 784 (1923) (referred to at p. 560); Chicago Board of Trade v. Olsen, 262 U. S. 1, 43 S. Ct. 470, 67 L. ed. 839 (1923); Morehead v. New York ex rel. Tipaldo, 298 U. S. 587, 56 St. Ct. 918, 80 L. ed. 1347 (1936) (see the court's references at pp. 616, 626); Nashville, C. & St. L. Ry. v. Walters, 294 U. S. 405, 55 S. Ct. 486, 79 L. ed. 949 (1935). In the recent Washington minimum wage law case no factual brief was submitted. West Coast Hotel Co. v. Parrish, 57 S. Ct. 578, 585 (1937).

18. Frankfurter, Hours of Labor and Realism in Constitutional Law (1916) 29 Harv. L. Rev. 353; Biklé, Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action (1924) 38 Harv. L. Rev. 6; Mott, *Due Process of Law* (1927) 562-588; Parkinson, Functions of Administration in Labor Legislation (1930) 20 Amer. Labor Leg. Rev. 143; Fuchs, Legal Technique and National Control of the Petroleum Industry (1931) 16 St. Louis Law Review 189, 201; Dickinson, Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Jurisdictional Fact" (1932) 80 U. of Pa. L. Rev. 1055, 1067; Deman, Comment on Trials of Fact in Constitutional Cases (1935) 21 A. B. A. J. 805; Note, The Presumption of Constitutionality Reconsidered (1936); 36 Col. L. Rev. 283; Note, The Presentation of Facts Underlying the Constitutionality of Statutes (1936) 49 Harv. L. Rev. 631.

19. Fuchs, The Constitutionality of the Recovery Program (1933) 19 St. Louis Law Review 1; Haines, Judicial Review of Acts of Congress and the Need for Constitutional Reform (1936) 45 Yale L. J. 816. Where control is exerted through administrative agencies, the democratic aspects of government are perhaps better preserved. Even as respects such agencies, however, objections are being raised to their undue immunity from control at the hands of the responsible executive. See the report of the President's Committee on Administrative Management (Jan. 8, 1937) 47. The Committee recommends that the Executive be given more power over various administrative agencies so that "the President will have effective managerial authority over the Executive Branch commensurate with his responsibility under the Constitution of the United States." With regard to the independent regulatory commissions, the report states: "These independent commissions have been given broad powers to explore, formulate, and administer policies of regulation; they have been given the task of investigating and prosecuting business misconduct; they have been given powers, similar to those exercised by courts of law, to pass in concrete cases upon the rights and liabilities of individuals under the statutes. They are in reality miniature independent governments. . . . They constitute a headless 'fourth branch' of the Government, a haphazard deposit of irresponsible agencies and uncoördinated powers. . . . We speak of 'independent' regulatory commissions. It would be more accurate to call them the 'irresponsible' regulatory commissions, for they are areas of unaccountability. . . . But though the commissions enjoy power without responsibility, they also leave the President with responsibility without power. Placed by the Con-

solving modern problems by scientific methods. Thus the ancient dream of a government of philosophers may find partial realization![20]

II.

By way of contrast, the undeveloped common-law technique still receives application in similar cases in England. In conspiracy or contract actions, involving alleged unlawful economic combinations, the legality of a given arrangement turns, as in this country, upon the justifiability of its purpose.[21] The courts, however, refuse to admit evidence of general economic factors involved in the situations which come before them. In consequence, the decisions must be based upon the direct effect of the arrangements in question as against particular parties and upon the judges' relatively uninformed reaction to the immediate facts as they thus appear.[22]

In what is essentially constitutional litigation, a British parallel to the delimitation of state and Federal power under the American Constitution is furnished by the decisions of the Privy Council interpreting the British North America Act.[23] The Act was adopted in the presence of an acute consciousness of the weakness of the Government of the United States as evidenced by the Civil War. For this reason, the definite and avowed purpose of the framers and sponsors of the Act in Canada and in Parliament was to set up a strong Dominion government and to reduce the provinces to a subordinate status. In the words of its great proponent, Sir John A. MacDonald,

> "We have strengthened the general government. We have given the general legislature all the great subjects of legislation. We have conferred on them, not only specifically and in detail all the powers which are incident to sovereignty, but we have expressly declared that all subjects of general

---

stitution at the head of a unified and centralized Executive Branch, and charged with the duty to see that the laws are faithfully executed, he must detour around powerful administrative agencies which are in no way subject to his authority and which are, therefore, both actual and potential obstructions to his effective over-all management of national administration."

20. Commons, *Legal Foundations of Capitalism* (1924) 360.

21. Kennedy and Finkelman, *The Right to Trade* (1933) 79-92; Frankfurter and Greene, *The Labor Injunction* (1930) 24.

22. Simpson, How Far Does the Law of England Forbid Monopoly? (1925) 41 Law Q. Rev. 393, 408.

23. 30 & 31 Vict. c. 3 (1867).

> interest not distinctly and exclusively conferred upon the local government and the local legislatures, shall be conferred upon the general government and legislature. We have thus avoided that great source of weakness which has been the cause of the disruption of the United States. We have avoided all conflict of jurisdiction and authority."[24]

Similarly, Lord Carnarvon, speaking for the British Cabinet as sponsor of the British North America Act in Parliament, said:

> "The real object which we have in view is to give to the central government those high functions and almost sovereign powers by which general principles and uniformity of legislation may be secured in those questions that are of common import to all the provinces, and at the same time to retain for each province so ample a measure of municipal liberty and self-government as will allow and indeed compel them to exercise those local powers which they can exercise with great advantage to the community. * * * Just as the authority of the central parliament will prevail whenever it may come in conflict with the local legislatures, so the residue of legislation, if any, unprovided for in the specific classifications * * * will belong to the central body."[25]

Thus the framers of the new Canadian Constitution went as far as they could, having in mind continued provincial loyalties, to establish a government which should be adequate to the needs of the future. In due course, the boundaries of the powers conferred upon the Dominion on the one hand and upon the provinces on the other hand had to be defined with precision. Acts of legislation by the Dominion Parliament and by the provinces became involved in cases arising in the Canadian courts, which were carried on appeal to the Privy Council.[26] Glaring inadequacy in the application of the British North America Act has grown out of a two-fold deficiency in the judicial technique of the Privy Council, arising through (1) failure to take account of the intention of the framers of the Act as revealed in historical records[26a] and (2) lack of realism in appraising the significance of the economic factors involved in provincial and Dominion legislation.

---

24. Kennedy, *Essays in Constitutional Law* (1934) 88-90.

25. *Ibid.*, at p. 89.

26. 3 & 4 Wm. IV c. 41, secs. 1, 3; Rev. Stat. Canada (1927) c. 35, secs. 35, 36, 54.

26a. The traditional rules of statutory construction, applied by the Judicial Council, "whatever else they have done, have at times robbed [the Act] of its historical context and divorced its meaning from the intention of those who in truth famed it." Kennedy, *op. cit.*, 85.

The following are the pertinent provisions of the British North America Act:

> Section 91. The Dominion may "make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say:— * * * 2. The regulation of trade and commerce; * * * 27. The criminal law; * * * and any matters coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."
>
> Section 92. In each province the legislature may exclusively make laws in relation to matters coming within the class of subjects next hereinafter enumerated; that is to say:— * * * 9. Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue; * * * 13. Property and civil rights in the province; * * * 16. Generally all matters of a merely local or private nature in the province.

The Privy Council took a narrow view of the Act in the first important case brought before it.[27] That was an action on a policy of fire insurance, in which the defendant sought to avoid the policy by reason of the non-disclosure of certain facts by the plaintiff in his application. The Ontario Insurance Act of 1876, however, provided that a policy could not be avoided except for breach of conditions that were duly endorsed on the policy. No such endorsement, relating to possible non-disclosures, was contained in the policy in question. The defendant contended that the Ontario Act was invalid because its subject-matter fell within the power of the Dominion to regulate trade and commerce. While conceding that the Dominion Parliament might have power to legislate with reference to "trade affecting the whole Dominion," the Privy Council held that the Dominion's authority "does not comprehend the power to regulate by legislation the contract of a particular business or trade, such as the business of fire in-

27. Citizens Insurance Co. v. Parsons, L. R. 7 A. C. 96 (1881).

surance in a single province." The opinion notes that Section 91 of the Act confers specific economic powers upon the Dominion, which would be unnecessary if the general power over trade and commerce extended to those matters and to others of a specific nature such as the regulation of fire insurance. Moreover, the opinion asserts, ordinary contracts are among the "civil rights" which in Section 92 are subjected to provincial control.

In the following year a liberal decision provided the principal obstacle to later narrowing of the Dominion's powers. In *Russell v. The Queen*[28] the Canada Temperance Act of 1878, which provided for local option as respects the sale of intoxicating liquor, was sustained as against the contention that liquor control fell within the scope of provincial powers. The Privy Council rejected the view that the sale of intoxicating liquor was primarily a matter of property or civil rights. Public order and safety is "the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law. * * * Laws which make it a criminal offense for a man wilfully to set fire to his own house on the ground that such acts endanger the public safety, or to overwork his horse on the ground of cruelty to the animal, though affecting in some sense property and the right of man to do as he pleases with his own, cannot properly be regarded as legislation in relation to property or civil rights." Holding that the Dominion's regulation fell within the scope of the criminal law, the opinion goes on to say:

> "Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada."

28. L. R. 7 A. C. 829 (1882). In Hodge v. The Queen, 9 A. C. 117 (1883), the Ontario Liquor License Act of 1877 was upheld as a regulation for the good government of taverns which did not interfere with "the general regulation of trade or commerce." In Attorney General for Ontario v. Attorney General for the Dominion and The Distillers and Brewers' Ass'n of Ontario [1896] A. C. 348, an optional local law restricting the consumption of liquor within the province was held to be within the power of the provincial legislature, where not in conflict with the Dominion Temperance Act.

An echo of this liberal point of view was heard in 1915 in the case of *John Deere Plough Company v. Wharton.*[29] That case involved the right of the plough company to do business in British Columbia without having been admitted under the Companies Act of the province. It claimed that right by reason of its powers under the Companies Act of the Dominion, which purported to confer upon it the authority to do business anywhere in Canada. The Privy Council held that the provinces by virtue of their power to regulate property and civil rights, "cannot legislate so as to deprive a Dominion company of its status and powers," conferred upon it under the Dominion Parliament's power to legislate for trade and commerce and for the peace, order, and good government of Canada.

In the next year[30] the Privy Council, affirming the Canadian Supreme Court, began the modern course of decisions which has so largely emasculated the powers of the Dominion. In a declaratory judgment, it asserted that the Dominion Parliament has no power to require Dominion licenses of life and fire insurance companies. "Their lordships think * * * it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces." The opinion relies again upon the fact that Section 91 of the British North America Act confers specific regulatory powers upon the Doninion as evidence that the general power over trade and commerce does not go beyond matters which are specifically enumerated. The characterization of the insurance business as a "trade" is perhaps indicative of the extent of the court's appreciation of modern economic facts. The opinion concedes, "No doubt the business of insurance is a very important one, which has attained to great importance in Canada. But this is equally true of other highly important and extensive forms of business in Canada which are today freely transacted under provincial authority." Actually, of course, the court was simply choosing to construe broadly the provincial power to regulate "property and civil rights," rather than the Dominion's power to regulate "trade and commerce"—

29. [1915] A. C. 330.
30. Attorney General for Canada v. Attorney General for Alberta [1916] A. C. 588.

and this in the face of the declaration of Section 91 that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

In a subsequent case a portion of the Canadian legislation which is equivalent to the American anti-trust acts was declared to be beyond the power of the Dominion.[31] The Combines and Fair Prices Act of 1919[32] authorized the Board of Commerce to restrain and prohibit the formation and operation of business combinations considered to be detrimental to the public interest and authorized the Board to restrict the hoarding of commodities by concerns and individuals. The opinion asserts that such measures come under the provincial power to regulate property and civil rights rather than under the Dominion power to regulate commerce. In sharp contrast to the view taken in *Russell v. The Queen*[33] is the further assertion with regard to the Dominion's power over the criminal law, that it is one thing to apply it to "subject matter * * * which by its very nature belongs to the domain of criminal jurisprudence. * * * It is quite another thing, first to attempt to interfere with a class of subjects committed exclusively to the provincial legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law." Thus, the sphere of the criminal law is sought to be crystallized according to its scope in 1867. A more liberal later decision, which expressly repudiates such restriction of the criminal law and upholds later anti-trust legislation without passing upon the scope of the power to regulate trade and commerce,[33a] seems not to have affected the main current of decision.[33b]

31. In re the Board of Commerce Act [1922] 1 A. C. 191. The Dominion's power over the regulation of aerial navigation was sustained in Re Aerial Navigation [1932] 1 D. L. R. 58.

32. 9 & 10 Geo. V, Dom. c. 45 (1919).

33. Supra, note 28. See also Union Colliery Co. of British Columbia v. Bryden [1899] A. C. 580, in which the Dominion's power to regulate "naturalization and aliens" was held to prevail over a provincial act seeking to prohibit Chinese from working in coal mines.

33a. Proprietory Articles Trade Association v. Attorney General of Canada [1931] A. C. 310.

33b. Reference re Natural Products Marketing Act [1936] 3 D. L. R. 622, 624-633.

The conclusive blow to Dominion powers came in *Toronto Electric Commissioners v. Snider*.[34] That case was an appeal by the Electric Commissioners from a declaratory judgment upholding the Canadian Industrial Disputes Investigation Act of 1907[35] as against the contention that the adjustment of industrial disputes belongs to the provinces. Again it was held that penal features of the Act did not bring it within the province of the criminal law. Legislation for the adjustment of such disputes, according to the opinion, does not have to do with the "peace, order, and good government of Canada" or with the regulation of "trade and commerce." It pertains rather to "property and civil rights." Thus the Privy Council chose to fasten its attention upon the individual contract between employer and employee and upon the employment relations existing within a given establishment, rather than upon the wide ramifications of modern industrial and labor relations, which according to a more realistic view render them at least national in scope. Perhaps significantly as respects legal technique, the Privy Council remarked, "On the only facts proved, * * * the circumstance that the dispute might spread to other provinces was not in itself enough to justify Dominion interference, if such interference affected property and civil rights."

Accompanying its death-blow to dominion powers by a grim jest, the Privy Council asserted that *Russell v. The Queen* can only be supported on the assumption "that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and so pressing that the national parliament was called on to intervene to protect the nation from

34. [1925] A. C. 396. See also Attorney General for Canada v. Attorney General for Ontario, Quebec and Nova Scotia [1898] A. C. 700, which held that the Dominion's power to improve navigation did not justify its granting exclusive fishing rights in inland waters. On the authority of Toronto Electric Commissioners v. Snider, most of the Canadian Recovery Acts were declared *ultra vires* of the Dominion in Reference Re Dominion Trade and Industry Commission Act [1936] 3 D. L. R. 607; Reference Re Natural Products Marketing Act [1936] 3 D. L. R. 622; Reference Re Employment and Social Insurance Act [1936] 3 D. L. R. 644. In Reference Re Weekly Rest in Industrial Undertakings Act and Minimum Wages Act and Limitation of Hours of Work Act [1936] 3 D. L. R. 673, the Supreme Court of Canada was evenly divided. The decisions were affirmed by the Privy Council, January 28, 1937. N. Y. Times (Jan. 29, 1937) p. 2.

35. 6 & 7 Edw. VII, Dom. c. 20 (1907).

disaster. An epidemic of pestilence might conceivably have been regarded as analogous."

Thus, except in times of definite emergency, the ample Dominion powers so confidently conferred in 1867 have been litigated away until they are wholly inadequate to meet the most pressing modern problems. In the words of Professor Kennedy,[36] "Canada possesses in law today a scheme of distribution of legislative powers which is in its essence diametrically opposed to the conception of the 'Fathers of Federation' and of the British Government of 1867." And this distribution of powers prevails in a situation in which political and racial differences have, if anything, become accentuated to the point where there is little hope of legislative enlargement of Dominion powers for some time to come.[37] This tragic result is in effect a sacrifice to outmoded and inadequate methods of judicial decision.

Only one way out seems possible for Canada. If the British North America Act cannot be directly amended, and if the judicial technique of the Privy Council presents a standing obstacle to the more liberal interpretation of the Act, the door may be opened to legal acceptance of Dominion economic legislation, which seems to be politically practicable, by depriving the Privy Council of its power to entertain appeals from the Dominion courts. Since such appeals do not rest upon the Act,[38] they may be abolished by the Dominion parliament.[39] The remedy, of course, will be availing only if the judicial techniques developed in the United States can be accepted in Canada and applied to overcome the existing accumulation of restrictive decisions.[40]

36. Kennedy, *Essays in Constitutional Law* (1934) 93.

37. *Ibid.*, 92-94, 169. In deference to Canadian provincialism the Statute of Westminster of 1931, which grants legislative autonomy to the dominions of the Empire, withholds from the Canadian parliament, as well as from the provincial legislatures, the power to affect the British North America Act. 22 Geo. V, c. 4, sec 7 (3) (1931).

38. Supra, note 26.

39. 22 Geo. V, c. 4, sec. 2 (1931); Kennedy, *op. cit.*, 171.

40. Historically there is little basis for a belief in greater realism in judicial decisions on the part of the Canadian courts than on the part of the Privy Council. In Toronto Electric Commissioners v. Snider, however, in which, as pointed out above, the Dominion powers were rendered definitely secondary to those of the provinces, the Privy Council reversed the decision of the Supreme Court of Canada. The cases in which reversals by the Privy Council occurred are distributed as follows, the result reached by the Privy Council being stated in each instance: provincial act preferred over Dominion act, 2; Dominion act preferred over provincial act, 2; Dominion act *held ultra vires*, 1. In one case the Dominion court and the Privy Council agreed

III.

The use of historical materials in the interpretation of statutes and constitutional provisions is unknown in England.[41] There, and traditionally in the United States as well,[42] the sole reliance of the courts is upon the language of enactments and upon judicial precedents construing that language. In this country, however, the courts have signified a growing willingness to avail themselves of extrinsic material which might cast light upon the intention of the framers and of legislatures in drafting and adopting their enactments.[43] Thus committee reports and legislative debates are frequently regarded as legitimate aids in the interpretation of uncertain or ambiguous statutes.[44] It seems inevitable that this tendency will continue. Thus the barrenness of the methods employed by the Privy Council in dealing with the British North America Act will characterize judicial functioning with diminishing frequency.

The problem of applying statutory and constitutional texts, however, frequently does not involve the ascertainment of legislative intention, either because the situation to which a text must be applied is new and there could have been no legislative intent

---

in holding a provincial act *intra vires*. In four cases both courts sustained Dominion acts, whereas in four other cases they agreed in invalidating them.

41. Construction of Statutes: Reports of Commissions (1935) 179 Law Times 305; Davies, The Interpretation of Statutes in the Light of their Policy by the English Courts (1935) 35 Col. L. Rev. 519. Re York, 2 Q. B. 1, 34, 114 Eng. Rep. 1, 15; Leader v. Duffy, 13 A. C. 294, 301 (1888); Reg. v. Hertford College, L. R. 3 Q. B. Div. 693, 707; Lyons & Co. v. Keating (1931) 2 K. B. 535, 539.

42. Fox v. Standard Oil Co., 294 U. S. 87, 55 S. Ct. 333, 79 L. ed. 780 (1935); Caminetti v. United States, 242 U. S. 470, 37 S. Ct. 192, 61 L. ed. 442 (1917); Heimberger v. University of Missouri, 268 Mo. 598, 188 S. W. 128 (1916); People ex rel. Watseka Telephone Co. v. Emmerson, 302 Ill. 300, 134 N. E. 707 (1922).

43. Duplex Printing Press v. Deering, 254 U. S. 443, 41 S. Ct. 172, 65 L. ed. 349 (1921); Buttfield v. Stranahan, 192 U. S. 470, 24 S. Ct. 349, 48 L. ed. 525 (1904); United States v. Coca Cola Co., 241 U. S. 265, 36 S. Ct. 573, 60 L. ed. 995 (1916); Ditzell v. Shoecraft, 219 Mo. App. 436, 274 S. W. 880 (1925); Minneapolis, etc. R. R. v. Industrial Commission, 153 Wis. 552, 141 N. W. 1119 (1913).

44. Chamberlain, The Courts and Committee Reports (1933) 1 U. Chi. L. Rev. 81; Note, Effect of Legislative History on Judicial Decision (1937) 5 Geo. Wash. L. Rev. 235; Annotation (1931) 70 A. L. R. 5; Humphrey's Executor v. United States, 295 U. S. 602, 55 S. Ct. 869, 79 L. ed. 1611 (1935); Church of the Holy Trinity v. United States, 143 U. S. 457, 12 S. Ct. 511, 36 L. ed. 226 (1892); Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 29 S. Ct. 671, 53 L. ed. 1013 (1909); United States v. Shreveport Grain & Elevator Co., 287 U. S. 77, 53 S. Ct. 42, 77 L. ed. 175 (1932).

with respect to it, or because the courts have extended the application of the text to matters which clearly were not originally embraced within it. The question of whether the production of steel under modern conditions can be regulated by Congress as a part of its power to regulate commerce among the states certainly could not have been in the minds of the Fathers;[45] and the acceptance of the due process clause as a basis of differentiating between valid and invalid legislation on other than procedural grounds came long after its inclusion in the Fifth Amendment.[46] The solution of questions arising under the commerce clause and the Fifth and Fourteenth Amendments, therefore, must rest upon the reactions of courts to contemporary conditions.

The legislative committee report, previously mentioned, is a frequent aid in throwing light upon the conditions with which a statute is designed to cope and which, therefore, must figure in giving specific meaning to any constitutional provision, couched in general terms, which it is later sought to apply to the statute.[47] In the National Labor Relations decisions themselves reliance was placed upon the reports of special Congressional commissions which have investigated industrial relations in the United States during the past half-century, whose findings have influenced the policy of the National Labor Relations Act.[48]

Related to committee reports because frequently based upon them, but briefer and more pointed, are the findings of the legislature itself which it is becoming increasingly the custom to express in the opening sections of regulatory and welfare measures. When viewed in the favorable light to which the legislation itself is entitled, these findings become important aids in sustain-

45. There may, of course, have been an all-embracing intent with respect to the adequacy of the federal power to meet national needs, as there seems to have been in the case of the British North America Act. Brant, *Storm Over the Constitution* (1936) *passim.* If the intention of the ratifiers as well as of the framers is taken into account, however, this historical problem is not susceptible of a clear answer. If it were, the problem of carrying out the agreed policy under new conditions would remain a difficult one of a practical nature.

46. Mott, *Due Process of Law* (1926) 314, 327, 329-360.

47. Chamberlain, The Courts and Committee Reports (1933) 1 U. Chi. L. Rev. 81, 87; Norman v. Baltimore & Ohio R. Co., 294 U. S. 240, 55 S. Ct. 103, 79 L. ed. 835 (1935); Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 92, 78 L. ed. 940 (1934).

48. National Labor Relations Board v. Jones & Laughlin Steel Corp., 57 S. Ct. 615, 627 (1937).

ing the validity of regulatory measures.[49] The courts, of course, can make short shrift of them when they wish,[50] but that fact does not destroy the value of their honest use as a means of directing judicial attention to facts deemed important by the legislature.

Procedurally, of course, the reports of legislative committees and commissions find their way into judicial opinions by the route of judicial notice. They may be known to the judges or noticed by them in the course of independent research. The impressive results of the occasional study of specific problems by judges, especially for the purpose of dissenting opinions, are well known,[51] and the absorption of the law merchant into the common law by this process is a classic episode in English jurisprudence.[52]

Recently the Supreme Court has been bold in recognizing economic facts of common knowledge which are, however, largely derived from the news rather than from actual observation.[53] Unaided judicial notice is, however, an unsafe reliance and an inadequate device for securing judicial apprehension of economic

---

49. Biklé, op. cit., supra, note 18, at 18; Block v. Hirsh, 256 U. S. 135, 154, 41 S. Ct. 458, 65 L. ed. 865; Home Bldg. & Loan Ass'n v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231, 78 L. ed. 413 (1934); Chicago Board of Trade v. Olsen, 262 U. S. 1, 43 S. Ct. 628, 67 L. ed. 839 (1923); James Everard's Breweries v. Day, 265 U. S. 545, 44 S. Ct. 628, 68 L. ed. 1174 (1924).

50. New State Ice Co. v. Liebmann, 285 U. S. 262, 52 S. Ct. 371, 76 L. ed. 747 (1932); Tyson & Bro. v. Banton, 273 U. S. 418, 47 S. Ct. 426, 71 L. ed. 718 (1927); Ribnik v. McBride, 277 U. S. 350, 48 S. Ct. 545, 72 L. ed. 913 (1928). The ability of the judiciary to determine the facts surrounding constitutionality independently of the legislature has recently been asserted in pointed fashion. St. Joseph Stockyards Co. v. United States, 298 U. S. 38, 51, 56 S. Ct. 720, 80 L. ed. 1033 (1936). Compare the dissent of Mr. Justice Brandeis, at p. 81.

51. Brandeis, J., dissenting, in New State Ice Co. v. Liebman, 285 U. S. 262, 286, 52 S. Ct. 371, 76 L. ed. 747 (1932), Truax v. Corrigan, 257 U. S. 312, 355, 42 S. Ct. 124, 66 L. ed. 254 (1921), and Duplex Printing Co. v. Deering, 254 U. S. 443, 479, 41 S. Ct. 443, 65 L. ed. 349 (1921); Stone, J., dissenting, in Ribnik v. McBride, 277 U. S. 350, 364, 48 S. Ct. 545, 72 L. ed. 913 (1928).

52. 1 Holdsworth, *History of English Law* (1922) 543, 568-573; Pluckett, *A Concise History of the Common Law* (1929) 168, 186.

53. Great Northern Ry. Co. v. Weeks, 297 U. S. 135, 56 S. Ct. 426, 80 L. ed. 532 (1936); West Coast Hotel Co. v. Parrish, 57 S. Ct. 578 (1937); Fox v. Standard Oil Co., 294 U. S. 87, 55 S. Ct. 333, 76 L. ed. 1261 (1935); Atchison, etc. Ry. v. United States, 284 U. S. 248, 52 S. Ct. 497, 76 L. ed. 273 (1932). ". . . . Courts are found noticing, from time to time, a varied array of unquestionable facts, ranging throughout the data of commerce, industry, history, and natural science." 5 Wigmore, *Evidence* (2d ed. 1923) sec. 2580.

and social facts.[54] The attachment of a research bureau to the Supreme Court, for the purpose of assisting it in ascertaining the facts upon which constitutional issues turn, has been proposed.[55] Up to the present time, however, the chief incitement to judicial consideration of economic and social facts and the principal means of bringing data before the courts have been the briefs of counsel. References to official and unofficial literature, and occasionally the products of original research, have been furnished to the judges by this means.[55a]

Judicial notice, together with the foregoing devices for stimulating and enlarging it, cannot be clearly marked off from more formal methods of fact ascertainment.[56] Of these, the supplying of evidence in the trial court is the most obvious.[56a] Aside from

54. Denman, Comment on Trials of Fact in Constitutional Cases (1935) 21 A. B. A. J. 805, 806; Hughes, C. J., in Willcuts v. Bunn, 282 U. S. 216, 51 S. Ct. 125, 75 L. ed. 304 (1931); Holmes, J., in Quong Wing v. Kirkendall, 223 U. S. 59, 64, 32 S. Ct. 192, 56 L. ed. 350 (1912): ". . . . there are many things that courts would notice if brought before them that beforehand they do not know. It rests with counsel to take the proper steps, and if they deliberately omit them, we do not feel called upon to institute inquiries on our own account."

55. Corwin, Report of the National Conference on the Science of Politics (1924) 18 Am. Pol. Sci. Rev. 148, 153.

55a. See cases cited in supra, note 17. See also the briefs submitted in the following cases: Virginian Railway Co. v. System Federation No. 40 et al., 57 S. Ct. 592 (1937); Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 55 S. Ct. 854, 79 L. ed. 1593 (1935).

56. Cardozo, J., in Shapleigh v. Mier, 57 S. Ct. 261, 264 (1937): "To say that a court will take judicial notice of a fact, whether it be an event or a custom or a law of some other government, is merely another way of saying that the usual forms of evidence will be dispensed with if knowledge of the fact can be otherwise acquired."

56a. In the following cases elaborate evidence introduced in the lower court apparently influenced the decisions: State Board of Tax Comm'rs v. Jackson, 283 U. S. 522, 51 S. Ct. 517, 75 L. ed. 1244 (1931); Stephenson v. Binford, 287 U. S. 241, 53 S. Ct. 129, 77 L. ed. 283 (1932); Advance Rumely Thresher Co., Inc. v. Jackson, 287 U. S. 283, 53 S. Ct. 133, 77 L. ed. 306 (1932); Sterling v. Constantin, 287 U. S. 378, 53 S. Ct. 190, 77 L. ed. 375 (1932); Appalachian Coals, Inc. v. United States, 288 U. S. 344, 53 S. Ct. 471, 77 L. ed. 825 (1933); Local 167, etc. v. United States, 291 U. S. 293, 54 S. Ct. 396, 78 L. ed. 804 (1934); United States v. Sugar Institute, Inc., 15 F. Supp. 817 (D. C. S. D. N. Y., 1934); Railroad Retirement Board v. Alton R. R., 295 U. S. 330, 55 S. Ct. 758, 79 L. ed. 1468 (1935); Great Northern Ry. Co. v. Washington, 57 S. Ct. 397 (1937); Chastleton Corp. v. Sinclair, 264 U. S. 543, 44 S. Ct. 405, 68 L. ed. 841 (1924); Hammond v. Schappi Bus Lines, Inc., 275 U. S. 164, 48 S. Ct. 66, 72 L. ed. 218 (1927); same v. Farina Bus Line, 275 U. S. 173, 48 S. Ct. 70, 72 L. ed. 222 (1927). Ever since Chastleton Corp. v. Sinclair, supra, the Supreme Court has indicated its desire to have the lower court ascertain facts of the nature here involved. Where the lower court has refused to consider evidence of constitutional facts, the Supreme Court has often remanded the case for further

its cumbersomeness, it is subject to the objection that the applicable rules of evidence are not adapted to sifting out reliable data from unreliable in respect to facts which frequently are of a statistical nature and cannot be made matters of direct observation. This deficiency is only partially remedied by liberalization of the rules in favor of official documents.[57] There is the difficulty, in addition, that evidence, to be admissible, should relate to fact issues in a case. The issue of constitutionality is one of law, to which the economic and social facts are subsidiary. For that reason, the introduction of factual material of this nature in trial court records is most successful in cases which involve the application of a statute rather than its constitutionality.[58] This technique is applicable where a statute is intended to apply only to the area of authority of the enacting legislature, which is to be marked off in particular cases as they arise.[59] The issue

consideration. See Nashville, C. & St. L. Ry. v. Walters, 294 U. S. 405, 55 S. Ct. 486, 79 L. ed. 949 (1935); Hammond v. Schappi Bus Lines, Inc., supra; same v. Farina Bus Line, supra; Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 55 S. Ct. 187, 79 L. ed. 281 (1934). The last-cited case is a striking example of the importance of pertinent evidence and findings. After the case was remanded to the lower court, proper evidence was admitted and findings made. 11 F. Supp. 599 (D. C. S. D. N. Y., 1935). On appeal to the Supreme Court the New York law was upheld. Borden's Farm Products Co., Inc. v. Ten Eyck, 297 U. S. 251, 56 S. Ct. 453, 80 L. ed. 669 (1936). In federal equity cases there is an express requirement that the district courts find the facts specially. Equity Rule 70½ (28 U. S. C. A. sec. 723): "In deciding suits in equity, including those required to be heard before three judges, the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and, in granting or refusing interlocutory injunctions, the court of first instance shall similarly set forth its findings of fact and conclusions of law which constitute the grounds of its action. Such findings and conclusions shall be entered of record and if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rules 75 and 76."

57. The exception to the hearsay rule, whereby official statements are admissible in evidence, has operated largely with reference to public records of particular transactions. 3 Wigmore, *Evidence* (2d ed. 1923) c. 54. The census, admissibility of which as evidence of the facts therein set forth is clear (*Idem*, pp. 518-519), is far from a sufficient source of information regarding the national life. As it expands its scope to include more and more economic data, it becomes less distinguishable from other government reports of a statistical nature. Their status as evidence seems not to be clearly established, although doubtless they will be admitted increasingly.

58. See the anti-trust cases, supra, note 15.

59. Besides the anti-trust acts, the federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C. A. sec. 51 (1908), and the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. A. sec. 901 (1927), may be noted. The same method of remaining within vaguely defined constitutional limits is employed in connection with zoning, where zoning boards

of whether the statute covers the specific instance becomes, then, partially one of fact which can be treated as such. It becomes, also, an issue which can be subjected to administrative determination in the first instance.[60]

The administrative process has important advantages over the other methods of collecting economic and social data which have been discussed down to this point.[61] Usually they are freed from adherence to the common law rules of evidence.[62] There is, however, assurance arising from the expert character of many administrative tribunals,[63] that the data upon which they rely in

---

of appeal are commonly given authority to vary the terms of ordinances in order "to avoid unnecessary hardship." The limits of rigidity in the application of zoning ordinances under such provisions must conform at least to the requirements of due process of law, and each case has within it a potential constitutional issue. Nectow v. Cambridge, 277 U. S. 183, 48 S. Ct. 447, 72 L. ed. 842 (1928); Dowsey v. Kensington, 257 N. Y. 221, 177 N. E. 427 (1931); Village of University Heights v. Cleveland Jewish Orphans' Home, 20 F. (2d) 743 (C. C. A. 6, 1927), Stason, *Cases on Municipal Corporations* (1935) 169-180.

60. The Federal Trade Commission under the Federal Trade Commission and Clayton Acts, 38 Stat. 722, 15 U. S. C. A. sec. 41 (1914), 38 Stat. 730, 15 U. S. C. A. sec. 12 (1914), the Longshoremen's and Harbor Workers' Compensation Commission under the federal Compensation Act, supra, note 59, and zoning boards of appeals must decide, respectively, whether alleged violations of the acts are in interstate commerce, whether an injury for which compensation is sought has occurred upon the navigable waters, and whether due process of law requires a variation of the zoning ordinance in a particular case.

61. Stephens, What Courts Can Learn from Commissions (1933) 19 A. B. A. J. 141, 142: "Courts have a narrowed horizon in looking for facts. This is due to the narrowness of issues, to the sharp and limited definitions of pleadings, to rigidity of application of the rules of evidence. This limitation is proper in certan types of cases involving life, liberty and property. But even within this limited judicial horizon a court's view of facts is often also incomplete and inexact, due to lack of facilities for getting at facts, and to defects in such facilities as are at hand. Within the field of constitutional law, the social and economic data underlying legislative action should be available to courts. Courts do, in fact, consider the social and economic backgrounds of legislation as bearing on the meaning and validity of statutes. The opinions of Mr. Justice Brandeis are rightly replete with such data. But few judges have this erudition, and few courts have the aid that counsel give our highest tribunal."

62. National Labor Relations Act, sec. 10(b); 1 Wigmore, *Evidence* (2d ed. 1923) secs. 4(a)-4(c); Note 80 U. Pa. L. Rev. 96 (1932). Occasionally, where important private rights are directly affected, adherence to the rules of evidence is required by statute. 45 Stat. 872, 26 U. S. C. A. sec. 611 (1928) (Board of Tax Appeals to observe the rules of evidence followed in the Supreme Court of the District of Columbia).

63. It is not contended, of course, that all administrative tribunals actually are expert. There is great variance among even the federal tribunals, and many in the field of state and local government are unspeakably bad. Doubtless many zoning boards of appeals leave much to be desired.

arriving at factual conclusions are trustworthy—assurance which is lacking in connection with both independent judicial research and the investigations of counsel which result in factual briefs.[64] The important administrative tribunals, moreover, have not been wholly freed of judicial control in regard to their methods. Procedural regularity is almost always subject to a judicial check, and there is a growing recognition of the importance of open presentation of evidence and its incorporation into the record.[65] The process of reasoning whereby evidence is translated into conclusions is becoming increasingly subject to the requirement that, in important classes of cases, explicit findings be made.[66]

Thus, upon important constitutional questions which can be resolved by marking out the boundaries of legislative authority case by case in proceedings arising under a statute that is designed to remain within the limits, the administrative process becomes an available means of sifting the evidence and of pre-

64. The research of judges and lawyers may, of course, at times be superior to that usually engaged in by administrative agencies. There are, however, no safeguards of a formal nature surrounding it, and it may be done incompetently or, in the case of counsel, with bias. Unless it is checked by the work of brother judges or opposing counsel, it may seriously affect the quality of judicial decisions based upon it. Moreover, in the numerous cases which may arise involving the constitutionality of the same enactment, different results are likely to be reached in different courts. In R. C. Tway Coal Co. v. Glenn, 12 F. Supp. 570 (D. C. W. D. Ky., 1935) the court disregarded all the evidence on the constitutional facts. The court was of the opinion that the effect of such evidence would serve as collateral attack upon the legislative inquiry, and to impeach its judgment. "The Congress has already investigated the facts as a basis for its action. If its findings may be impeached by the testimony of opinion witnesses, the act might be found to be constitutional in one case and unconstitutional in another, depending on the testimony. As many conclusions might be reached as to constitutionality as there might be judges, or upon such facts as ingenuity might suggest as matters of opinion or actual facts in evidence." The administrative presentation of facts to the courts, on the other hand, would be coördinated from case to case.

65. Hanft, Utilities Commissions as Expert Courts (1936) 15 N. C. L. Rev. 12; Smith, Practice and Procedure Before the Interstate Commerce Commission (1937) 5 Geo. Wash. L. Rev. 404; Ohio Bell Telephone Co. v. Public Utilities Commission, 57 S. Ct. 724 (1937). A tribunal which must dispose of numerous small controversies is likely, of course, to employ less formal methods. Brown, The Administration of Workmen's Compensation in Wisconsin (1935) 10 Wis. L. Rev. 345, 449; Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency (1937) 46 Yale L. J. 567.

66. Florida v. United States, 282 U. S. 194, 51 S. Ct. 119, 75 L. ed. 291 (1931), 292 U. S. 1, 54 S. Ct. 603, 78 L. ed. 1077 (1934); United States v. B. & O. Ry. Co., 293 U. S. 454, 55 S. Ct. 268, 79 L. ed. 597 (1935). The Federal Trade Commission has recently undertaken to prepare opinions in its cases. See vol. 20 of F. T. C. Reports.

senting it to the courts in assimilable form. The recent National Labor Relations decisions represent the triumph of this method. The jurisdiction of the National Labor Relations Board was limited by the Act to proceedings in situations "affecting commerce."[67] By the methods previously outlined,[68] the Board performed its task with great ability. The response of the Court revivifies the previously moribund federal power.

IV.

Important dangers remain in the governmental process exemplified by the National Labor Relations cases. The facts upon which the constitutionality of an administrative order rests are "jurisdictional"[69] or, at least, involve the "constitutional rights" of the parties adversely affected.[70] Insofar as the Supreme Court has shown a disposition to insist upon the judicial power to determine such facts by trial de novo, independently of administrative findings,[71] it is threatening to cast a monkey wrench into the machinery by which desirable results are obtained from the administrative process.[72]

Judicial apprehension of economic and social phenomena, even when they are well presented, moreover, remains an uncertain factor. Five justices who are impressed by the constitutional significance of the steel industry's interstate ramifications are almost balanced by four who are not.[73] The attitude of the Privy Council in *Toronto Electric Commissioners v. Snider*[74] finds its echo in the opinion of the Court in *Carter v. Carter Coal Company*:[75] "The relation of employer and employee is a local rela-

67. National Labor Relations Act, secs. 9(c), 10(a).

68. Supra, text at notes 11, 12, & 13.

69. Ng Fung Ho v. White, 259 U. S. 276, 42 S. Ct. 492, 66 L. ed. 938 (1922); Crowell v. Benson, 285 U. S. 22, 52 S. Ct. 285, 76 L. ed. 598 (1932).

70. Ng Fung Ho v. White, supra; Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 40 S. Ct. 527, 64 L. ed. 908 (1920).

71. Crowell v. Benson, supra, note 69; St. Joseph Stockyards Co. v. Wallace, 298 U. S. 38, 56 S. Ct. 720, 80 L. ed. 1033 (1936); B. & O. Ry. Co. v. United States, 298 U. S. 349, 56 S. Ct. 797, 80 L. ed. 1209 (1936). Compare Acker v. United States, 298 U. S. 426, 56 S. Ct. 824, 80 L. ed. 1257 (1936).

72. The point is not that administrative tribunals are inherently abler than courts. It is, rather, that they can be made expert in the matters with which they deal, whereas courts must continue to concern themselves with many classes of cases in such manner as virtually to preclude them from independently grasping the significance of complex social and economic phenomena.

73. Jones & Laughlin case, 57 S. Ct. 615, 630 (1937).

74. Supra, note 34.

75. 298 U. S. 238, 56 S. Ct. 855, 80 L. ed. 1160 (1936).

tion. At common law, it is one of the domestic relations. The wages are paid for the doing of local work." "Liberal" decisions are "distinguishable" from those which restrict the federal power, and the latter remain as precedents alongside the former.[77] Either may dominate in future opinions. Federal authority to guard against stoppage of production through strikes for the right to organize, does not necessarily connote federal power to regulate wages and working conditions.[78] The government which is morally and politically responsible for the welfare of a national economic unit may yet confront a future crisis, constitutionally impotent to give effect to necessary legislation.

To a large extent, however, the legal "battle of the century" appears to have been won for democracy. The constructive forces in the Anglo-American judicial process will hardly yield now to blind conservatism. "The traditional common-law technique does not rule out but requires some inquiry into the social and economic data to which it is to be applied. . . . The judge . . . must open his eyes to all those conditions and circumstances within the range of judicial knowledge, in the light of which reasonableness is to be measured. In this he but follows historic precedent, even though he does less than did Lord Mansfield in learning the practices of merchants in order to adapt the rules of the common law to the needs of a mercantile community."[79] If the judge of today does less, which is questionable, he also has aids that go far beyond those available in the eighteenth century.

---

76. At p. 308-309.
77. Supra, text at notes 5, 6, and 7.
78. Message of President Roosevelt to Congress, May 24, 1937.
79. Stone, The Common Law in the United States (1936) 50 Harv. L. Rev. 4, 24.