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DO WE NEED LABOR COURTS?

GEORGE CAHILL

If other disputes can be determined by law, why not disagreements as to wages? The regulation of wages by law has a historical background. The wages of unskilled laborers were regulated in England from 1349 to 1536 under the "*Statute of Laborers*," and later under the "*Statute of Elizabeth*,"¹ which affected not only unskilled workers but the greater part of the industry of that time. The English people "did not for centuries believe that wages determined by free contract were necessarily just — That they believed in an objective standard of justice, a standard independent of the terms of the wage agreement, is evident from their continued efforts to regulate the remuneration of labor by law".² This policy of regulation by statute was not the only means used, but regulation was also effected through the rules and customs of the guilds.³

In 1720 the English Parliament fixed a maximum wage scale for journeyman tailors,⁴ and in 1750-51 the English courts required master tailors to pay a certain minimum wage. In some cases the local justices of the peace fixed wages pursuant to Act of Parliament.⁵ "It was assumed to be the business of Parliament and the law courts to regulate the conditions of labor".⁶

The English Parliament in 1795, 1800 and in 1808 enacted various minimum wage laws. It also enacted laws empowering courts to fix wages.⁷ In 1812 the cotton weavers of Glasgow were unable to agree with a committee of their employers on a reasonable standard of wages and thereupon appealed to the Court of Sessions who confirmed the wage rates established by the Justices as reasonable. Thereupon the employers withdrew from the proceedings and refused to comply with the decision of the justices. This precipitated a nationwide strike which was broken up by the arrest of the strike leaders for the crime of combination.⁸

¹ Webb, "History of Trade Unionism," p. 42; Ryan, "A Living Wage," p. 23-26.

² Ryan, op. cit., p. 25.

³ Op. cit., 26.

⁴ Webb, op. cit., p. 31.

⁵ Op. cit., p. 50.

⁶ Op. cit., p. 65.

⁷ Webb, op. cit., p. 58.

⁸ Webb, op. cit., p. 58, 59.

I

THE RIGHT TO WAGES IS A MORAL RIGHT

All men have a primary natural right "to subsist upon the bounty of the earth",⁹ from which is derived the secondary right (for those who work for wages) of a decent living. This includes sufficient to raise, support and educate a family, with reasonable opportunity for recreation and self improvement. In other words, wages, hours and other conditions of employment is an objective ethical or moral concept, and is not based upon free bargaining or contract which latter may or may not be fair either to the employer or to the employee. The only way that a fair wage can be determined is either by legislative act or by a labor court upon evidence submitted to it. As legislatures cannot always be in session and as conditions affecting wages change from time to time and as they differ in certain kinds of work the determination of a labor court, in a particular case, would seem to be the only practical and effective method of fixing a fair wage.

The Australian labor court, which has satisfactorily settled numerous labor disputes, speaking through its presiding Justice, stated that the court adopted the principle¹⁰ "that each worker should have at least his essential human needs satisfied, and that among the human needs, there must be included, the needs of the family. Sobriety, health, efficiency, the proper rearing of the young, morality, humanity all depend greatly upon the family life and the family life cannot be maintained without suitable economic conditions.

Pope Leo XIII in his famous encyclical on labor, *Rerum Novarum*, formulated the doctrine that regardless of an agreement freely entered into between the employer and the employee, the wage earner was entitled as a matter of morals to a sufficient remuneration to support him in reasonable frugal comfort. Professor Ryan in his book, "A Living Wage," states that unlimited bargaining is not a solution of disputes between employer and employee; that a just, an impartial, fixing of wages is based on ethical principles; that bargaining between employer and employee is comparatively new in the history of labor relations.¹¹

⁹ Ryan, op. cit., Chapter VII.

¹⁰ 29 Harv. Law Rev. 13-27 (1915).

¹¹ "The ethical theory underlying the method of unlimited bargaining, namely, that contracts made without force are necessarily fair, is, despite the prevailing practice condemned by the majority of disinterested persons. This attitude of mind is most clearly shown in the widespread conviction that the exorbitant prices charged and the enormous profits obtained by some of the great trusts are not only a menace to public welfare but positively unjust and dishonest. Yet the contracts by which this result is brought about are free. Speaking of the exorbitant profits made by a prominent corporation in the manufacture of steel rails, a capitalist and ex-senator of the United States not long ago declared, "If this is not robbery, I would like to find some stronger word to

The encyclical, "*Rerum Novarum*," written in 1891, foreshadowed the need of Labor Courts in these words; (translation):

"Whenever the general interest of any particular class suffers or is threatened with evils which can in no other way be met, the public authority must step in to meet them. Now among the interests of the public, as of private individuals are these; that the peace and good order be maintained — that the sanctity of justice be respected, and that no one should injure another with impunity . . . If by a strike or other combination of workmen, there should be imminent danger of disturbance of the public peace . . . or if employers laid burdens upon the workmen which were unjust, or degraded them with conditions, that were repugnant to their dignity as human beings; finally if health were endangered by excessive labor, or by work unsuited to sex or age — in these cases there would be no question that, within certain limits, it would be right to call in the help and authority of the law."

"It must be born in mind that the chief thing to be secured is the safeguarding by legal enactment and policy, of private property . . . This great labor question cannot be solved except by assuming as a principle that private ownership must be held sacred and inviolable."

The encyclical, "*Quadragesimo Anno*," formulated in 1931 by Pius XI, as a revised edition of "*Rerum Novarum*" reiterated Leo's postulates based as they were on the Gospel teaching. It declared it the duty of the civil authority to administer justice among the warring elements in the modern economy; to protect the weak from the strong, and in general to secure the highest well being for the entire body politic. That labor, due to the fact that the laborer is a human being, cannot be bought and sold like any other commodity. That it cannot be subject solely to free competition or economic supremacy. The corollary to the foregoing is that impartial labor or industrial courts can alone dispense justice, not only as between employer and

characteriez it." With this view practically the whole of the American people would agree. Nevertheless, the purchasers of steel rails are neither deceived or coerced; the transaction is free. Again the money shark who trades on the distress and ignorance of the poor by charging exorbitant rates of interest, gives his victim the benefit of a free contract; yet he is restrained by the civil law and condemned by the public conscience. Similarly with bargains where the subject matter is human services. . . . men have always regarded the fixing of wages as in some degree an ethical action . . . the preponderance of human opinion is decidedly against the method of unlimited bargaining. The belief that the amount of remuneration given the laborer is entirely devoid of moral aspects, in other words, that "there is no such thing as fair wages" has never been held by any considerable section of any community. Either explicitly or implicitly men have always been virtually unanimous in the conviction that the standard for determining wages should be a moral standard. Although the method of unlimited bargaining is the prevailing one, it is less than a century in existence and was established through the mistaken efforts of economists and legislators. Previously to that period it was frowned upon by the political, religious, and moral forces of society." Ryan, op. cit., 35, 39.

employee, but also in the public interest. Such courts exist in Sweden and in Great Britain and while their decrees in the latter country are not binding they are generally accepted.

Human rights are superior to rights of property. Professor Ryan has this to say:¹²

"The greatest of theologians, St. Thomas Aquinas, maintained that the man in extreme need who had no other resources, was justified in supplying his necessities from the goods of his neighbor, and that this would not, properly speaking, be theft."

Those who are blessed with "superfluous goods" have a "general duty of charity or beneficence" to help their less fortunate brothers. "Superfluous goods are a trust to be administered for the benefit of the needy".¹³ The Apostle St. Paul says:

"Let your abundance supply their want." II Cor. VIII, 14. Pope Leo XIII in his encyclical, "On the Condition of Labor" said:

"When one's necessities have been fairly supplied, and one's position fairly considered, one is bound to give to the indigent out of that which remains."

St. Thomas Aquinas in his, "*Summa Theologica*," says:¹⁴

"To give from one's superfluous goods is strictly commanded."

II

THE AUSTRALIAN LABOR COURTS

Settlement of labor disputes by court action is recommended by Judge Higgins, President of the Australian Court of Conciliation, and also Justice of the High Court of Australia. The Australian Federal System is similar to ours, the residuary powers of government being in the States. The Federal government was empowered to legislate as to industrial disputes "extending beyond the limits of any one state." A Court of Conciliation was established by statute and where Conciliation was impracticable, arbitration was provided for, and the court made an award which was binding on the parties. A strike or lockout in disputes that came within the act was made an offense. Conciliation was provided for with compulsory arbitration in the background; this was substituted for the "barbarous processes of strike and lockout. Reason is to displace force; the might of the State is to enforce peace between industrial combatants; and all in

¹² Ryan, "A Living Wage," p. 69-70; "*Summa Theologica*," 2a, 2ae. q. 86, a. 7.

¹³ Ryan, id., 270, 271.

¹⁴ 2a, 2ae, q. 32, art. 6. Also St. Basil, "Are you not a despoiler since you have made your own that which you have received to distribute;" Migne, "*Patrologia Graeca*," vol. XXXI—col. 27.

the interest of the public".¹⁵ The Australian federal compulsory arbitration act requires the organization or unionization of employees. An individual formerly could not invoke the powers of the labor court, although the court can intervene for the preservation of industrial peace, even when its powers are not invoked by any union.¹⁶ The underlying thought is that the employer should not be harassed by individual complaints but should deal only with his employees as an organized responsible unit. A union must be "registered," and its constitution and by-laws approved by the Arbitration Court.¹⁷

The Australian Labor Court fixes a minimum wage;¹⁸ the cost of court proceedings are small, the chief expense being the securing of witnesses. As to the effect of compulsory arbitration in Australia, Judge Higgins, writing in November 1915, stated that since the act came into effect, while there were "numerous strikes in Australia as elsewhere," there had been none in wage disputes coming under the jurisdiction of the federal labor court. As to this court "its object is industrial peace between those who do the work and those who direct it".¹⁹

III

THE KANSAS EXPERIMENT

The only instance in this country of the settlement of labor disputes by a labor or industrial court is the Kansas Act of 1920. The proposed bill for the act was brought before the Kansas legislature under determined opposition by organized labor as well as employers. Judge W. L. Higgins, advocating the proposed act before the House in committee of the whole, in part said:²⁰

"... in every Anglo-Saxon country in the world, every government (this is an Anglo-Saxon country because our laws and institutions are founded upon the English common law), every permanent addition to the body of the law, every enactment which has become permanent and remained, has grown out of some great public necessity. In Anglo-Saxon countries the law springs from the common level of the general public. In monarchical countries it comes the other way — from the top down. In our country it comes from the bottom and springs up, and every permanent law takes root in human necessity as the tree takes root in the soil. Let me illustrate briefly. Two hundred and fifty years ago Sir Matthew Hale, one of the great judges of England, later lord chief justice, wrote a paragraph concerning public use which has been said to be the greatest expression of its kind that ever has been printed,

¹⁵ 29 Harv. Law Rev. 13 (1915).

¹⁶ Op. cit., 13 and 23.

¹⁷ Minn. Law Rev., Vol. 30, Page 1-19.

¹⁸ Judge Higgins in 29 Harv. Law Review 25 (1915).

¹⁹ 29 Harv. L.R. 13-27 (1915).

²⁰ "The Party of the Third Part," Allen, pp. 84, 85, 87 and 88 (1922).

and it was about as follows: He said that if the king himself (mark the word "king") is the owner of a public wharf to which all persons must come to unload their goods, even he cannot make excessive charges for wharfage, cranage, and the like, because the wharf, the crane, and the other loading facilities are public utilities, and are no longer to be regarded as private property. That was a long time ago. That has been the law in every English speaking country of the world ever since. Never has it been gainsaid. We have extended the principle — extended it in Kansa a good many years ago when we passed the law creating the railroad board; extended it farther when we created the Public Utilities Act, so that we have now not only fixed the price which the public must pay for these things, but we have compelled the continuance of the service, compelled the railroads to run their trains — to run continuously; haven't allowed a road to take off a freight train in order to boost the price of freight; haven't allowed an electric plant to shut down its service — So in this bill, we are stepping out a little bit farther, and we are saying that not only shall the railroads be compelled to furnish service, not only shall the electric-light company be compelled to furnish its service, and the water company, and the telephone company, but because of the very necessities of the case the people must have food, clothing and fuel. Therefore, we say to the concerns which furnish these products, the bare necessities of life; "You shall not cease operations and let the people go hungry. You shall not cease operations and let the people freeze . . ."

"Now I am going a little farther, and say you have no right, no moral right, to take away the laboring man's right to strike, unless you give him a better remedy. You study that over, all of you. You have no right to take away the laboring man's only weapon unless you give him a better one. Why I have lived in a community in which it was necessary to carry a revolver. I didn't like it very well, and didn't stay there very long, but it was necessary, and I carried one — because the law didn't protect me. It was down in Mexico, where they don't have any law of any kind. Now we have passed a statute in which we make it a crime for a man to carry concealed weapons. We have a right to do that as a state, because we have surrounded every citizen by the greatest protection that ever was known, the protection of Anglo-Saxon law, guaranteeing Anglo-Saxon liberty and justice. Consequently he doesn't need his weapon and we have a right to say to him, "You can't have it." We have never given labor a weapon of self-defense, so we have to let labor carry a gun — that is the right to strike; and if you can't give labor a better weapon, for God's sake don't take the only weapon it has away from it. You are offering labor a weapon which makes the old weapon unnecessary. You are offering it a legally constituted tribunal composed of impartial judges, and all the machinery necessary to give free and even handed justice, with power to enforce against employers the duty of paying a fair wage, of granting

fair hours of labor, and good moral, and healthful surroundings while they are engaged in that labor; and the bill says so in that many words. And when you give labor that other weapon, when you give it a court to which to go and surround it by the protection of law, you have the same right to take away the weapon of the strike as you have to make a law preventing me from carrying a concealed weapon; you have gone farther to insure labor a fair reward; you have gone farther to insure to every laboring man the right and ability to bring up his family, to educate his children, and to give them good, moral, and educational surroundings, than any state or nation has done since the founding of society."

William Allen White, representing the public, supporting the proposed law, discussed before the Senate Committee the philosophy of the proposed bill. He said:²¹

"As civilization grows, it grows more complex — Civilization is the constant enlargement from the more simple form to the more complicated form, and it will never return to the simpler form. Today we are taking in Kansas, a step which must be taken throughout the world. To affect with public use all those interests which are concerned with productive industry, we are in effect making them public utilities.

Every age, every century, and in these modern times every decade, sees some business or interest formerly considered private business or private interest set over in the public interest. Two hundred years ago, when a gentleman had a quarrel with another gentleman, it was supposed to be a private quarrel, which should be settled under a private code called dueling, but too many innocent bystanders got hurt and dueling was stopped in the interest of the public. Time was when a quarrel between a slave and his master was a private matter, and the master had private rights over his slave. That was stopped.

The pirate's right was once a private right, but that right was removed for the public good, and when labor and capital engage in a brawl which threatens daily processes of civilization, we are taking away the right to that brawl and saying the quarrel must be settled in the public interest.

The public in establishing wages, will be interested, not in labor as a commodity, but in labor as a citizen. The public is interested in capital chiefly to see that capital gets justice; that it has a fair return and a profit sufficiently large to encourage enterprise, which is our God-given gift — the gift which distinguishes America from all the world; and by trusting to the public — that is to say, trusting to the organized forces of society in government — to adjudicate wages, capital will find a just and equitable bureau or court or commission, or what you will, and in ten years capital will regard this day as the beginning of a new era in its organization. We are not trying to throttle capital and labor in Kansas, but to emancipate them from their own strangle-hold upon each other and to establish an equitable and living relation between them."

²¹ Op. cit., p. 89, 90.

The Kansas Industrial Court Act, enacted in 1920, covered businesses "affected with a public interest" declared by the Act to include — (1) the manufacture and preparation of food for human needs; (2) manufacture of clothing for human wear; (3) production of any substance in common use for fuel; (4) transportation of the foregoing; (5) Public utilities and common carriers. The act empowered an industrial court of three judges, either upon its own motion, or upon complaint, to summon the parties before it, and hear any dispute over wages or the terms of employment, and if it should find the health or peace of the public imperiled by such dispute, to make findings and fix wages and other terms for the conduct of the industry. Appeal could be taken from its orders to the Supreme Court of Kansas, which had power of review of such orders and if approved, to enforce them.

The activities of the first eighteen months of the Kansas Labor court were reported upon by its presiding judges in 1922.²² This report showed that both labor and industry were satisfied. Of the thirty-nine formal cases brought before the court and disposed of, in only one case was an appeal taken to the Supreme Court of Kansas. This was the famous *Wolf Packing Company* case²³ which finally landed in the Supreme Court of the United States. The latter Court reversed the Supreme Court of Kansas, and declared the Kansas Statute invalid in so far as it affected a private business as a violation of the Fourteenth Amendment.

IV

THE SUPREME COURT HURDLE

In view of the decision in the *Wolf Packing Co.* case²⁴ it has been generally considered in this country that compulsory arbitration of labor disputes, either by administrative board or by a labor court, will be prohibited as a deprivation of "property and liberty of con-

²² Judge Huggins in "Labor Democracy" pages 102105 (1922):

"The Kansas Industrial Relations Act became operative Jan. 24, 1920. On Feb. 2, following the Court of Industrial Relations established by the Act was organized and began to function. From Feb. 2, 1920 to Aug. 1, 1921, 39 formal industrial cases have been issued. Among the formal cases, there have been three original investigations instituted by the court. The Court has considered many informal matters relating to industrial conditions and contracts of employment. Labor on the whole has appeared to be fairly well satisfied with the treatment in the Court of Industrial Relations. All of the orders and judgments of the Court so far have been accepted by the employers and employees alike with the exception of the last one. In that case, the *Wolf Packing Company* of Topeka, Kansas, has availed itself of the provisions of Section 12 of the law and has taken the matter to the Supreme Court of the State. Laborers have in every case accepted the judgment of the Industrial Court although they might have demanded a review by the Supreme Court without any expense to themselves."

²³ *Wolf Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 67 L. ed. 1103 (1923).

²⁴ *Wolf Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923).

tract" under the due process clause of either the Fourteenth or the Fifth Amendment. The due process clause is the same in both amendments and makes no mention of contract. Justice Holmes, in his historic dissent in the *Adkins* case²⁵ in 1923, which was followed as the law by Chief Justice Hughes in the *West Coast Hotel Company* case²⁶ in 1937, discussed "Liberty of Contract" as imported into the Fifth Amendment as follows:

"But in the present instance the only objection that can be urged is found within the *vague contours* of the 5th Amendment prohibiting the depriving any person of liberty or property without due process of law. To that I turn.

The earlier decisions upon the same words in the 14th Amendment began within our memory and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma. Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do embodied in the word "Liberty." But pretty much all law consists in forbidding man to do some things that they want to do and contract is no more exempt from law than other acts." (emphasis supplied)

Justice Miller, in 1878 in the *Davidson* case, deprecated the use of the Fourteenth Amendment (adopted in 1868) as a catch-all for dissatisfied litigants in the lower courts. Speaking for the Court he said:²⁷

"But while it (the 14th Amendment) has been a part of the Constitution, as a restraint upon the power of the States only a very few years, the docket of this Court is overcrowded with cases in which we are asked to hold that the State Courts and State Legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the 14th Amendment. In fact, it would seem from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing

²⁵ *Adkins v. Childrens Hospital*, 261 U.S. 525, 562 (1923). In the *Adkins* case there was involved the constitutionality of an act of Congress fixing minimum wages for women and children in the District of Columbia. The act provided for a board of three members which would hold hearings and determine minimum wages that employers could pay women and children as would be sufficient for a decent living for their employees. The Supreme Court, by a 5 to 4 decision, held the act invalid as a violation of freedom of contract under the due process clause of the 5th Amendment.

²⁶ *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). There was presented in this case the constitutionality of the minimum wage law of the State of Washington for women. It was claimed that it violated freedom of contract under the 14th Amendment. The Supreme Court reversed the *Adkins* case and held the Washington statute valid.

²⁷ *Davidson v. New Orleans*, 86 U.S. 103; 6 Otto 97-108, 24 L. ed. 616, 619 (1878).

to the test of the decision of this Court the abstract opinions of every unsuccessful litigant in a State Court of the justice of the decision against him and of the merits of the legislation on which such a decision may be founded."

Justice Holmes in 1930 in a dissent, concurred in by Justices Brandeis and Stone, again stated a similar opinion. He said:²⁸

"I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the 14th Amendment in cutting down what I believe to be the constitutional rights of the States. As decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions — we ought to remember the caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the 14th Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass."

The Supreme Court in 1877 upheld the rights of the States to regulate the rates and services of public utilities but with two Justices dissenting.²⁹ However, beginning with 1890, almost any kind of State regulatory or reform legislation was subjected to the narrow gauge contract and property restrictions imported into the Fourteenth Amendment by judicial construction based upon an early nineteenth century economy.³⁰

In 1936 the Supreme Court declared the New York minimum wage law unconstitutional,³¹ having held in the *Adkins* case³² that Congress was without power to enact such legislation. The New York minimum wage law prohibited the employment of women in certain lines of work for less wages than were commensurate with the work done, and which would be sufficient to supply a minimum standard for a reasonable healthful living. In other words, the "sweat-shop" was to bed one away with.³³ The Supreme Court held the New York act invalid as an interference with "freedom of contract" under the Fourteenth Amendment. Justice Butler, speaking for the Court, said;

"In making contracts of employment generally speaking, the parties have equal right to obtain from each other the best terms they can by private bargaining . . . The state is without

²⁸ *Baldwin v. Missouri*, 281 U.S. 586, 595, 74 L. ed. 1056, 1061 (6 to 3 decision) (1930).

²⁹ *Munn v. Illinois*, 94 U.S. 113 (1877).

³⁰ Jackson, "Struggle for Judicial Supremacy" (1941).

³¹ *Morehead v. N.Y.*, 298 U.S. 587, 610, 618, 632 (5 to 4 decision) (1936).

³² *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

³³ Jackson, op. cit. 173-4 (1941).

power by any form of legislation to prohibit, change, or modify contracts between employers and adult women workers as to the amount of wages to be paid."

Chief Justice Hughes, dissenting, said;

"I can find nothing in the Federal Constitution which denies to the State the power to protect women from being exploited by overreaching employers through the refusal of a fair wage as defined in the New York statute and ascertained in a reasonable manner by competent authority."

Justice Stone dissenting said;

There is grim irony in speaking of freedom of contract of those who because of their economic necessities, give their services for less than is needful to keep body and soul together. But if this is freedom of contract, no one has ever denied that it is a freedom which may be restrained notwithstanding the 14th Amendment by a statute passed in the public interest."

The Supreme Court is a restricting influence on the executive and legislative branches of the government. It is naturally conservative and opposed to a liberal viewpoint.³⁴ Its primary office according to its ancient tradition, is to protect rights of property as superior to human rights.³⁵ Its interpretation of the Constitution is that of a prior age. It is not tuned to present social or economic needs. It is made up of lawyers, both as to the presentation of cases as well as their decision. Lawyers are generally protectors of property rights. The popular trend or liberal philosophy is most obviously represented in dissenting opinions of courageous judges who are willing to get away from the beaten path of ancient decisions generally based upon a social policy that has passed into history. In other words, the dissenters are original thinkers; they are not slaves to *stare decisis* but base their decisions on reason and on present economic conditions.

The judicial department with life tenure generally belongs to a prior generation and is a retarding influence upon any progressive and untried governmental policy proposed by the elective branches of the government. It is controlled by lawyers exclusively. It is not responsive to the popular will and is often uninformed as to popular needs especially where human rights are involved.

Robert H. Jackson, later Justice,³⁶ writing in 1940 condemned the attitude of the conservatives on the Supreme Court in restricting

³⁴ Jackson, op. cit., Chpts. IX and X.

³⁵ As stated by Judge VanOrsdel in the Adkins case in the lower Federal Court, 284 Fed. 613 (1922):

"It should be remembered that the three fundamental principles which underlie government and for which government exists, the protection of life, liberty, and property, *the chief of these is property*," (emphasis supplied).

³⁶ Justice was sworn in a member of the Supreme Court, Oct. 6, 1941.

economic and social legislation both by Congress and the state legislatures under an all embracing construction of the due process clause in the Fifth and the Fourteenth Amendments. The Court had gone to unlimited extremes to invalidate state laws, enacted under the police power for the welfare of the ordinary citizen. If it had permitted the states, at an earlier time, to try out industrial courts, compulsory arbitration, and other regulatory restrictions in the interest of the public, we would have today a workable solution of the labor problem now confronting Congress as well as the states.³⁷ The old Supreme Court conservative majority, champion of property rights as opposed to human rights, was almost always in error in its decisions on great national questions, as shown by the *Dred Scot* case, the legal tender cases and the income tax decision, all of which pronouncements were later repudiated by an enlightened and humane public opinion. The same is true as to its restrictive policy on labor legislation both state and national, now since the *West Coast Hotel Co.* case³⁸ being gradually discarded.

Again we hear from the Supreme Court the voice of that great philosopher, Justice Holmes, in 1921:³⁹

"There is nothing that I more deprecate than the use of the 14th Amendment beyond the absolute compulsion of its words to prevent the making of social experiments, that an important part of the community desires, in its insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect."

Compulsory settlement of labor disputes by an impartial labor court is not in conflict with the Fifth or the Fourteenth Amendments, as indicated in the reasoning of numerous decisions of the Supreme Court.

The *Adkins* case held that a minimum wage law interfered with liberty of contract. This was reversed in the *West Coast Hotel Company* case. In the case of *Wilson v. New*,⁴⁰ which upheld the validity of the Adamson law, Chief Justice White, speaking for the Court, said:

"The act which is before us was clearly within the legislative power of Congress to adopt and that in substance and effect, it amounted to an assertion of its authority, under the circumstances disclosed to compulsorily arbitrate the dispute between the parties by establishing as to the subject matter of the dispute,

³⁷ Jackson, op. cit., 68.

³⁸ *West Coast Hotel Co.*, supra. (opinion by Chief Justice Hughes; 5 to 4 decision —dissenting, Sutherland, Vandevanter, HMcReynolds and Butler), 300 U.S. 379, 81 L. ed. 703, 108 A.L.R. 1330 (1937).

³⁹ *Truax v. Corrigan*, 257 U.S. 312, 344, 66 L. ed. 254, 267 (5 to 4 dec.) (1921).

⁴⁰ *Wilson v. New*, 243 U.S. 331; 61 L. ed. 755 (5 to 4 decision) (1917).

a legislative standard of wages operative and binding as a matter of law upon the parties — a power none the less efficaciously exerted because exercised by direct legislation instead of by enactment of other appropriate means providing for the bringing about of such result."

The passage of the Adamson Law was demanded by the four American brotherhoods, and President Wilson at that time stated:

"Matters have come to a sudden crisis in this dispute and the country has been caught unprovided with any practical *means of enforcing the principle of arbitration* — A situation had to be met whose elements and fixed conditions were indisputable. The practical and patriotic course to pursue, it seemed to me, was to secure immediate peace by acceding the one thing in the demands of the men which would bring peace." (emphasis supplied)

President Wilson at that time advocated compulsory arbitration, or a court's settlement of labor disputes to be established by Congress as to interstate commerce. He said:

"There is one thing we should do if we are true champions of arbitration. We should make all awards and judgments by record of a court of law, in order that their interpretation and enforcement might lay, not with one of the parties in arbitration but with an impartial and authoratative tribunal. These things I urge upon you, not in haste or merely as a means of meeting the present emergency but as permanent and necessary *additions* to the laws of the land, suggested by circumstances we hope never to see, but imperative as well as just, if such emergencies are to be met in the future." (emphasis supplied)⁴¹

Justice McReynolds, dissenting in the case of *Wilson v. New*,⁴² stated:

"But considering the doctrine now advanced by a majority of the court is established, it follows of course that Congress has power to fix a maximum as well as a minimum wage for trainmen; and *to require compulsory arbitration of labor disputes*, which may seriously and directly jeopardize the movement of interstate traffic; and take measures effectively to protect the free flow of such commerce against any combination, whether of operators, owners, or strangers." (emphasis supplied)

In the case of *U. S. v. Darby*,⁴³ the Supreme Court established the power of Congress to fix minimum wages and maximum hours in the Fair Labor Standards Act. If Congress can fix wages and hours by direct legislation, why not by means of a labor court?⁴⁴

The only practical solution of the conflict between industry and labor is the principle of the Kansas act. It has been applied in England and has worked satisfactorily in Australia and New Zealand.

⁴¹ "The Party of the Third Part," p. 192.

⁴² 243 U.S. 332, 389; 61 L. ed. 755, 791.

⁴³ *U.S. v. Darby*, 312 U.S. 100; 85 L. ed. 609 (1941).

⁴⁴ Prof. Ross in 29 Va. Law Rev. 881.

In the *Adkins case*,⁴⁵ a property-minded conservative Supreme Court majority of five justices declared a minimum wage law for women and children in the District of Columbia, a violation of freedom of contract as injected into the Fifth Amendment. Only 14 years later,⁴⁷ the same Supreme Court, with a liberal majority of five justices, speaking through Chief Justice Hughes, held the minimum wage law of Washington not invalidated by the freedom of contract doctrine. In the *Wolf Packing Company case*,⁴⁶ decided in 1923, the Supreme Court held the Kansas act invalid under the theory of the *Adkins* decision.

It would seem that under current economic conditions, and in view of the futility of trying to settle wage disputes by free bargaining, that the Constitution should be interpreted in the light of present conditions. Chief Justice Taft, dissenting in the *Adkins case*, said:

"The boundary of the police power beyond which its exercise becomes an invasion of the guaranty of liberty under the 5th and 14th Amendments to the Constitution, is not easy to mark. Our Court has been laboriously engaged in pricking out the line in successive cases."

In the *West Coast Hotel Co. case*, which squarely reversed the *Adkins case*, Chief Justice Hughes, speaking for the Court, said:

"The Supreme Court of Washington has upheld the minimum wage statute of that State. It has decided that the statute is a reasonable exercise of the police power of the State — The state court has refused to regard the decision in the *Adkins case* as determinative — the ruling of the state court demands on our part a reexamination of the *Adkins case*. The importance of the question, *in which many States having similar laws* are concerned, the close division by which the decision in the *Adkins case* was reached, and the *economic conditions which have supervened*, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration." (emphasis supplied).

In *Hammer v. Dagenhart*⁴⁸ the Supreme Court held unconstitutional an act of Congress prohibiting the shipment in interstate commerce of products of child labor. In the *Darby case*,⁴⁹ the validity of the Fair Labor Standards Act was established. The constitutionality of the Act was challenged under the Commerce clause and the Fifth and the Tenth Amendments. Chief Justice Stone, speaking for the

⁴⁵ *Adkins case*, supra., 261 U.S. 525, 562.

⁴⁶ *Wolf Packing Co. case*, supra., (1923).

⁴⁷ *West Coast Hotel Co. v. Parrish*, 300 U.S. 379; 81 L. ed. 703, (Washington

⁴⁸ 247 U.S. 251, 62 L. ed. 1104 (June 3, 1918) (5 to 4 decision).

Minimum Wage case).

⁴⁹ *U.S. v. Darby*, 312 U.S. 100, 85 L. ed. 609 (1941).

Court, specially overruled *Hammer v. Dagenhart* and held for a unanimous court that Congress as well as the State Legislatures had the power to fix minimum wages and maximum hours applicable to men as well as women and children and that such regulations were not objectionable to freedom of contract under the Fifth and the Fourteenth Amendments.

The *Darby* case established the power of Legislatures, both State and Federal, to fix not only wages and hours of employment but also conditions of employment. It necessarily follows that legislative acts could also establish Labor courts with power to determine disputes between employer and employee.

V

THE PUBLIC INTEREST MUST BE SAFEGUARDED

The Attorney General of the United States, Tom C. Clark, in an address before the Chicago Bar Association in June, 1946 said:

"We know that there is a national and international conspiracy to divide our people, to discredit our institutions, and to bring about disrespect for our government — We know full well what communism and facism practice — sometimes one taking the cloak of the other. We know that in the Black Bible of their faith they seek to capture the important offices in labor unions to create strikes and dissensions, and to raise barriers to the efforts of lawful authorities to maintain civil peace — I am told that in the councils of many labor unions, wherein deliberations are screened from the public, identical tactics, staged with acute parliamentary skill, are used to discredit and disrupt proceedings, in the hope that the communists, or the facists or both — for I see no difference in them — may achieve final power. Small groups of radicals, well coached in a prearranged plan, are using party line methods in identical activity, so that they can speak to the people as a whole, not in open avowal of their aims but with the voice of the honest workingman".⁵⁰

Labor unions with a membership of over eleven million in the United States collect large sums of money in dues, initiation fees, fines and special assessments and are not required by law to make an accounting to their membership or to the public for the collection or disbursement of these funds. They are generally unincorporated; only one state requires their incorporation. They are in no way subject to legal supervision and have at times threatened to use unlimited sums of money to defeat particular candidates for office, and in one well-known instance the President of the United States. They spend money for political purposes without the consent of their

⁵⁰ 32 A.B.A.J. 453, 456 (1946).

membership. They are not required to publish financial statements of their collections and disbursements as the law requires for banks, insurance companies, candidates for public office and political parties. They take an active part in electing to public office both state and federal officials and exercise a potent influence on legislative policy through their official labor journals which make convenient media for communist and fascist propaganda.⁵¹

The welfare of the general public, that great unorganized majority of the American people, demands regulation by law to prevent or at least control in the interest of the public, the wave of strikes and labor stoppages which so seriously reduce production and also to oppose or at least equalize the activities of organized minorities and pressure groups, chief among which is unionized labor. The recent reorganization act⁵² passed by Congress requiring

⁵¹ Edward F. Albertsworth, Northwestern Univ. Law School, writing in the American Bar Association Journal in February, 1942 (28 A.B.A.J. 106, 109) has this to say: "Assuming union dues to average \$2 weekly, plus initiation fees and special assessments, collections from eleven million persons would be approximately between one and two billion dollars annually. What happens to these funds thus collected?—there are but few unions who do present to their membership regular and reliable stewardship of the moneys collected. There are today in the United States as a general rule no laws compelling accounting by union officials of the sums collected from their membership nor their expenditure. Banks, insurance companies and even political parties publish their incomes and expenditures but not labor unions. The British law so requires and goes further in providing that consent of the union dues payer to expenditure of his dues for political purposes must be obtained. With the great growth of unionism during the past decade in the United States, the question arises. Is their legal responsibility commensurate with their growth? The State of Kansas in 1920 attained national recognition when its legislature sought to affect with a public interest certain types of business not theretofore regarded as public business. But the United States Supreme Court in review of the legislation gradually made the Kansas Industrial Court Act a dead letter. However, the formula 'affected with a public interest' is a flexible one and has since the decisions in the Kansas case been amplified to various new situations. With a new majority personnel upon the Supreme Court of the United States there is sound justification for the belief that, as the American public may become convinced of regulation of unions of workers both in its interest and that of the union membership, the Court will sustain the *reasonable statutory regulation* of labor unionism now impending." David Lawrence the noted columnist, writing in August, 1946, said: "The mayor of the largest city in the United States announced to the country that the 'Communist party is leading the strike' of truck drivers in New York and vicinity—a strike that caused untold losses to the people of that metropolis. Coincidentally, this week the New York Times announced through Louis Stark, its principal correspondent on labor matters and widely known for impartiality, that Communists who have infiltrated into three major unions are forcing a test of strength. There are other unions in which Communists play an important part. They are influential, for example, in the Auto Workers union and in some of the unions engaged in shipping—all of which have inflicted costly strikes on the United States. The American people now are observing unions with substantial minorities which openly favor the cause of Russia as against the United States. Before 1941, the Nazis operated through the Bund and other organizations not only in this country but in other countries in North and South America. The Communists are doing the same thing by infiltrating in the labor movements both of the United States and of other countries in this hemisphere."

⁵² The Legislative Reorganization Act of 1946; Public Laws 601; 2 U.S.C.A. sec. 241-256.

paid lobbyists to register is a step in the right direction. The records in Washington show that in March 1947, five hundred forty-four lobbyists were registered under the act.

On the other hand industry is not without the "beam" in its eye. As has been indicated, the laborer has a primary moral right to a decent livelihood for himself and for his family, due to the fact that he is a human being. We quote again from Judge Higgins;⁵³

"The imposition of a minimum wage, a wage below which an employer must not go in employing a worker of a given character implies of course, an admission of the truth of the doctrine of modern economists of all schools — that freedom of contract is a misnomer as applied to the contract between an employer and an ordinary individual employee. The strategic position of the employer in a contest as to wages is much stronger than that of the individual employee. 'The power of the employer to withhold bread is a much more effective weapon than the power of the employee to refuse to labor.' Low wages are bad in the workers' eyes, but unemployment with starvation in the background, is worse."

Formerly industry was a law unto itself. The laborer accepted what wages he was offered or was obliged to starve. This was free competition. Industry formed its monopolies, had its manufacturer's and other associations, its lobbies in Washington and at the various state capitals, and domineered ruthlessly over the wage earner. However since 1929 and 1930 labor has gained the ascendancy, due to labor unions, the National Labor Relations Act, and the friendly "New Deal" administration. Now labor wields economic supremacy with the same domineering attitude formerly exercised by the so called masters of industry. Capital now howls to high heaven for the sins of labor, forgetful of the sins it committed (when it was able) against the laborer, including the employment of women and children at starvation wages.

The numerous current clashes between capital and labor that have rocked the nation, not only affect the parties directly involved, but also the vast majority of our people, which is neither organized labor or monopolized industry. Governor Allen, commenting on this phase of the problem, has this to say:

"Are industrial relations a matter of private contract? Is the industrial problem contained within the four corners of a collective bargain? A contract is between the party of the first part and the party of the second part. In the evolution of civilization and its industrial implements, a third party has come to the front, and the party of the third part is greater than the parties of the first and second parts. That third

⁵³ 29 Harv. Law Rev. 13, 25 (1915).

party is the public and that means all of us. Industrial relations have taken a new meaning in society. In fact the public is becoming enmeshed in them to such an extent that the relations constitute a great public problem . . . The laboring man must be given prompt and complete justice. He must be given the government's guarantee of absolute protection in order that his progress be sane and constructive.

But the same principles of justice which are extended to his side of the quarrel must be extended also to the side of the employers. It is the duty of the government to see to it that the strife which has grown between them shall no longer express itself in a form of warfare upon an innocent and helpless public . . . Roughly speaking, one tenth of the total population is composed of the actual members of organized labor and organized capital. For the sake of convenience, it may therefore be said that nine tenths of the population represent the public".⁵⁴

VI

THE NATIONAL LABOR RELATIONS ACT IS NOT A SOLUTION

The National Labor Relations Act does not provide a workable system for the settlement of disputes between labor and industry. It provides that labor has a right of self-organization without being influenced or coerced either directly or indirectly by industry so that the parties may bargain on an equal footing. This is as far as the act goes. They do not have to agree upon anything. What agreement they make if any is entirely their own affair; the public has nothing to say about it, even if as a consequence the price of commodities has been doubled. The situation is comparable to that of two men meeting on a crowded street who get into an argument; each throws rocks at the other; traffic is held up and congested; store windows are broken and several women and children are trampled upon; some persons are injured. The police arrive and referee the fight; all business is stopped for the time being. Finally the combatants and some spectators are taken to the hospital, after considerable damage to the gentlemen involved and to a number of innocent bystanders. Any settlement is based purely on physical strength. This is the old trial by battle with the rules provided by the National Labor Relations Act, the fight being supervised by the National Labor Relations Board.

From the foregoing, it abundantly appears that to expect labor and industry to settle their own differences by mutual agreement, as contemplated by the National Labor Relations Act, is about as sensible as to expect opposing litigants to settle their own law suits between themselves and to do away with law courts. There is little

⁵⁴ "The Party of the Third Part," Henry J. Allen, Governor of Kansas; Harper & Brothers (1923).

doubt that in America today the underlying thought of the overwhelming majority of our population, which is neither organized labor or organized capital, is that the labor disputes should be determined by an impartial judicial tribunal to effectively mete out justice to both parties. All that the law now requires is that they bargain. Chief Justice Hughes in the *Jones and Laughlin* case,⁵⁵ which determined the constitutionality of the Wagner Act (N.L.R.A.) said: "The Act does not compel agreements between employers and the employees. It does not compel any agreement whatever." The Court further stated that the object of the act was to give employees "free opportunity for negotiation" with their employers by representatives of their own choosing without coercion from the employer. That the employer has a right to select and discharge employees without interference from the Act, subject, however, to this proviso:⁵⁶

"The employer may not under cover of the right, intimidate or coerce its employees with respect to their self-organization and representation, and on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion."

Where employees are discharged, the intent of the employer can be determined by the National Labor Relations Board, and if there is any evidence in support of the Board's findings that the discharges were on account of union activities of such employees, the employer is penalized by being required to reinstate the employees and to reimburse them with such back pay as may be determined by the Board. Chief Justice Hughes in the *Jones & Laughlin* case by inference admitted that the act was "one-sided in its application," but stated that that was the "policy of Congress" as expressed in the act and that the court was only concerned with the power of Congress, not its policy. The National Labor Relations Board is practically a Kangaroo Court. In the hearings before it, it is not confined to orderly court procedure. The act says:⁵⁷

"In any such proceeding (hearings before the board) the rules of evidence prevailing in courts of law or equity shall not be controlling." sec. 10(b).

The Board has a right to determine the secret intent of the employer and if there is any testimony to support its findings, such

⁵⁵ N.R.L.A.B. v. *Jones & Laughlin*, 301 U.S. 1, 45, 46.

⁵⁶ *Id.*

⁵⁷ 29 U.S.C.A. sec. 160 (1940).

findings are conclusive regardless of the weight of the testimony on behalf of the employer. The act states;⁵⁸

"The findings of the Board as to the facts, *if supported by evidence* shall be conclusive." sec. 10(e). (emphasis supplied).

The National Labor Relations Board is an administrative agency with the powers of a court.⁵⁹ Its members are not required to have judicial qualifications. They need not be "learned in the law," or even be lawyers. Their annual salary is \$10,000; they cannot be removed except for malfeasance. There is no appeal from their findings of the facts, "if supported by evidence." The act does not say "substantial evidence." The rules of evidence in an ordinary court are not binding on the "examiner". In almost any case a decision for either party would have some evidence to support it. The Board might consist of political appointees whose decisions, protected by the Act from review on the facts by a higher court, would play into the hands of a well organized and powerful minority.

As above outlined, under the original setup, hearings before the National Labor Relations Board (as well as before other federal administrative agencies) denied to litigants procedural due process. To remedy this situation the American Bar Association sponsored the "Administrative Procedure Act" which became law June 11, 1946. The act applies to over thirty-five different administrative boards and executive agencies. The law is entitled: "An act to improve the administration of justice by prescribing fair administrative procedure." In short it provides for the fundamentals of ordinary court procedure and review in hearings before administrative boards; that their findings and decisions be based upon legal evidence and a fair hearing.

While the new law will probably secure an impartial hearing before the National Labor Relations Board "examiners", the Administrative Procedure Act itself does not repeal either expressly or by

⁵⁸ 29 U.S.C.A.; 29 Stat 449 (1935);

In the case of *N.L.R.B. v. Virginia Elec. & Power Co.*, 314 U.S. 469 (1941), the court said: "The command of sec. 10(e) of the act that 'the findings of the Board as to the facts, if supported by evidence' precludes an independent consideration of the facts. Bearing this in mind we must ever guard against allowing our views to be substituted for those of the agency which Congress created to administer the act;"

In *N.L.R.B. v. Remington Rand Inc.*, 94 Fed. (2nd) 862, 873 (1938), the court said; "the charges are that the examiner cut short cross-examination—himself took an undue part in the examination—admitted incompetent and excluded competent evidence. He did indeed admit much that would have been excluded at common law, but the act specifically so provided. Section 10(b), 29 U.S.C.A. sec. 160(b); no doubt that does not mean that mere rumor will serve to "support" a finding but hearsay may do so, at least if more is not conveniently available. . . . The underlying tone and style of the decision, may not have indeed evinced that judicial detachment which is the surest guarantee of even justice. . . . Our review does not extend to controverted questions of fact."

⁵⁹ 29 U.S.C.A. sec. 151 et. seq.

implication the limitations of the Wagner act, which deny to the appellate court a reconsideration of the facts and explicitly provide that the ordinary rules of evidence shall not be controlling.

In *Bridges v. Wixon*⁶⁰ the Supreme Court held that in administrative hearings there was "the obligation to preserve the essential rules of evidence by which rights are asserted or defended." The dissent in this case naively states:⁶¹

"With increasing frequency this Court is called upon to apply the rule, which it has followed for many years, in deportation cases as well as in other reviews of administrative proceedings, that when there is evidence more than a scintilla, and not unbelievable on its face, it is for the administrative officer to determine its credibility and weight."

It would seem that according to the foregoing dissent administrative boards, prior to the adoption of the Administrative Procedure Act, were not bound to accord to the parties procedural due process under the Fifth Amendment. This probably was the implied assumption under which the Wagner Act was framed.

Under section 10 of the Administrative Procedure Act, the reviewing court may set aside agency action, findings and conclusions that are arbitrary, capricious, or are an abuse of discretion; are contrary to constitutional right; are without observance of procedure required by law; unsupported by substantial evidence; or are unwarranted by the evidence, "to the extent that the facts are subject to trial de novo by the reviewing court." However, as stated above, the Administrative Procedure Act does not repeal the provisions as to evidence, procedure and review in agency hearings under the National Labor Relations Act.

While it is true, that the *Jones & Laughlin* case upheld the validity of the Wagner act, it was a five to four decision. Three Circuit Courts of Appeals, consisting of nine experienced judges, basing their decisions on prior well-established principles laid down by the Supreme Court, had previously declared the act unconstitutional.

VII

THE SOLUTION IS THE ARBITRATION OF AN IMPARTIAL LABOR COURT

Courts are often, and lawyers are most always, slaves to *stare decisis*. The courts are prone to regard decisions of the Supreme Court, following prior decisions based on an ancient economy, as part of the Constitution. Recent decisions have been getting away from this mode of construction and have endeavored to get back to

⁶⁰ 326 U.S. 135, 153, 89 L. ed. 2103 (1945).

⁶¹ *Ibid.*, p. 178.

the Constitution by interpreting it in the light of the public welfare under present conditions. In the *Graves v. New York* case,⁶² which overruled a long line of former decisions and abolished the doctrine of intergovernmental immunity from taxation of salaries of employees of either the states or the federal government, Mr. Justice Frankfurter, concurring, condemned the tendency to regard what is said about the Constitution as part of the Constitution itself. He said that the Constitution should be interpreted:

"Mindful of the necessary demands of *continuity* in civilized society. A reversal of a long line of current decisions can be justified only if rooted in the Constitution itself as an historic document *designed for a developing nation* . . . In this Court dissents have gradually become majority opinions, and even before the present decision the rationale of the doctrine had been undermined. The judicial history of this doctrine of immunity is a striking illustration of the occasional tendency to encrust unwarranted interpretations upon the Constitution and thereafter to consider merely what has been judicially said about the Constitution, rather than to be primarily controlled by a fair conception of the Constitution. Judicial exegesis is unavoidable with reference to an organic act like our Constitution, drawn in many particulars with purposed vagueness so as to leave room for the unfolding future. But the ultimate touchstone on constitutionality is the Constitution itself and not what we have said about it." (emphasis supplied)

In support of the above statement Mr. Justice Frankfurter referred to Chief Justice Taney's statement in the *Passenger* cases:⁶³

"I am quite willing that it be regarded hereafter as the law of this Court that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."

The Supreme Court as now constituted is inclined to get back to a rationalized interpretation of the Fourteenth Amendment as construed by Mr. Justice Miller in 1878 in the *Davidson* case above referred to. Mr. Justice Black, speaking for the Court in *Everson v. Board of Education*, decided February 10, 1947, says:

"Changing local conditions create new local problems which may lead a state's people to believe that laws authorizing new types of public services are necessary to promote the general well being of the people. The Fourteenth Amendment did not strip the states of their power to meet problems previously left to individual solution."

⁶² 306 U.S. 466, 491-2 (1939).

⁶³ 7 (How.) 283, 470, 12 L. ed. 702, 780.

The principle of compulsory arbitration as embodied in the Kansas act is within the scope of the police power of the States. The decision in the *Wolf Packing Company* case would today probably be out of tune with present economic thought in view of recent aggression by organized labor which has seriously disturbed and affected the entire nation. With a Supreme Court composed of liberal Justices such as were Justices Miller, Holmes, Brandeis, Hughes, Cardozo, and Stone, settlement of labor disputes by court judgment would probably be today declared to be within the police power and not prohibited by the Fifth or the Fourteenth Amendments. Accounting for the change in constitutional exegesis by our present Supreme Court, Dr. Carl B. Swisher of John Hopkins University says:

"... because of the fact that for a period of years the old Court failed to perform properly the function of steady adaptation of constitutional law to the needs of the people, the new Court finds it necessary to make what appears to be a sharp break with the line of constitutional reasoning in the immediate past in order to bring constitutional interpretation into harmony with the public welfare which the constitution was framed to promote. Having made that necessary break, the task of the Court will be and, indeed already is, that of re-establishing lines of continuity with the more distant past in order to guide current constitutional development in terms of the essential principles and ideals of our constitutional system. Intermingled, therefore, with an unprecedented number of frank reversals of past decisions have been efforts on the part of the Court to get "back to the Constitution" — Where labor legislation has been involved, the present Court, unlike its predecessor of some two decades earlier, has not merely recognized the existence of constitutional power of regulation on the basis of the commerce clause but has inclined to interpret broadly the regulatory power which Congress through various labor statutes has conferred upon administrators — Again in connection with the exercise of both state and federal power, the Supreme Court seems quietly to have devitalized the due process clauses so far as what is known as substantive due process is concerned. That barrier to governmental interference with the rights of property elusive of definition though it was, had stood squarely in the way of recognition of the changes in the character of private property which the changes in the essential character of our economy were forcing upon us. In the hands of Justice Sutherland and others who had accepted his point of view, it was a potent weapon. His successors regarding it as an overused weapon for the achievement of undesirable ends, seem to have thrown it into the discard. These and other constitutional changes which have taken place in recent years, do not mean that the Supreme Court has abandoned its duty of appraising governmental action in terms of constitutionality. It means, rather, that the Court is at-

tempting to reconsolidate constitutional interpretation along lines, which are tenable in terms of current conception of the public welfare".⁶⁴

The decision of the Supreme Court in the *Wolf Packing Co.* case, declaring the Kansas act invalid, appears to have effectively discouraged a program either by the states or the federal government to have labor disputes settled by court judgment. There is also the further factor of the definite opposition of organized labor to compulsory arbitration in any form.

A recent proponent of labor courts is United States Senator Homer Ferguson of Michigan,⁶⁵ a former state circuit judge in Detroit. His argument is that management-labor, as well as jurisdictional disputes, are basically the same as disputes between ordinary individuals, which are every day determined and disposed of by the courts. He proposes a system of labor courts, in disputes affecting interstate commerce, similar to our present federal district and circuit courts. *It would seem that all that would be necessary, would be to enlarge the jurisdiction of our existing federal courts as well as the appropriate state courts under the principle of the Kansas Industrial Act heretofore discussed, so that labor and capital would be amenable to the same courts as other trusts and combinations with similar burdens and obligations.*

The proposed plan of Senator Ferguson would be to prohibit strikes in certain basic industries engaged in interstate commerce. If a contract could not be agreed upon, the matter would be decided by the labor court after a hearing and the court's decision would be final. The basic industries listed are: basic steel, coal, oil, gas (when crossing state lines), all maritime shipping, railroads, electric power, telephone and telegraph. The foregoing plan has now been offered to Congress (in March 1947), sponsored by Senator Ferguson and by Senator Smith of New Jersey, for special federal courts to handle interstate labor cases. There would be eleven such courts to hear disputes arising out of labor contracts, the national labor relations act, the fair labor standards act, and the railway labor act. The bill provides a means of enforcing existing labor contracts, which enforcement is now left to a strike. It provides for suability of unions, without making the decision enforceable against individual members.

To allow for quick action, which is essential in most cases, pre-trial conferences in the nature of mediation are authorized, and appeals are given precedence in United States courts of appeal. Only two of the three judges in each court would be lawyers. The third

⁶⁴ "The Growth of Constitutional Power in the United States," C. B. Swischer, The University of Chicago Press, pages 227-229, (1946).

⁶⁵ American Magainze, February, 1947.

judge will be a layman qualified in labor relations, involving a recognition that labor problems are not strictly legal .

In support of the labor court act introduced in the Senate, Judge Ferguson stated; Congressional Record March 19, 1947):

"When labor disputes which affect the public interest occur and are not settled, our citizens have reason to ask what has become of our system of government under law.

Why are labor-management disputes any different from landlord-tenant disputes except that the issues are bigger, more people are involved, and the economic security of the Nation is endangered?

Basically they are the same. The difference is in the handling of the issues. Industrial disputes are still settled on the basis of economic power. Which side can outstrangle the other in a showdown? And nowadays these strangle holds cover such wide areas that the public's neck is usually included . . .

Labor-industrial disputes should come within the jurisdiction of a court established to handle them. The machinery to provide the legal discipline of a civilized society must be designed as nearly as humanly possible to carry out two basic principles; first, that we are a government of law and not of men; and second, that there must be equal justice under law.

Throughout our history, in all other fields of endeavor we have discovered that the machinery best suited to settle disputes and arrive at just decisions is the courts. Yet in labor-industrial relations, we still cling to the principle that economic and political pressure should govern. We create boards, commissions, or bureaus, and place on them special pleaders, or instructed partisan jurors, who act as prosecutors, judges, and juries, and the people wonder why the system does not work. This method would not be successful in any other field of endeavor and it will not work in labor-management relations.

To me the appealing thing about a court system is that it is simple, clearcut, understandable, fair, and the least political of our institutions. It is neither anti-labor or anti-management, but rather is pro-everybody. Our courts have long been admired as symbols of impartial justice, and I believe that the labor-relations courts would soon likewise become such symbols."

Senator Smith of New Jersey, the other proponent of the labor courts bill, had this to say in the Senate (Congressional Record; March 19, 1947):

"As a member of the Committee on Labor and Public Welfare, I am working with my colleagues on that committee on measures to correct current abuses in the labor situation, to improve the conciliation and mediation machinery, and to insure individual workers protection against exploitation both by unfair employers and by power-obsessed labor unions.

But beyond these corrective measures which are called for at the moment I have all along had the feeling that we have been remiss in getting at the very heart of this matter. We have permitted remedies for labor disputes to drift along while those labor disputes threaten the very peace of our society. We have permitted labor-management disputes to come to a dead end and to be settled by the rule of force.

We have tried to equalize the weight of the "brass knuckles" in the contest and have then told the parties to "slug it out." We have not made a statesmanlike effort to find out what is right and just, but we have rather left the matter to the determination between the parties of who is the strongest in a knock-down, dragout struggle.

We have not adequately set our minds to the problem of creating tribunals that will have the confidence of the contending parties and to which they can go to seek justice.

My colleague and I are now studying the whole question of national paralysis cases, in which the interest of the public must be paramount . . . We do believe that we may be able to find a special procedure for those cases in which the health and safety of the public are affected and in which it will be necessary for the Government, preferably through the courts, to act in order to maintain the status quo and continue production pending an equitable adjustment of the disputes.

Mr. President, I am convinced that this bill is an important contribution to the ultimate solution of labor-management difficulties. I am in no way minimizing my insistence on the principle that voluntary collective bargaining between the parties must always be the first bulwark of labor peace, and that mediation and conciliation must be completely explored before we even approach the normal legal procedures."

The current popular demand for laws prohibiting strikes by public employees calls for a tribunal to equitably and authoritatively settle their grievances. We cannot take away the right to strike without providing a better remedy. This remedy is a system of impartial labor courts whose decisions would be subject to review the same as in an ordinary lawsuit.

Charles P. Taft, president of the Federal Council of Churches, proposes compulsory arbitration of strikes that affect the public interest. Mr. Taft is a brother of Senator Taft, chairman of the Senate Labor Committee, and he is labor relations counsel to the Monsanto Chemical Company. Ludwig Teller, prominent New York lawyer, an authority on labor relations, who has written⁶⁶ on the subject, proposes a special labor court, free from political interference, with jurisdiction limited to disputes affecting the public interest. Lee H. Hill, publisher of "The Electrical World," approves compulsory arbitration.

⁶⁶ "A Labor Policy for America," Teller (1945).

As to the feasibility of a labor court, we quote from Judge Huggins, the presiding officer of the Kansas Industrial Court;⁶⁷

"The Anglo-Saxon people in general accept without question the authority and jurisdiction of their courts to adjudicate all matters affecting the life, the liberty and the property of the citizen. If a man's right to life is justiciable, if his liberty which to the Anglo-Saxon is dearer than life itself, can be taken away from him by the judgment of a court, surely disputes as to wages, hours of labor and working conditions are also subject to the jurisdiction of courts. A man who has no faith in the courts has no place in a government of democratic institutions."

We conclude with the words of Governor Allen;⁶⁸

"Strikes, lockouts, and other oppressive caveman measures can no longer be considered mere private disputes under our finely organized society. The world is getting too crowded and its activities are becoming too scientific. Watches cannot be repaired with monkey wrenches and crowbars. There is no valid reason why industrial disputes should not be settled by the government of the people than there is a reason for settling debts by the use of fists and clubs. There is no valid reason why the majority should submit to tremendous hardship because of quarrels between members of a minority, when such quarrels can be settled justly by the majority through law. Courts are not perfect, but they stand between savagery and civilization. If criminal and civil courts can be trusted, industrial courts can be trusted. 'Let the safety of the public be the supreme law'."

⁶⁷ "The Party of the Third Part," Allen, p. 219 (1922).

⁶⁸ "The Party of the Third Part," Allen, (1922). p. 143.