

## Leadership from the Bench (editorial)

Editorial Board

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

---

### Repository Citation

Editorial Board, *Leadership from the Bench (editorial)*, 17 Marq. L. Rev. 277 (1933).

Available at: <http://scholarship.law.marquette.edu/mulr/vol17/iss4/4>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

# MARQUETTE LAW REVIEW

June, 1933

VOLUME XVII

MILWAUKEE, WISCONSIN

NUMBER FOUR

## EDITORIAL BOARD

RICHARD F. MOONEY, *Editor-in-Chief*  
ERNEST O. EISENBERG, *Notes* FRANK J. ANTOINE, *Recent Decisions*  
CLEMENS H. ZEIDLER RALPH J. PODELL  
DONALD W. GLEASON, *Book Reviews* CARL HOFMEISTER, *Legislation*  
WILLIS E. LANG, *Faculty Advisor*

## BUSINESS STAFF

JOHN H. MURPHY, *Business Manager* RICHARD A. McDERMOTT, *Advertising Manager*  
VINCENT T. HARTNETT, *Circulation Manager*

## ALUMNI EDITORIAL BOARD—EDITORS EX OFFICIO

James D. Moran, '17, Tampa, Fla. John M. O'Brien, '26, Milwaukee, Wis.  
Russel M. Frawley, '18, Milwaukee, Wis. Bentley Courtenay, '27, Milwaukee, Wis.  
Alfred E. Ecks, '19, Milwaukee, Wis. H. William Ihrig, '28, Milwaukee, Wis.  
Gilbert E. Brach, '20, Racine, Wis. Stewart G. Honeck, '29, Milwaukee, Wis.  
Matthew F. Billek, '21, Menominee, Mich. Lewis A. Stocking, '30, Milwaukee, Wis.  
Walter F. Kaye, '22, Rhinelander, Wis. Carl F. Zeidler, '31, Milwaukee, Wis.  
Gerald T. Boileau, '23, Wausau, Wis. Eugene H. Christman, '32, Racine, Wis.  
Joseph Witmer, '24, Appleton, Wis. Robert W. Hansen, '33, Milwaukee, Wis.  
V. W. Dittmann, '25, Kenosha, Wis.

Unless the LAW REVIEW receives notice to the effect that a subscriber wishes his subscription discontinued, it is assumed that a continuation is desired.

An earnest attempt is made to print only authoritative matters. The articles and comments, whenever possible, are accompanied by the name or initials of the writer; the Editorial Board assumes no responsibility for statements appearing in the REVIEW.

Published December, February, April, and June by the students of Marquette University School of Law. \$2.00 per annum. 60 cents per current number.

## LEADERSHIP FROM THE BENCH

LIKE a voice "crying out in the wilderness" come two recent dissenting opinions<sup>1</sup> written by Louis D. Brandeis, Associate Justice of the United States Supreme Court. The distressing situation in this country, bringing in its wake social and economic chaos, has given the people leadership in government; and, as if to keep pace with the constructive forces being brought to bear on administrative problems, the unprecedented pronouncements by Mr. Justice Brandeis have given the people, but more particularly the courts, standards for determining our future policy in matters of social and economic concern.

It has been said that one who sits upon the bench of the Federal Supreme Court should be primarily a statesman. Certainly the career of Mr. Chief Justice Marshall attests the wisdom of this statement. Today, more than ever before, this court is concerned chiefly with problems of policy; the merits of the particular controversy are often

<sup>1</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 52 Sup. Ct. 371, 76 L. Ed. 747 (1932); *Louis K. Liggett Co. v. Lee*, 53 Sup. Ct. 481, 77 L. Ed. 553 (1933).

brushed aside in an effort to get at the underlying cross currents of public welfare. The adequate performance of such a function requires a court composed of men with a deep understanding of the diffused elements of our social order and intellects capable of experimenting with new and untried methods. The dominance of the machine age over the lives of men must be brought to an end.

In the *Liebmann* case, the legislature of Oklahoma required those who desired to engage in the ice business to obtain from the proper authority a certificate of public convenience and necessity. This requirement made the ice business in effect a public utility. The majority of the court considered this to be an arbitrary and unreasonable designation, unwarranted by the facts, and hence the requiring of the certificate to be an oppressive regulation. Concerning legislative classification of a hitherto private business as a public utility, Mr. Justice Brandeis says:

"Of course, a Legislature cannot by mere legislative fiat convert a business into a public utility. But the conception of a public utility is not static. The welfare of the community may require that the business of supplying ice be made a public utility, as well as the business of supplying water, or any other necessary commodity or service. If the business is or can be made a public utility, it must be possible to make the issue of a certificate a prerequisite to engaging in it."

Mr. Justice Brandeis declares himself in favor of social experiments, with "a single courageous state, if its citizens choose," serving as a laboratory. He considers that the country is in need of experiments, carefully considered, for it is only thus that progress can be made. The responsibility in regard to such experiments lies with the court; but "if we would guide by the light of reason, we must let our minds be bold. \* \* \* The people of the United States are now confronted with an emergency more serious than war. \* \* \* Some people believe that the existing conditions threaten even the stability of the capitalistic system. \* \* \* There must be power in the states and nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the states which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts."

Thus does Mr. Justice Brandeis, with Mr. Justice Stone joining in the opinion, conclude his mighty dissent. In it is contained an entire economic philosophy, one which invokes action by the best minds in the country.

Just one year later, this man, who combines in himself the clarity of a great jurist and the foresight of a pre-eminent statesman, seized another opportunity for further exposition of his philosophy of government. In the *Florida Chain Store* case, the majority of the court held a regulatory tax of chain stores by the Florida legislature to be unconstitutional because of an obvious discrimination against the large chains. The dissent is based upon the same grounds as in the previous case, and this time Mr. Justice Cardozo and Mr. Justice Stone also dissent. In concluding Mr. Justice Brandeis states:

“There is a widespread belief that the existing unemployment is the result, in large part, of the gross inequality in the distribution of wealth and income which giant corporations have fostered; that by the control which the few have exerted through giant corporations individual initiative and effort are being paralyzed, creative power impaired and human happiness lessened; that the true prosperity of the past came not from big business, but through the courage, the energy, and the resourcefulness of small men; that only by releasing from corporate control the faculties of the unknown many, only by reopening to them the opportunities for leadership, can confidence in our future be restored and the existing misery be overcome. \* \* \* If the citizens of Florida share that belief, I know of nothing in the Federal Constitution which precludes the state from endeavoring to give it effect and prevent domination in intrastate commerce by subjecting corporate chains to discriminatory license fees.”

Whether we agree or not with the disposition of the particular controversies presented in these cases, we are forced to acknowledge that a new leadership has arisen, one which faces the difficult realities of our present condition, and which strives by the power of intellect to overcome them. Control of industry is inevitable; nor does it seem to be far in the future when a shoemaker will be prevented “from making or selling shoes because shoemakers already in that occupation can make and sell all the shoes that are needed” if the welfare of the public as a whole demands it. Surely when that comes to pass, these opinions will be looked upon as guide posts for directing and controlling the unknown forces that will be unleashed.

Leadership should come from those in high positions; it is inspiring to know that a man, writing opinions, so consummate from every standpoint, graces the highest tribunal in this country. Surely opinions such as his have seldom appeared in the reports of the Supreme Court or of any court. One should not be afraid to entrust the destinies of this nation to him.