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LEGAL TECHNIQUE AND NATIONAL CONTROL OF THE PETROLEUM INDUSTRY

BY RALPH F. FUCHS

I. THE FATALIST VIEWPOINT

Physical waste and economic distress in the petroleum industry have recently been called to public attention in ways which have made the subject familiar to many newspaper readers. Among participants in the industry there has been a demand for its control on a national scale. While this demand is typical of agitation regarding a number of industries that are functioning badly, it is rendered the more insistent in the oil industry by the acuteness of certain conditions peculiar to the extraction of petroleum. Nevertheless there seems to be little disposition to believe that the demand can be met, for legal and constitutional obstacles are deemed to stand in the way of national control. Of late the industry has contented itself with local efforts at controlling production and with the promotion of an interstate compact to handle matters on a broader scale.¹ It is the purpose of this article to suggest² that a proper understanding of the legal techniques employed in court decisions upon industrial control would eliminate much of the fatalism which accepts legal and constitutional obstacles to national control as unchangeable. Whether an interstate compact is a preferable means of taking the situation in hand is, of course, not under discussion here.

¹ See Lippincott, *Troubles of the Oil Industry*, ST. LOUIS POST-DISPATCH, Apr. 7, 1931 p. B2, for an excellent summary of the present situation.

² Limitations of time make a thorough study impossible.

II. LEGAL OBSTACLES TO NATIONAL CONTROL

Control of the petroleum industry on a national scale could come about in one of four ways.³ A merger of corporations, involving substantially the entire industry, might be undertaken. An association of oil companies, with power to establish and enforce general policies for its members, might be formed. The Federal government might step in with a comprehensive scheme of regulation involving the licensing of oil wells or of shipments in interstate commerce.⁴ Or, finally, some form of merger or association of oil companies might be accompanied by supervision at the hands of a Federal agency.⁵

The foregoing brief statements do not, of course, begin to define the precise powers or types of administrative machinery that would be employed under each form of control. Indeed an almost infinite variety is possible under each form. Thus a merger of oil companies might be accomplished by the formation of a holding company or by the complete absorption of existing companies into a new business unit. In either event manage-

³ That is, assuming that current modes of organization and habits of thought will not be revolutionized. In order to formulate a plan which would go to the roots of existing evils, further possibilities would have to be considered. The analogous problems of the bituminous coal industry have been attacked in this fundamental manner. See HAMILTON AND WRIGHT, *A WAY OF ORDER FOR BITUMINOUS COAL* (1928) reviewed 14 *St. Louis L. Rev.* 341. Here, however, where the purpose is simply to survey the legal status of certain proposals that stand a chance of adoption in the near future, it is unnecessary to venture far beyond the limits of the familiar.

⁴ The U. S. Coal Commission of 1922 recommended Federal licensing of shippers and buyers of coal in interstate commerce. HAMILTON & WRIGHT, *op. cit.* n. 3 above, 325; HUNT, *WHAT THE COAL COMMISSION FOUND* (1925) 404.

⁵ A "Committee of Nine," composed of three members of the Section on Mineral Law of the American Bar Association, three representatives of the American Petroleum Institute, and three representatives of the Federal Oil Conservation Board, recommended in 1928 that Congress enact a statute adopting such a scheme for use in emergencies. The proposed law specified that agreements among producers of oil to curtail production during periods of overproduction should not be deemed to violate the anti-trust acts. It was provided that periods of overproduction should be deemed to exist only when declared by the Federal Oil Conservation Board. Thus the latter body, created in 1924 to study the petroleum situation and report upon it, was to be entrusted with limited regulatory powers. The Board consists of the Secretaries of War, Navy, Commerce, and the Interior. See 53 *A. B. A. Rep.* 637.

ment might be highly concentrated or left in the hands of relatively autonomous subsidiary companies or regional subdivisions. Under the second plan the nominally independent companies might surrender much power or little to the association which they formed by agreement. Such an organization might budget production and fix prices, assessing penalties for non-conformity, or confine itself to carrying on cooperative undertakings for the prevention of waste in production. Federal control, whether of a competitively or non-competitively organized industry, might be limited to enforcing technically sound methods of production or might extend to price fixing and determining the purposes for which petroleum might be used. But each form of national control, whether applied drastically or only to a limited extent, would raise the doubts as to legality or constitutionality which are referred to above.⁶

It is, of course, the anti-trust acts⁷ which are the real or supposed bar to the industry's uniting in an effort to control the overproduction which is the outstanding evil at the present time. Not only are there the words of the acts themselves, warning against contracts, combinations, and conspiracies in restraint of trade, but there rests upon the industry the shadow of the *Standard Oil* decree,⁸ dissolving the combination that existed

⁶In the spring of 1929 the American Petroleum Institute, composed of representatives of the larger oil companies, advanced a proposal which doubtless would have formed the starting point for continued national control by these companies in so far as their economic power would have permitted. It was agreed that the companies represented in the Institute would limit their 1929 production to the level of 1928, provided the Federal Oil Conservation Board would give its sanction to the plan. A request from the Secretary of the Interior brought from the Attorney-General the opinion that the Board had no power to pass on any such proposal and that the oil companies could not obtain advance assurance against prosecution under the anti-trust acts for any schemes they might enter into. N. Y. TIMES, Apr. 4, 1929, 1:3. At the same time the administration was reported to be opposed to any modification of the anti-trust acts in favor of the oil companies, since the displacement of enforced competition would doubtless have to be accompanied by the creation of a new regulatory commission—a highly undesirable outcome in the eyes of the President. *Ibid.* Apr. 3, 1929, 1:3.

⁷Chiefly the Sherman Act (1890) 26 Stat. 209, 15 U. S. C. sec. 1, the Federal Trade Commission Act (1914) 38 Stat. 717, 15 U. S. C. sec. 41, and the Clayton Act (1914) 38 Stat. 730, 15 U. S. C. sec. 12.

⁸U. S. v. *Standard Oil Co.* (1909) 173 Fed. 177, aff'd (1911) 221 U. S. 1. It seems likely that mergers in the oil industry could be effected with a high

prior to 1911 and forbidding its re-creation. Federal regulation, on the other hand, meets with two constitutional obstacles—the due process clause of the Fifth Amendment and the doctrine that production and manufacture are not subject to control by Congress in the exercise of its power to regulate interstate commerce.⁹

III. PRIVATE CONTROL AND THE ANTI-TRUST ACTS

The Supreme Court, since announcing in the *Standard Oil*¹⁰ and *American Tobacco*¹¹ cases that only *unreasonable* contracts and combinations in restraint of trade are illegal under the Sherman Act, has stated that certain practices are *per se* unreasonable and in violation of the Act. *United States v. Trenton Pottery Co.*¹² was a prosecution of the parties to a trade association which fixed the prices upon vitreous pottery bathroom fixtures. It was held that the defendants were not entitled to have the jury in the district court pass upon the reasonableness of their prices. It was enough to sustain the convictions that prices were found to have been fixed. "The reasonable price fixed today may . . . become the unreasonable price of tomorrow. . . . Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful re-

degree of success if the matter could be approached *de novo*. In other industries the anti-trust acts have not been a bar to mergers that have resulted in almost monopoly control. *U. S. v. United Shoe Machinery Corp.* (1918) 247 U. S. 32; *U. S. v. U. S. Steel Corp.* (1920) 251 U. S. 417; *U. S. v. International Harvester Co.* (1927) 274 U. S. 693. So largely is this true that some commentators have concluded that the anti-trust acts have largely ceased to be a deterrent to industrial mergers. NATIONAL INDUSTRIAL CONFERENCE BOARD, *MERGERS AND THE LAW* (1929) 80-82, 148-153; KEEZER & MAY, *THE PUBLIC CONTROL OF BUSINESS* (1930) 42-50. The illegality of the Standard Oil combination is explainable in terms of the piratical tactics employed in building it up and perhaps also in terms of the early public attitude of hostility toward large-scale business. The Supreme Court may have reflected that attitude in the Standard Oil decision and later, as public opinion changed, have modified its own views. Whatever the reason, the petroleum industry, like the meat-packing industry [*Swift & Co. v. U. S.* (1928) 276 U. S. 311], is under a continuing judicial control in all matters involving possible violation of the dissolution decree.

⁹ Const. Art. I, Sec. 8, Clause 3.

¹⁰ N. 8 above.

¹¹ (1911) 221 U. S. 106.

¹² (1927) 273 U. S. 392.

straints."¹³ And in another case¹⁴ the activities of a trade association in the hardwood lumber industry were enjoined upon the ground simply that an intention to maintain prices and limit production had been manifested. Only in a dissenting opinion¹⁵ was attention paid to conditions in the industry which may have justified what the association was doing.

In view of such decisions¹⁶ it is not surprising that it should have become the general opinion that circumstances cannot in the eyes of the courts justify price fixing or curtailing of production by associations of competitors.¹⁷ Nor is it to be wondered at that the men who conduct the petroleum industry, where curtailment of production is the crying need of the hour, should fight shy of taking the risks incident to endeavoring to meet that need.¹⁸ With a comprehensive merger largely ruled out in advance,¹⁹ the road to national control of itself by the industry appears to many to be blocked. Serious students, however, envisage a larger field for trade association activities than the language of some past decisions would indicate;²⁰ and successful lawyers have proceeded upon the assumption that the anti-trust laws will be construed with sufficient flexibility to accommodate them to changing business situations.²¹ To a considerable extent history supports these views.

¹³ *Ibid.* at 397.

¹⁴ *American Column & Lumber Co. v. U. S.* (1921) 257 U. S. 377.

¹⁵ Written by Brandeis, J. and concurred in by McKenna and Holmes, JJ.

¹⁶ Decisions which point the other way are noted below.

¹⁷ NATIONAL INDUSTRIAL CONFERENCE BOARD, *TRADE ASSOCIATIONS AND THE LAW* (1925) cc. V & VI.

¹⁸ N. 4 above.

¹⁹ N. 6 above.

²⁰ KIRSCH, *TRADE ASSOCIATIONS—THE LEGAL ASPECTS* (1928), while recognizing the force of precedents such as the Trenton Potteries case, points out (at p. 28) that: "The stabilization of price levels, arising from economic laws and not from artificial agreements, and the elimination of industrial waste and inefficiency with their attendant evil consequences, could not long be the subject, at the same time, of economic approval and legal condemnation."

²¹ Mr. Charles Nagel, addressing the students of the Washington University School of Law on *The Evolution of the Sherman Act*, recently stated his belief that the approval of the Supreme Court under the existing anti-trust laws may be won for any business transaction which is ethically and economically sound.

The "Rule of Reason" itself, first announced in 1911,²² was a tremendous reversal in the Supreme Court's position, as frequently has been pointed out.²³ It is difficult to see how the idea of fixity in the doctrines of anti-trust law can receive the support it does in the face of so complete a reversal of previously accepted views. The reversal, it is true, was a reversal of *obiter dicta*; but there is no doubt that the *dicta* on both sides represented views which the justices adhering to them would have applied had occasion arisen. The Rule of Reason has, of course, since operated to permit industrial mergers whose illegality under the earlier view is beyond question.²⁴

Scarcely less important a reversal, although a less obvious one, occurred in the decisions upon "open price" arrangements maintained by trade associations. Under such an arrangement the primary function of the trade association is to gather statistics and other information, largely from its members, and to redistribute this information in digestible form to the members. Thus each producer is supplied with facts concerning, among other things, the production, stocks on hand, costs, and prices of his competitors and can shape his own policies in the light of actual conditions. In the *Hardwood Lumber* case,²⁵ decided in 1921, the Supreme Court sustained an injunction decree which forbade such activities, largely because the secretary of the trade association indulged in exhortation to the members, thereby, as the court thought, revealing a purpose to curtail production and enhance prices. The decision caused a "storm of protest in the business world."²⁶ Less than five years later an association in the same industry, whose reporting of informa-

²² In *U. S. v. Standard Oil Co.*, n. 8 above, and *U. S. v. American Tobacco Co.*, n. 11 above.

²³ NATIONAL INDUSTRIAL CONFERENCE BOARD, *op. cit.* n. 17 above, 46. According to the "Rule of Reason," as the phrase implies, the Sherman Act was construed to mean that only unreasonable contracts and combinations in restraint of trade are illegal. The earlier view, expressed in *U. S. v. Trans-Missouri Freight Assn.* (1897) 166 U. S. 290 and other cases, was that all such contracts and combinations, whether reasonable or unreasonable, were in violation of the Act.

²⁴ N. 8 above. Compare *Northern Securities Co. v. U. S.* (1904) 193 U. S. 197.

²⁵ N. 14 above.

²⁶ NATIONAL INDUSTRIAL CONFERENCE BOARD, *op. cit.* n. 20 above, 91.

tion lent itself more readily to price fixing than that in the earlier case, was sustained as legal, there being no evidence that prices actually had been fixed.²⁷ In this case information regarding single members of the association was not distributed, but reports containing generalized statistics were made. Included in these statistics was the average cost of production of various grades of hardwood flooring, computed periodically by the association from data furnished by members. A book was also prepared, showing the freight rates on such flooring from Cadillac, Michigan, a central point in the association's territory, to destinations throughout the United States. The majority of the Court refused in this instance to be governed by the fear that the average cost of production would be used as a base, to which the quoted freight rates and an agreed percentage of profit would be added, so as in effect to fix the prices on flooring.

In at least two instances special circumstances have led the Court to approve what were in effect limited arrangements to control production or fix prices. In the *Window Glass* case²⁸ all of the manufacturers of hand-blown window glass in the country agreed with a trade union, representing all of the hand workers, upon a wage scale and upon the operation of each plant for only half of the working year. There were not enough workers to serve all of the plants full time. The Court was convinced that the industry was dying before the advance of machine-made glass. Hence it upheld the agreement despite the government's contention that hand-blown glass was higher in quality and had its own market and that the defendants were enabled by the agreement to fix prices.

In *Chicago Board of Trade v. U. S.*²⁹ the Court upheld a rule of the Board, binding upon its 1600 members, to the effect that prices offered for grain in transit to Chicago in all private transactions of members should remain from one day to the next at the closing bid made upon the floor of the exchange. A simple doctrine that price fixing is illegal would have led to an injunction against the Board's rule, as it did in the district court. The

²⁷ *Maple Flooring Assn. v. U. S.* (1925) 268 U. S. 563.

²⁸ *Window Glass Mfrs. v. U. S.* (1923) 263 U. S. 403.

²⁹ (1918) 246 U. S. 231.

Supreme Court, however, reversed the case and in an opinion by Mr. Justice Brandeis used the following oft-quoted language:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

A court which permits such an expression to stand can scarcely be said to have become irrevocably committed to specific doctrines limiting the possibility of control of an industry by its members. The significance of the foregoing language, however, can only be determined in connection with the attitude of the court in other similar matters.

IV. FEDERAL CONTROL UNDER THE CONSTITUTION

The shifting decisions of the Supreme Court upon the constitutionality of Federal and state regulatory legislation have been a favorite topic of discussion in legal and economic literature.³⁰ No realistic student of the United States Reports can retain the slightest faith in the utility of doctrinal distinctions between police power measures which are valid and statutes that infringe upon the guaranties of due process contained in the Fifth and Fourteenth Amendments to the Federal Constitution. Judicial language which sets forth the right of free contract and defines in general terms the scope of its immunity from legislative interference cannot hope to explain why a maximum working day of eight hours may be prescribed for mines and smelteries³¹ but not one of ten hours for bakeries;³² why maximum

³⁰ Brown, *Due Process of Law, Police Power, and the Supreme Court* (1927) 40 HARV. L. REV. 943, is a useful review of the decisions of the Supreme Court of the United States upon this point. References are there given to earlier surveys in legal periodicals. For an exhaustive analysis of the development of the concept of due process of law see MOTT, *DUE PROCESS OF LAW* (1926).

³¹ *Holden v. Hardy* (1898) 169 U. S. 366.

³² *Lochner v. N. Y.* (1905) 198 U. S. 45.

hours of work³³ but not minimum wages³⁴ for women may be established by law; why the commissions of fire insurance agents³⁵ but not the fees of employment agencies³⁶ may be fixed by legislation; or how it is that railroads cannot be forbidden to discharge men on account of membership in a labor union³⁷ but may be prohibited from exerting pressure upon their employees to prevent a free choice of means of collective bargaining.³⁸ To resolve such apparent conflicts in the decisions requires a resort to factors which are revealed imperfectly, if at all, in the opinions of judges. If, therefore, it were contended that the requirement of a license for the development of oil-bearing land would deprive landowners and lessees of their property without due process of law, the soundness of the contention could not be appraised by merely resorting to the cases. Not even the decision invalidating a state statute which provided for regulation of the selling price of gasoline, upon the ground that the gasoline business is not "affected with a public interest,"³⁹ is conclusive—especially when the court admits⁴⁰ that the "established test" which it is applying is indefinite. It is not unthinkable that a contrary result might be reached in a case which varied but slightly from the one already decided.⁴¹

Supposedly a more serious obstacle to Federal regulation of the oil industry than the due process requirement is the fact that only interstate commerce is subject to Congress' regulatory power. It is generally recognized that control of the production of petroleum is the key to control of the industry. The competitive scramble for a limited, "fugitive" natural resource brings forth an unneeded flood of oil.⁴² It is the unavoidable effort to

³³ *Radice v. N. Y.* (1924) 264 U. S. 292.

³⁴ *Adkins v. Children's Hospital* (1923) 261 U. S. 525.

³⁵ *O'Gorman & Young v. Hartford Fire Ins. Co.* (1931) 51 S. Ct. 131.

³⁶ *Ribnik v. McBride* (1928) 277 U. S. 350.

³⁷ *Adair v. U. S.* (1908) 208 U. S. 161.

³⁸ *Tex. & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks* (1930) 281 U. S. 548.

³⁹ *Williams v. Standard Oil Co.* (1929) 278 U. S. 235.

⁴⁰ At p. 239.

⁴¹ The Fourteenth Amendment has not prevented the supreme courts of the three most important oil-producing states from upholding drastic restrictions upon the production of petroleum. See below, pp. 223, 235, 241.

⁴² For the physical factors which intensify the oil problem as compared with those of other natural resources see below, p. 221.

dispose somehow of this flood which is the cause of most of the difficulty in the industry. Because the Supreme Court has stated in a number of cases⁴³ that production of commodities is not interstate commerce, most commentators have concluded that Federal regulation of the industry, which must have control of production for its object, is impossible.⁴⁴ As a matter of mere words the contention is plausible. Indeed it is possible that it would prevail in a decision involving the point. Yet it stands conceded in even the Supreme Court's most reactionary decision,⁴⁵ and it is of course true that in other connections Federal control has reached far back into the production of goods⁴⁶ and the ownership of producing concerns,⁴⁷ as well as

⁴³ *Coe v. Errol* (1886) 116 U. S. 517, *Heisler v. Thomas Colliery Co.* (1922) 260 U. S. 245, and *Oliver Iron Co. v. Lord* (1923) 262 U. S. 172, upholding state and local taxes on products ready for shipment in interstate commerce; *U. S. v. E. C. Knight Co.* (1895) 156 U. S. 1, holding that the manufacture of sugar is not interstate commerce and hence not subject to the Sherman Act; *United Mine Workers v. Coronado Coal Co.* (1922) 259 U. S. 344, holding that prevention of the mining of coal intended for shipment in interstate commerce is not necessarily interference with such commerce; *Del. L. & W. R. Co. v. Yurkonis* (1915) 238 U. S. 439, holding that the Federal Employers' Liability Act does not apply to a worker engaged in mining coal for use in locomotives operating in interstate commerce; *Hammer v. Dagenhart* (1918) 247 U. S. 251, holding that the employment of child labor in the manufacture of goods shipped in interstate commerce cannot be subjected to national control.

⁴⁴ Veasey, *Legislative Control of the Business of Producing Oil and Gas* (1927) 52 A.B. A. REP. 577 at 587; HAYDEN, *FEDERAL REGULATION OF THE PRODUCTION OF OIL* (1929) c. 10; LOGAN, *THE STABILIZATION OF THE PETROLEUM INDUSTRY* (1930) 195-197.

⁴⁵ *Hammer v. Dagenhart*, n. 43 above, at p. 270.

⁴⁶ *Pittsburgh Melting Co. v. Totten* (1918) 248 U. S. 1, upholding the Federal Meat Inspection Act; *Coronado Coal Co. v. United Mine Workers* (1925) 268 U. S. 295, holding that interference with the production of coal for the conscious purpose of preventing shipments in interstate commerce comes within the Sherman Act. In *Dahnke-Walker Co. v. Bondurant* (1921) 257 U. S. 282 a contract of purchase of grain, to be performed within a state, was held to be in interstate commerce because the grain was to be delivered on board cars for shipment in such commerce.

⁴⁷ Much of the operation of the anti-trust acts would be impossible without a foundation in the view, now largely taken for granted, that the power of Congress extends to the regulation of the ownership of the means of production. For an account of the implied reversal of the Knight case, n. 43 above, by later decisions, see TAFT, *THE SUPREME COURT AND THE ANTI-TRUST ACT* (1914) c. III.

forward over dealings with goods which previously have been subjects of interstate commerce.⁴⁸

The problem, then, appears to revolve about the question of whether the Supreme Court can be made to see that the production of petroleum affects interstate commerce. At least one series of cases indicates that the task need not be regarded as hopeless.

In *Hopkins v. U. S.*⁴⁹ the question was over the legality under the Sherman Act of an agreement among commission merchants at the Kansas City stockyards, whereby they fixed the rates of commission they would charge, limited the number of solicitors of business each would employ, and agreed not to do business with non-members of their exchange. Cattle were consigned to the defendants from other states and were sold to purchasers who immediately shipped them in interstate commerce. The Kansas City stockyards were the only available market for many of the defendants' clients. The court held that the business of the defendants was not interstate commerce and that their agreement, whether in restraint of that business or not, was not subject to the Sherman Act. A general reading of the opinion would lead to the view that the business of the defendants could not be subjected to Federal control.⁵⁰

In the subsequent case of *Swift & Co. v. U. S.*,⁵¹ in which a

⁴⁸ *Bedford Cut Stone Co. v. Stone Cutters' Association* (1927) 274 U. S. 37, holding that a refusal of union men to work on stone after its shipment in interstate commerce for the reason that it was cut by non-union labor, falls within the Sherman Act. The Court reasoned that the purpose was to prevent further shipments.

⁴⁹ (1898) 171 U. S. 578.

⁵⁰ The basis of the decision is not entirely clear, however, for the Court goes on to say that "It is possible that exorbitant charges for the use of these defendants' facilities might have a similar effect as a burden on commerce that a charge upon commerce itself might have. In a case like that the remedy would probably be forthcoming." Thus it apparently was recognized, despite the general tenor of the opinion, that activities which bear upon interstate commerce in a manner which the Court can recognize may be subjected to the control of Congress. A companion case, *Anderson v. U. S.*, 171 U. S. 604, involving the similar activities of "yard traders," or buyers of cattle, is decided upon the ground that the defendants' activities, though possibly having to do with interstate commerce, did not restrain it directly enough to come within the Sherman Act. Hence the basis of the decision in effect is the same as in the *Hopkins* case.

⁵¹ (1905) 196 U. S. 375.

conspiracy of the meat packers as purchasers to control the prices of live animals at the stockyards and as sellers to monopolize the trade in fresh meats was charged, the court found there was a sufficient basis for distinguishing the *Hopkins* case and holding that the Sherman Law applied. In the course of the opinion, however, the Court went farther and said:

When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce.

Thus the logic of the opinion pointed clearly to a reversal of the doctrine of the *Hopkins* case.

Such a reversal took place in *Stafford v. Wallace*,⁵² in which the constitutionality of the Packers and Stockyards Act⁵³ was upheld. That Act subjects not only the packers but the commission men and dealers at the stockyards—the very parties involved in the *Hopkins* and *Anderson* cases—to regulation by the Secretary of Agriculture. The Secretary's power is broad, being defined in a number of particulars by reference to the Interstate Commerce Act. In the opinion by Chief Justice Taft it is expressly stated⁵⁴ that any matter affecting interstate commerce, whether itself constituting such commerce or not, is subject to the regulatory power of Congress.⁵⁵

⁵² (1922) 258 U. S. 495.

⁵³ (1921) 42 Stat. 159, 7 U. S. C. sec. 181.

⁵⁴ At p. 521.

⁵⁵ In *Tagg Bros. & Moorhead v. U. S.* (1930) 280 U. S. 420, the constitutionality of the rate-fixing features of the Act was specifically upheld. *Chicago Board of Trade v. Olsen* (1923) 262 U. S. 1, is similar in its reasoning to *Stafford v. Wallace*. In it the Grain Futures Act (1922) 42 Stat. 998, 7 U. S. C. sec. 1, is sustained although the powers conferred upon the Secretary of Agriculture extend to regulation of future trading, a large part of which represents purely paper transactions. The Court, aided by a "recital and finding" incorporated in sec. 3 of the Act, concluded that future trading bears vitally upon interstate commerce in grain. It was also held that grain temporarily in elevators at Chicago, although subject to local taxation, is also subject to regulation by Congress. Thus is demonstrated the futility of arguing by analogy from tax cases to matters of

V. THE ROLE OF LEGAL TECHNIQUE

In each of the foregoing classes of cases the same doctrinal foundation has served as a basis for conflicting decisions. The predictability of these decisions, so far as that is determined according to accepted legal methods, has been at a minimum. The clear lesson of such a record is that the language of the Supreme Court cannot validly be made the basis of forecasts, gloomy or otherwise, regarding the validity of future methods of control of the petroleum industry or of any other industry. Rather must the determining factors be sought elsewhere. Two major possibilities suggest themselves.

Convincing data can be adduced in support of the view that the factor which really determines court decisions in matters of industrial control is what may be called the psychology of judges—that is, the judges' general views of policy and their instinctive reactions to unfamiliar proposals. These, it may be maintained, depend upon influences which antedate by far the argument in a particular case and cannot be affected by anything that parties or their counsel may do. Thus the decisions cited above,⁵⁶ striking down minimum wage laws and upholding maximum hour laws, were rendered by the same nine judges with reference to the employment of women under substantially similar conditions. The same doctrines of constitutional law were involved. The minimum wage law had the benefit of an elaborate argument in its support. In both cases there was directly applicable precedent in support of the statute in question,⁵⁷ although in the case sustaining a previous minimum wage statute the law did not command the support of an actual majority of the Supreme Court. Very possibly the decisions in the two cases were opposed because, as the opinions of Mr. Justice Sutherland indicated, the majority of the court was wedded to the idea, which argument could not shake, that the wage feature of the labor contract is more fundamental and immune from governmental interference than any other.

regulation, as many writers still do. See HAYDEN, *op. cit.* n. 44 above. Compare book review (1930) 9 TEX. L. REV. 120.

⁵⁶ See nn. 33 and 34 above.

⁵⁷ Maximum hour laws had been sustained in *Muller v. Oregon* (1908) 208 U. S. 412 and *Bunting v. Oregon* (1917) 243 U. S. 426. Minimum wage laws for women had been sustained by an evenly divided court in *Stetler v. O'Hara* (1917) 243 U. S. 629.

It can be demonstrated, also, that a number of the important reversals which have occurred in the history of the Supreme Court are explainable in terms of the Court's changing personnel. Thus not a single judge reversed his position to bring about the adoption of the Rule of Reason in the application of the Sherman Act. The change was accompanied by a largely altered personnel upon the Court.⁶⁸ In connection with the legality of "open price" trade associations only a single justice voted differently in the two principal cases.⁶⁹ In the matter of the con-

⁶⁸ The latest important case in which the Rule of Reason had been rejected was *U. S. v. Joint Traffic Assn.* (1898) 171 U. S. 505. The following table shows the positions of the Justices in that and in the Standard Oil case:

	For the Rule of Reason	Against the Rule of Reason
<i>U. S. v. Joint Traffic Assn.</i>	Gray Shiras	Fuller Brewer Brown Peckham
Both cases	White	Harlan
<i>U. S. v. Standard Oil Co.,</i> n. 8 above	McKenna Holmes Day Lurton Hughes Lamar VanDevanter	

⁶⁹ The following table shows their positions:

	For the Plan	Against the Plan
<i>U. S. v. American Column & Lbr. Co.,</i> n. 14 above	McKenna	Clarke VanDevanter Day Pitney
Both cases	Holmes Brandeis	Taft McReynolds
<i>Maple Flooring Assn. v. U. S.,</i> n. 27 above.	VanDevanter Sutherland Stone Butler	Sanford

stitutional freedom of employers to employ economic coercion in battling labor unions, Mr. Justice Hughes, who dissented in a pre-war case involving the point,⁶⁰ was placed in the position as Chief Justice of being able in 1930 to write the opinion of a unanimous court in substantial accord with his earlier views.⁶¹ Only one Justice who had agreed to the earlier decision participated in deciding the later one.⁶² Other instances of reversals, partially explainable in terms of the Court's changing personnel, might be cited.

If the foregoing view of the matter be accepted, it becomes of little avail to discuss the basis of judicial decisions in the class of cases here under discussion. The manner of selection of the Justices of the Supreme Court becomes the only important question. And since, after all, the inclinations of a prospective Justice, even after his record has been investigated, are not capable of exact determination, an agnostic view of the probable course of the Court's adjudications becomes the only possible one to take.⁶³

The alternative view of the determining factors in the class of decisions here under discussion is that matters of fact rather than merely of legal doctrine or judicial psychology are determining. Whether a newly-enacted regulatory measure takes property without due process of law depends upon the circumstances. How far certain practices or conditions in a business or industry bear upon interstate commerce can only be ascertained by examining the general situation. Whether a given restraint of trade is reasonable or unreasonable depends upon the facts. It seems fairly obvious, therefore, that the technique of marshalling and presenting facts to a court and the judicial technique of dealing with them are of central importance. Judges do not function in a vacuum. Their psychology, important though it may be, must operate upon a situation which is presented to them. And since the presentation and comprehension of that situation in each case are the factors most definitely subject to manipulation for effect, they seem of central

⁶⁰ *Coppage v. Kansas* (1915) 236 U. S. 1.

⁶¹ *Tex. and N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks*, n. 38 above.

⁶² Mr. Justice VanDevanter. Mr. Justice Holmes dissented in the earlier case. Mr. Justice McReynolds did not take part in the later one.

⁶³ See note (1930) 30 *COL. L. REV.* 360.

importance to lawyers and others who are interested in guiding the course of judicial decision in matters of industrial control.

The art of presenting facts to a court, of course, is as old as the practice of law. But the facts whose presentation is a matter of concern in the ordinary case are quite different from those which are involved in a constitutional decision. In a personal injury case, for instance, the purpose of the testimony ordinarily is to enable the jury to form a correct (or incorrect) picture of the occurrence upon which the suit is based. The rules of evidence are designed to preserve the purity of the information thus furnished. Facts of common knowledge are supplied through the medium of judicial notice or from the jury's store of everyday information. If the case is appealed the testimony preserved in the record and the appellate court's stock of general knowledge ordinarily suffice for the purposes of decision. If, either at the trial or upon appeal, counsel wish to induce the court to announce an alleged rule of law, such as that certain conduct is negligence *per se*, it is the oral or written argument (printed brief) upon which the principal reliance is placed. So long as this argument is conceived to be purely doctrinal in character no question of the presentation or consideration of facts is involved. But if, for example, counsel were to deem it desirable to argue for a new rule of law in the light of the increasing use of the automobile, it would be necessary to present facts regarding this modern phenomenon. So long as the court were willing to accept them, these facts might simply be stated in the brief with such supporting authorities as counsel might deem it desirable to include. But if questions regarding the reliability of these alleged facts were raised, it would become important to consider whether the proper method of presenting them had been employed. In any event counsel would have done less than a thoroughly competent piece of work if equally as great care and thought had not been expended upon the presentation of these "background" facts as upon the testimony in the immediate case.

It is these "background" facts which are of central importance in constitutional cases and, to a lesser extent, in anti-trust litigation. Whether a minimum wage law is constitutional does not depend upon the facts relating to the employment of the young

woman who may have been induced to challenge it. It turns, rather, upon the facts relating to the employment of the thousands of women who come under the law. The immediate facts in the case, analogous to those presented in an ordinary lawsuit, have to do simply with the question of whether the young woman actually is being employed for less than the minimum. Usually that is admitted. And the "background" facts, upon which the real issue turns, may come before the court in various ways which have not been the subject of much conscious attention.⁶⁴ In some cases the cleavage between the immediate facts and the background facts is less clear, as, for example, in a case involving the alleged confiscatory nature of a rate-fixing statute or order. It is this inevitable blurring of distinctions, no doubt, which is responsible for the avoidable lack of clarity with regard to methods of presentation of background facts. These range from reliance upon judicial notice to the introduction of formal testimony.⁶⁵

Various problems obviously will arise in connection with the development of an adequate technique for the presentation and consideration of such background facts. An exclusive reliance upon formal testimony would be expensive and would create records of unmanageable size. The rules of evidence, moreover, are entirely unsuited to sifting reliable testimony of this sort from unreliable.⁶⁶ The introduction of facts into the argument and briefs is subject to no formal check as to accuracy, and again the bulk of the material is likely to become unmanageable. Very probably increasing reliance will be placed upon additional fact-determining agencies, such as administrative bodies, to

⁶⁴ *Op. cit.* n. 63. An illuminating discussion is contained in Biklé, *Judicial Determinations of Questions of Fact Affecting the Constitutional Validity of Legislative Action* (1924) 38 HARV. L. REV. 6, in which alternative ways of handling the problem of factual presentation are suggested. See also MOTT, *op. cit.* n. 30 above, c. 24; FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928) 308-315.

⁶⁵ In a recent case Mr. Chief Justice Hughes complained that "No facts as to actual consequences are brought to our attention, either *by the record* or *by argument*. . . . We are left to the inadequate guidance of *judicial notice*." (Italics the writer's.) *Willcuts v. Bunn* (1931) 51 S. Ct. 125 at 129.

⁶⁶ Many rules of evidence are designed to exclude testimony relating to matters which are outside the witness' personal knowledge. Economic and sociological data, except in small part, cannot be known personally to any person.

pass judgment upon the facts before their submission to a court⁶⁷ or upon research bureaus attached to the courts, whose function it would be to check up on facts supplied by counsel and to fill gaps in the data.

Be the solutions to the foregoing problems what they will, the bearing of these questions upon the probable success of efforts to subject an industry, such as the petroleum industry, to control is clear. The doctrines of anti-trust law and of constitutional law throw little light upon the fate of measures of control when these are called in question in court. The outcome depends, at least to a considerable extent, upon the manner in which the plight of the industry and the factual relation of the measures selected to a solution are presented to the courts. If a merger or trade agreement is effected which gives promise of eliminating the obvious evils of overproduction without subjecting consumers to undue price burdens, it should be possible to make that clear and to secure a favorable reaction from judges. Certainly the doctrinal obstacles, which are those most greatly feared, are insubstantial. Similarly if the excessive flood of petroleum issuing from the ground throws interstate commerce into disorder and threatens to diminish the ultimate supply of oil through the weakening of producing and marketing agencies, there is ample precedent for the view that the Supreme Court can be convinced of the constitutionality of Congress' assuming control of production. Certainty, of course, cannot be had; but certainty is not an outstanding characteristic of human affairs. A realization that the focus of constitutional law has shifted from substantive rules to methods of procedure should prove a fruitful source of progress.

⁶⁷ See BIKLE, *op. cit.* n. 64 above, for the applicability of this procedure to constitutional questions.