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THE FUTURE CONSTITUTIONAL OPINIONS OF MR. JUSTICE CARDOZO

A Prophecy Based upon a Fragmentary Review of the Opinions of Judge Cardozo

CHARLES P. LIGHT, JR.*

Judge Cardozo of the Court of Appeals of New York, at long last, is Mr. Justice Cardozo of the Supreme Court of the United States. Eminently fitting it is that the ceremony which effected this happy transition was marked by brevity and simplicity. Its simplicity but serves to accentuate the auspiciousness of the occasion. Its brevity makes it possible and right to reproduce the proceedings.[1]

Chief Justice Hughes, the entire membership of the Court being present, said:

> "The Court is advised that Judge Benjamin N. Cardozo, for many years Chief Judge of the Court of Appeals of the State of New York, has been appointed an Associate Justice of this Court to fill the vacancy caused by the resignation of Mr. Justice Holmes. Judge Cardozo is present. The Clerk will read his Commission. Judge Cardozo will then take the oath of office, and the Marshal will escort him to the Bench."

The Clerk then read the Commission:

> "Herbert Hoover, President of the United States of America,
> "To all who shall see these presents greeting:
>
> "Know ye; that reposing special trust and confidence in the wisdom, uprightness and learning of Benjamin Nathan Cardozo, of New York, I have nominated, and, by and with the advice and consent of the Senate, do appoint him an Associate Justice of the Supreme Court of the United States, and do authorize and empower him to execute and fulfill the duties of that office according to the Constitution and laws of the said United States, and to have and to hold the said office, with all the powers, privileges and emoluments to the same of right appertaining unto him, the said Benjamin Nathan Cardozo, during his good behavior.
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> "In testimony whereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

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[1]The United States Daily, March 15, 1932, p. 4.

"Done at the City of Washington this second day of March, in the year of our Lord one thousand nine hundred and thirty-two and of the Independence of the United States of America the one hundred and fifty-sixth.

(Signed) Herbert Hoover.

"By the President: William D. Mitchell, Attorney General."

The oath of office was then administered by the clerk, and Mr. Justice Cardozo was escorted by the marshal to his seat on the bench.

Frequently justices are appointed to the Supreme Court without having had previous judicial experience. Six members of the present Court are of this group.[2] Of these appointees it might have been difficult to prognosticate at the threshold of their judicial careers.[3] There is also the case which, so far as is known, has occurred only once, of the appointee having served before upon the same Supreme Bench. Chief Justice Hughes makes up this class.[4] In his case prophecy should have been relatively facile. That it was misguided is a fecund commentary upon the temper of the times. Not to engage in belabored grouping, there is a third class whose members have served before in state or federal courts. From this group comes Mr. Justice Cardozo.[5] It is not only possible but meet that his opinions, written while judge and later chief judge of the New York Court of Appeals, be examined for the light they will cast upon his future course. His common law opinions we will put to one side, inasmuch as the Court to which he now belongs "is too aloof from adequate contact with the stuff of common law cases to make it an apt tribunal for such causes."[6] This is reluctant renunciation, for his own contributions and those of the New York Court under his "able guidance . . . have done much to clarify many of the most obscure and difficult parts of the subject"[7] of Torts, to mention but one branch of the law.

Much has been written of the function of the Supreme Court of the

[2]Justices McReynolds, Brandeis, Sutherland, Butler, Stone and Roberts.

[3]Each of the six justices, save perhaps Mr. Justice Butler, seems to have had previous governmental experience. See the respective biographies in WHO'S WHO IN AMERICA (1929–1930).

[4]Chief Justice Jay declined a second appointment as chief justice, and Mr. Justice Rutledge's second appointment, to be chief justice, failed of confirmation by the Senate. Mr. Justice White was appointed chief justice, having served continuously on the Court. 3 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, Appendix pp. 479–483.

[5]Mr. Justice Van Devanter served for a short time as Chief Justice of the Wyoming Supreme Court and later as United States Circuit Judge. WHO'S WHO IN AMERICA (1929–1930).

[6]Frankfurter and Landis, *The Business of the Supreme Court at October Term, 1929* (1930) 44 HARV. L. REV. 1, 18.

[7]BOHLEN, CASES ON TORTS (3rd Ed. 1930) Preface p. iii.

United States in deciding upon the constitutionality of state laws which touch men in myriad ways. Few there are today who are unaware of the crucial part played by the Court in our governmental scheme. Some may decry the Court's power of review, others may applaud, none deny that the power is being exercised. More widespread today is the knowledge that the issue of constitutionality in "important" cases is not clearly defined as white or black. More often than not it is gray. Theoretically, if the gray is not too dark, it will pass muster as white, the law will be upheld. It would be too much to expect of the judicial perception of color, unanimity upon the precise shade of the gray. To one judge a gray, not too dark in degree to be treated as white, may to another appear to be Stygian black. It is fashionable today to call the former and more optimistic judge a liberal, to give to the latter, a pessimist, the name conservative. Whatever the label we apply, the judge must choose his color for the law. Only rarely are we made conscious of the difficulty of choice so candidly lamented by Mr. Justice McKenna: "I find myself unable to concur, yet reluctant to dissent."[8] His inability resulted in a much criticised five-to-four decision. It is in this kind of case where the choice is narrowly made, the die barely cast, that spectators are not averse to crying, "Colorblind!" or worse. There might well be more of tolerant reluctance to predicate judicial colorblindness of an inability to distinguish between the infinite shades of gray. It is important nevertheless to learn as much as possible of the powers of perception, of the attributes and of the abilities possessed by the interpreters of our laws. Vastly more important it becomes if the judge is to sit upon the Supreme Court of the United States. For this Court, "governmental operations and the application of constitutional provisions are destined more and more to furnish the staple business."[9] Its role in our national drama "is that of high judicial statesmanship in the adjustment of controversies of a public nature to which our complicated federal society gives rise."[10]

I

We proceed, first, to consider the opinions of Judge Cardozo which set forth his technique of constitutional and statutory interpretation. The opinions have as a common denominator the striving of the judge to discover the essence of the meaning of the provision in the

[8] Arizona Employers' Liability Cases, 250 U. S. 400, 434, 39 Sup. Ct. 553, 561 (1919).

[9] *Op. Cit. supra* note 6, 44 HARV. L. REV. 1, 15, 18. [10] *Ibid.*, p. 18.

case before him. His function is to determine the intent of the framers of the constitution[11] or of the legislature which enacted the statute. In Judge Cardozo's own words:

> "Our duty is to search out the intention of the Legislature and to give effect to it when discovered though the expression be imperfect. . ."[12]

The acid test of the ability to judge is faced when the expression of the legislative intent is particularly imperfect. The test is passed when the judge can skillfully read the legislative mind, when he is able to appreciate the often Delphic utterances of that phenomenal organism. Fortunate it would seem to be too that the opportunity for sane interstitial legislation increases in proportion to the oracular quality of the constitutional or statutory provision.

The problem of determining the intent of the legislature in enacting a statute which provided that no child under the age of fourteen years should be employed or permitted to work in or in connection with any mercantile establishment, gives Judge Cardozo no apparent trouble:

> "The employer, therefore, is chargeable with the sufferance of illegal conditions by the delegates of his power. But to say that does not tell us how sufferance may be implied. We do not construe the statute with all the rigor urged by counsel for the People. Not every casual service rendered by a child at the instance of a servant is 'suffered' by the master. If a traveling salesman employed by a mercantile establishment in New York gives a dime to a boy of thirteen who has carried his sample case in Buffalo, the absent employer is not brought within the grip of the statute. Sufferance as here prohibited implies knowledge or the opportunity through reasonable diligence to acquire knowledge. . . . But where work is done away from the plant, the inference of sufferance weakens as the opportunity for supervision lessens. No one would say that an employer had suffered the continuance of a wrong because some pieceworker, working at home on a garment, had been aided by a child. In such a case, the true implications of sufferance would be almost instinctively perceived. On the other hand, we think the statute draws no distinction between sufferance and permission. This is apparent from its scheme as revealed in related sections (Labor Law, secs. 70, 161, 93, 131). The two words are used indiscriminately. In such circumstances, each may take some little color from the other. Permission, like sufferance connotes something less than consent. Sufferance, like permission, connotes some opportunity

[11]An incisive commentary is found in BEARD AND BEARD, THE AMERICAN LEVIATHAN (1930), C. II.

[12]103 Park Ave. Co. v. Exchange Buffet Corp., 242 N. Y. 366, 374, 152 N. E. 117 119 (1926).

for knowledge. Thus viewed, the scheme of the statute becomes consistent and uniform."[13]

We have in this passage an application of what may be styled the rule of rationality or of reason, more fully, the rule of rational self-limitation or of reasonable forbearance in statutory construction.

The same rule Judge Cardozo follows where a legislative interpretation of a constitutional provision is questioned. Then, to his way of thinking, the allowance of latitude to the legislature becomes the rule of reason for the court. If reasonable latitude is denied, if a majority of the judges confuse the expediency of legislation with the power to legislate, he will dissent. He did so when a majority held that the New York statute providing for a forty-five million dollar bond issue with which to pay a bonus to the state's citizens who served the country during the late war, violated the constitutional provision reading: "The credit of the state shall not in any manner be given or loaned to or in aid of any individual . . . "

> "I am led, therefore, to the conclusion that the payment of this bonus, as money earned, but not received, is not wholly without support in something which the legislature might estimate as a moral or honorary obligation. If there is any reasonable basis for such an estimate, for such a conception of equity and justice, the courts must yield to the judgment of the legislature that it is worthy of recognition. The question is then one that the legislature must determine for itself.... 'Its decision ... can rarely, if ever, be the subject of review by the judicial branch of the government' . . . Some may think the service so far beyond requital that the attempt should be surrendered for mere futility. Others may think that high and unselfish sacrifice is cheapened when repaid in money. Others again may think that for the sake of the economic or financial stability of the commonwealth, losses already suffered should be left to lie where they have fallen. These are questions of political or legislative expediency. I make no attempt to answer them. I am not to substitute my judgment for the judgment of the lawmakers. . . . If there be the possibility of conflicting motives, those that vitiate are to be rejected, and those that validate presumed."[14]

Where the legislature has spoken clearly, there is no room for a strained interpretation of the words of a statute even to achieve humane results. Where the interstices are filled Judge Cardozo may regret, but he will not act. Specifically, a statute of the state provided that alien friends are empowered to take, hold, transmit and dispose

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[13]People ex rel. Price v. Sheffield Farms Co., 225 N. Y. 25, 30, 31, 121 N. E. 474, 476 (1918).

[14]People v. Westchester Co. Nat. Bank, 231 N. Y. 465, 489, 490, 132 N. E. 241, 250 (1921).

of real property within the state in the same manner as native born citizens. An American citizen died leaving real estate in New York. Is his daughter, who has married a subject of Austria-Hungary, eligible to take the real estate, where the father died twenty days after war was declared between the United States and Austria? In answer to many arguments, Judge Cardozo writes:

> "The legislature might have refused to draw a distinction between enemies and friends. It might have given capacity to all aliens alike, and in that event capacity would not have ended with the outbreak of the war. It chose a policy less liberal. It gave the privilege to friends and withheld the privilege from enemies. I find no ground for the belief that it intended the definition of enemies to wait upon the varying terms of proclamations of future presidents, to be enlarged to-day, and restricted to-morrow, with the changing fortunes of a war. For the same reason, I cannot think that there was willingness to impair the security of titles by substituting the uncertain and fluid test of loyalty in act and speech for the certain and historic test of allegiance to the sovereign. In the law of land, more than in any other branch of law, words are used as terms of art. Here, more than in any other field, the method of history supplies the organon of interpretation for the work of legislators and judges. Deep into the soil go the roots of the words in which the rights of the owners of the soil find expression in the law. We do not readily uproot the growths of centuries."[15]

Nor has the rule of reasonable latitude room for play where the terms of a constitutional provision are clear, and where the legislative act in question by its tendencies runs squarely into a clear constitutional prohibition:

> "The plaintiffs made a contract with the defendant, the city of New York, in Augnst, 1916, for the construction of that part of the subway known as route number 61 in consideration of the payment of $4,194,797. They assert the existence of a later contract by which the defendant, acting through the public service commission and the board of estimate and apportionment, undertook to pay to them the extra cost incurred through the advance in the price of labor and material as a consequence of the war. The validity of that contract is the chief question to be determined. The circumstances leading up to its making are set forth fully in the fourth cause of action, to which for the time being our attention will be confined. . . .
>
> "We think the contract is condemned by article III, section 28, of the Constitution of the state.
>
> "'The legislature shall not, nor shall the common council of any city, nor any board of supervisors, grant any extra compensation to any public officer, servant, agent or contractor' . . .

[15]Techt v. Hughes, 229 N. Y. 222, 239, 240, 128 N. E. 185, 190 (1920).

"We hold, then, that the defendant's promise is unenforcible for lack of a consideration to support it. If, however, some shred of value could be discovered, if we could gather from the maze of this complaint the abandonment of an opportunity to find cheaper labor elsewhere, the promise in its dominant purpose and effect would remain the promise of a gift. We are dealing here with a restraint imposed by the Constitution itself upon the agencies of government. Its prohibitions are to be interpreted, not narrowly and grudgingly like those of a penal statute . . ., but broadly and liberally to promote the policy behind them. . . . What concerns us here is not whether a contract exists, but whether in substance and operation it is one for extra compensation, a largess in purpose and effect though in name and in form a payment for money's worth . . . The Constitution would be 'a splendid bauble' . . . if its mandate could be evaded by the surrender of any right however trivial or technical. In such matters, tendencies and consequences count for more than forms and names."[16]

We are furnished another illustration that the rule of reasonable forbearance will not be applied where it is clearly evident that the legislature is attempting to evade a Home Rule provision of the state constitution to this effect: "The Legislature shall not pass any law relating to the property, affairs or government of cities, which shall be special or local either in its terms or in its effect . . . ", except by an extraordinary form of legislation. Judge Cardozo says:

"Futile is the endeavor to mark the principle of division with the precision or binding force of a codifying statute. Any statement attempted will need to be shaded down or enlarged to meet the exigencies of particular instances as hereafter they develop. Roughly speaking, however, the principle of division, considered merely for the purpose of a working approximation, may be stated to be this: If the class in its formation is so unnatural and wayward that only by the rarest coincidence can the range of its extension include more than one locality, and at best but two or three, the act so hedged and circumscribed is local in effect. If the same limits are apparent upon the face of the act, unaided by extrinsic evidence, or are so notorious or obvious as to be the subject of judicial notice, it is also local in its terms.

"The statute now before us does not survive these tests. All the stigmata of arbitrary selection, of forced and unnatural classification, appear upon its face. By its terms a new burden has been laid, not upon cities generally, despite its pretense of generality, but upon one city or a few. A misshapen congeries of accidents has been made to masquerade under the semblance of a class."[17]

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[16]McGovern v. City of New York, 234 N. Y. 377, 381, 382, 384, 390, 138 N. E. 26, 28, 29, 32 (1923).

[17]Matter of Mayor etc. of New York (Elm St.), 246 N. Y. 72, 78, 79, 158 N. E. 24, 26 (1927).

It is to be noted that Judge Cardozo interprets the Home Rule prohibition "broadly and liberally to promote the policy behind" it. This yet leaves to the judges the determination of what that policy is. Where unfortunate results would be reached by a particular finding on policy, he will search for another meaning. This yet may be called a broad construction, but it is made to fulfil a narrow policy. In reality the prohibition is being narrowly construed. Judge Cardozo gives a narrow construction to the constitutional provision set out in the last paragraph, when he holds that a state law regulating multiple dwellings in the city of New York alone is not within its prohibitions:

> "The Multiple Dwelling Act is aimed at many evils, but most of all it is a measure to eradicate the slum. It seeks to bring about conditions whereby healthy children shall be born, and healthy men and women reared, in the dwellings of the great metropolis. To have such men and women is not a city concern merely. It is the concern of the whole State. Here is to be bred the citizenry with which the State must do its work in the years that are to come. The end to be achieved is more than the avoidance of pestilence or contagion. The end to be achieved is the quality of men and women. . . . If the moral and physical fibre of its manhood and its womanhood is not a State concern, the question is, what is? . . ."[18]

True it is that—

> "There may be difficulty at times in allocating interests to State or municipality, and in marking their respective limits when they seem to come together."[19]

However, in this zone where "State and city concerns overlap and intermingle"—

> "The Constitution and the statute will not be read as enjoining an impossible dichotomy. The question to be faced is this, has the State surrendered the power to enact local laws by the usual forms of legislation where subjects of State concern are directly and substantially involved, though intermingled with these, and perhaps identical with them, are concerns proper to the city?"[20]

Judge Cardozo finds that the judicial precedents point to the answer, no. To fix the scope of permissible state action in the intermingled field, he applies a rational test of substantiality:

> "How great must be the infusion of local interest before fetters are imposed? There is concession even by the plaintiff

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[18]Adler v. Deegan, 251 N. Y. 467, 484, 167 N. E. 705, 711 (1929). Concurring opinion.

[19]*Supra* note 18 at 485, 167 N. E. at 711.

[20]*Supra* note 18 at 489, 490, 167 N. E. at 713.

> that if the subject be 'predominantly' of State concern, the Legislature may act according to the usual forms. But predominance is not the test. The introduction of such a test involves comparisons too vague and too variable, too much a matter of mere opinion, to serve as an objective standard. To adopt it is to infect our legislation with the virus of uncertainty. . . . Considerations of 'more or less' will lead us in such a case, and in many others, into a morass of indecision. The test is rather this, that if the subject be in a substantial degree a matter of State concern, the Legislature may act, though intermingled with it are concerns of the locality. Measured by that test, this statute must prevail. . . ."[21]

There is always the possibility of conflicting state and municipal regulations of the same intermingled subject-matter. To take care of this possibility, Judge Cardozo employs a treatment similar to that used by the Supreme Court in certain cases arising under the Commerce Clause:

> "I assume that if the affair is partly State and partly local, the city is free to act until the State has intervened. As to concerns of this class there is thus concurrent jurisdiction for each in default of action by the other. The power of the city is subordinate at such times to the power of the State, but may be exerted without restraint to the extent that the two can work in harmony together."[22]

II

The historic guarantees against unreasonable searches and seizures and against compulsory self-incrimination are today much in the public eye. Judge Cardozo's opinions in cases which involve these guarantees convincingly demonstrate his talent as constitutional interpreter. Especially important are they as prophecy, since he will now be called upon to apply the provisions of the Federal Bill of Rights:

> The Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated . . ." (Alone among the states, the New York counterpart of the Fourth Amendment is found in a statute, the Civil Rights Law.[23])
>
> The Fifth Amendment: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." (The New York Constitution contains a similar guarantee.)

We remember that the legislature by giving statutory immunity from punishment, which might follow upon incriminating disclosures,

[21] *Supra* note 18 at 490, 491, 167 N. E. at 713.

[22] *Supra* note 18 at 491, 167 N. E. at 714.

[23] Fraenkel, *Concerning Searches and Seizures* (1921) 34 HARV. L. REV. 361.

may require a witness to speak. Where such immunity has been given, is the statute that grants it to be construed to prevent disbarment of an attorney whose testimony shows that he has acted unprofessionally? Are the courts to extend the protection of the provision against self-incrimination to this length? Judge Cardozo takes this common-sense view:

> "Consequences cannot alter statutes, but may help to fix their meaning. Statutes must be so construed, if possible, that absurdity and mischief may be avoided. The claim of immunity from disbarment cannot survive the application of that test. If the exemption protects lawyers, it must equally protect physicians, whose licenses have long been subject to revocation for misconduct . . . Two great and honorable professions have in that view been denied the right to purify their membership and vindicate their honor. The charlatan and rogue may assume to heal the sick. The knave and criminal may pose as minister of justice. Such things cannot have been intended, and will not be allowed.
>
> "The order of disbarment should be affirmed."[24]

Judge Cardozo, we have seen, will interpret a constitutional or important statutory prohibition liberally to promote the policy behind it. In determining what that policy is, with respect to the search of a person lawfully arrested for crime, he looks with the clear eye of the realist:

> "The basic principle is this: Search of the person is unlawful when the seizure of the body is a trespass, and the purpose of the search is to discover grounds as yet unknown for arrest or accusation . . . Search of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its physical dominion.
>
> "The distinction may seem subtle, but in truth it is founded in shrewd appreciation of the necessities of government. We are not to strain an immunity to the point at which human nature rebels against honoring it in conduct. The peace officer empowered to arrest must be empowered to disarm. If he may disarm, he may search, lest a weapon be concealed. The search being lawful, he retains what he finds if connected with the crime. We may be sure that the law would be flouted and derided if, defeating its own ends, it drew too fine a point, after sanctioning the search, between the things to be retained and the things to be returned."[25]

In the same way that he refuses to strain the constitutional immunity to overprotect an accused, Judge Cardozo will decline to

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[24]Matter of Rouss, 221 N. Y. 81, 91, 116 N. E. 782, 785, 786 (1917).

[25]People v. Chiagles, 237 N. Y. 193, 197, 142 N. E. 583, 584 (1923).

fritter the immunity away because public sentiment is aroused against supposed wrongdoers:

> "The privilege may not be violated because in a particular case its restraints are inconvenient or because the supposed malefactor may be a subject of public execration or because the disclosure of his wrongdoings will promote the public weal.
>
> "It is a barrier interposed between the individual and the power of the government, a barrier interposed by the sovereign people of the state; and neither legislators nor judges are free to overleap it.
>
> "The appellant is therefore privileged to refuse to answer questions that may tend to implicate him in a crime, unless by some act of amnesty or indemnity, or some valid resolution equivalent thereto, he has been relieved from the risk of prosecution for any felony or misdemeanor that his testimony may reveal. The immunity is not adequate if it does no more than assure him that the testimony coming from his lips will not be read in evidence against him upon a criminal prosecution. The clues thereby developed may still supply the links whereby a chain of guilt can be forged from the testimony of others. To force disclosure from unwilling lips, the immunity must be so broad that the risk of prosecution is ended altogether. . . ."[26]

His peroration is masterly:

> "We are not unmindful of the public interests, of the insistent hope and need that the ways of bribers and corruptionists shall be exposed to an indignant world. Commanding as those interests are, they do not supply us with a license to palter with the truth or to twist what has been written in the statutes into something else that we should like to see. Historic liberties and privileges are not to bend from day to day 'because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment' . . . , are not to change their form and content in response to the 'hydraulic pressure' . . . exerted by great causes. A community whose judges would be willing to give it whatever law might gratify the impulse of the moment would find in the end that it had paid too high a price for relieving itself of the bother of awaiting a session of the Legislature and the enactment of a statute in accordance with established forms."[27]

Judge Cardozo is of the opinion that the rule which forbids the use in evidence of objects secured through an unlawful search oversecures the criminal at the expense of society. He would keep distinct the immunities of the New York counterparts of the Fourth and Fifth Amendments. This conclusion he reaches after a frank balancing of the competing interests:

[26]Doyle v. Hofstader, 257 N. Y. 244, 177 N. E. 489, 491 (1931).

[27]*Supra* note 26 at 268, 177 N. E. at 497

"No doubt the protection of the statute would be greater from the point of view of the individual whose privacy had been invaded if the government were required to ignore what it had learned through the invasion. The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice. The rule of the *Adams* case strikes a balance between opposing interests. We must hold it to be the law until those organs of government by which a change of public policy is normally effected, shall give notice to the courts that the change has come to pass."[28]

The Federal rule prohibiting the use in evidence of unlawfully seized objects, we know, is subject to exceptions. Here is trenchant comment upon its operation:

"The Federal rule as it stands is either too strict or too lax. A Federal prosecutor may take no benefit from evidence collected through the trespass of a Federal officer. The thought is that in appropriating the results, he ratifies the means . . . He does not have to be so scrupulous about evidence brought to him by others. How finely the line is drawn is seen when we recall that marshals in the service of the nation are on one side of it, and police in the service of the States on the other. The nation may keep what the servants of the States supply . . . We must go farther or not so far. The professed object of the trespass rather than the official character of the trespasser should test the rights of government . . ."[29]

We shall scan the United States Reports with interest to see whether comment is translated into action.

III

Enough cases involving the doctrine of the separation of the powers of government reach the Supreme Court to make the position of a new justice a matter of moment. This doctrine can be applied in such fashion as to strike down wise legislation. We find that Judge Cardozo takes a *via media*. His choice leads to a refusal to give advisory opinions in the absence of a statute so directing:

"The record now before us supplies a pointed illustration of the need that the judicial function be kept within its ancient bounds. Some of the arguments addressed to us in criticism of the resolution apply to all awards for death benefits; others to awards made before June, 1916; others to awards where one of the dependents is a widow. It is thus conceivable that the pro-

[28]People v. Defore, 242 N. Y. 13, 24, 25, 150 N. E. 585, 589 (1926).

[29]*Supra* note 28 at 22, 150 N. E. at 588.

posed resolution may be valid as to some carriers and invalid as to others. We are asked by an omnibus answer to an omnibus question to adjudge the rights of all. That is not the way in which a system of case law develops. We deal with the particular instance; and we wait till it arises."[30]

In denying that a judge may act non-judicially as an adjunct of the executive power of the state, Judge Cardozo points to the sound reasons behind the separation doctrine. Its proper application calls for judicial statesmanship of high order, for a nice appreciation of governmental realities. We see that here:

"From the beginnings of our history, the principle has been enforced that there is no inherent power in Executive or Legislature to charge the judiciary with administrative functions except when reasonably incidental to the fulfilment of judicial duties . . . The exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers. Elasticity has not meant that what is of the essence of the judicial function may be destroyed by turning the power to decide into a pallid opportunity to consult and recommend . . .

"The policy at the root of the constitutional prohibition reinforces this conclusion. The policy is to conserve the time of the judges for the performance of their work as judges, and to save them from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties. Some of these possibilities find significant illustration in the very cases before us now. . . ."[31]

Again, in the field of questions political, Judge Cardozo wisely thinks that the courts should tread carefully until the legislature or the executive has first acted:

"No one can study the vague and wavering statements of treatise and decision in this field of international law with any feeling of assurance at the end that he has chosen the right path. One looks in vain either for uniformity of doctrine or for scientific accuracy of exposition. There are wise cautions for the statesman. There are few precepts for the judge. All the more, in this uncertainty, I am impelled to the belief that until the political departments have acted, the courts, in refusing to give effect to treaties, should limit their refusal to the needs of the occasion; that they are not bound by any rigid formula to nullify the whole or nothing; and that in determining whether this treaty survived the coming of war, they are free to make choice of the conclusion which shall seem the most in

[30]Matter of State Industrial Comm., 224 N. Y. 13, 17, 18, 119 N. E. 1027, 1028 (1918).

[31]Matter of Richardson, 247 N. Y. 401, 410, 420, 160 N. E. 655, 657, 661 (1928).

keeping with the traditions of the law, the policy of the statutes, the dictates of fair dealing, and the honor of the nation."[32]

IV

The Fourteenth Amendment prohibits a state from denying to a person within its jurisdiction the equal protection of the laws. The amendment prevents arbitrary discriminations against or arbitrary classifications of persons or things for particular treatment. Obviously it will require judicial skill of large calibre to strike a balance between reasonableness and unreasonableness in classification. Should the legislature of the State provide that United States citizens only are to be employed on public works, would a contractor using alien labor be able successfully to attack the classification contained in the statute? Judge Cardozo illumines while he is deciding:

> "It [the government] is not fettered, of course, by any rule of absolute equality; the public welfare may at times be bound up with the welfare of a class; but public welfare, in a large sense, must, none the less, be the end in view. . . . To disqualify citizens from employment on the public works is not only discrimination, but arbitrary discrimination. To disqualify aliens is discrimination indeed, but not arbitrary discrimination, for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. Ungenerous and unwise such discrimination may be. It is not for that reason unlawful.
>
> " . . . There are probably many other public works so intimately related, if not to life, at least to health and comfort, that merely arbitrary or oppressive discrimination against the alien in regulating their use, would be a denial by the state of the equal protection of the laws. To attempt to draw the line in advance is futile. The question must in each case be whether the use is one that is reasonably incidental to life under modern conditions in a civilized state, or whether it is rather a privilege which the state may grant or may withhold. To be employed by the state on the public works, and to receive payment out of the public purse is, I think, a privilege rather than a right. . . . "[33]

The courts are not to make use of the Fourteenth Amendment to strike down highly desirable social legislation. The legislature, Judge Cardozo feels, must be given a pretty free hand in its classification of persons and localities. Not only his results in this type of case, but even the language used in expressing them reminds us happily of his predecessor, Mr. Justice Holmes.

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[32]Techt v. Hughes, *supra* note 15 at 247, 128 N. E. at 193.

[33]People v. Crane, 214 N. Y. 154, 161, 169, 170, 108 N. E. 427, 429, 432 (1915).

"This section was amended in 1924 by adding thereto the following:

"'Whenever ninety per centum of the herds of cattle in any town have been subjected to the tuberculin test . . . and the owner of any untested herd in such town refuses or neglects to have his herd tuberculin tested, then the commissioner may order the premises or farm on which such untested herd is harbored to be put in quarantine, so that no domestic animal shall be removed from or brought to the premises quarantined, and so that no products of the domestic animals on the premises so quarantined shall be removed from the said premises.'" . . .

"We find no arbitrary preference of localities or persons, no classification unrelated to the mischief to be remedied.

"The plan of the statute is to make the township the territorial unit in the war upon unhealthy cattle. More will be accomplished, it has been thought, by attacking the units severally than by going against all together . . . No doubt there are gaps and leaks in any scheme of subdivision. . . . At least the local herds will be sound, and buyers from that source of supply will have a certificate of safety. A class may lawfully be restricted if the lines defining the restriction are not arbitrary altogether and the rule to be applied within them is uniform and even. . . . Legislation is not void because it hits the evil that is uppermost. Equally it is not void because it hits the evil that is nearest. There would be paralysis in a different rule. . . .

"The size of the unit is not, however, the sole basis of the attack upon the statute. Attack is also made upon the standard of selection to be applied within the unit. . . . There is a denial, in this view, of the equal protection of the laws if not an unlawful delegation of legislative power, when the voluntary use of a test by a prescribed percentage of the owners in a township is made a standard of conduct to which others must conform, though owners in other townships, where there is a different percentage of opposition, are free from such restraints.

"A command thus conditioned is neither a denial of equal laws . . . , nor an illegitimate delegation of legislative power . . . It is the adaptation of the rule, according to the judgment of the vicinage, to the occasion and the need. Small use would there be in stimulating the many within a township to a care of the public health, if one or a few wiseacres or obstructionists could make the labor vain. More and more, in its social engineering, the law is looking to co-operative effort by those within an industry as a force for social good. It is harnessing the power that is latent within groups as it is harnessing the power in wind and fall and stream. Conspicuously is it doing this in its dealings with agricultural producers, spread often over wide areas, and thus deficient in cohesion, but yielding up new energies when functioning together. We see this in the very statutes,

already quoted, with their attempt to check tuberculosis by co-operative effort. . . . "[34]

A civil service law decision, containing a treatment similar to that in an equal protection case, brings vividly before our eyes a plodding pedestrian police officer, who, Judge Cardozo rightly tells us, cannot be put in a class by himself merely because he has plodded a good long time.

"Here, upon the face of the statute, the signs are unmistakable that a favor is to be conferred upon a single member of the force by making length of service count for him when it is to count for no one else. . . . The act would have been more sincere, and not different in effect, if it had designated its beneficiary by name, and not by the roundabout method of a description of his record.

". . . There is no denial of the power of the Legislature to make experience a factor in determining promotion. What is denied is the power to establish such a test for one applicant without establishing it for others in the same or like conditions. Some qualities, such as those of bravery or heroism, are unique and incommensurable . . . They refuse, like originality or genius, to stay within a class. Exceptions appropriate at such times must not be stretched to take within their shelter the merit, more pedestrian, of mere adherence to the job. These plodding virtues are not so rare that their possessors, however estimable, cannot be classified in groups. The mandate of the Constitution is that merit and fitness shall be ascertained 'so far as practicable' by competitive examination . . . Discretion there is in determining the limits of the practicable. It is not, however, an uncontrolled discretion, but one subject to the teachings of experience and the supervision of the courts . . . The range of selection must be determined by a principle of general application unless the qualities to be preferred are so unique and extraordinary as to bid defiance to classification and call for treatment by themselves. Such plainly are not the qualities that are here selected for reward."[35]

The Privileges and Immunities Clause of Article Four which was designed to secure to the citizen equality of treatment when he was away from home, has been construed to permit numerous discriminations against him. And none the less, because his residence was the basis of the statutory discrimination rather than his citizenship. Necessity or expediency no doubt require sueh discriminations at times. Where, however, the state taxes the estate of a nonresident decedent under a scheme which results in a tax many times heavier

[34]People v. Teuscher, 248 N. Y. 454, 457, 459, 460, 461, 462, 463, 162 N. E. 484, 485, 486, 487 (1928).

[35]Barlow v. Berry, 245 N. Y. 500, 503, 504, 157 N. E. 834, 835 (1927).

than that imposed upon the estate of a resident, Judge Cardozo is quick to apply the prohibition of Article Four:

> "The State does not establish the validity of this act by showing that from certain points of view or in aid of certain purposes a classification discriminating between residents or non-residents has a basis, not wholly illusory, in policy or reason. There is no occasion to inquire whether such a showing would suffice if we were dealing with the equal protection clause of the Fourteenth Amendment, and nothing else. We deal in fact with something more. 'The power of a State to make reasonable and natural classifications for purposes of taxation is clear and not questioned; but neither under form of classification nor otherwise can any State enforce taxing laws which in their practical operation materially abridge or impair the equality of commercial privileges secured by the Federal Constitution to citizens of the several States' . . . Classification may be supported by many considerations of expediency or fairness and, none the less, may be illegal if it denies to the citizens of any State the privileges and immunities that belong to citizens of another. To put it differently, equality in such circumstances is itself the highest policy, to which other policies must bow. The Constitution so commands. Few of its commands, if any, have had an influence more profound upon the attainment and preservation of the unity of the nation . . .
>
> "The principle of equal treatment for the citizens of all the States is a good deal more precious than the gain of revenue in one year or another. We are not to whittle it down by refinement of exception or by the implication of a reciprocal advantage that is merely trivial or specious. The principle is put in jeopardy—there is set in it an entering wedge that may be the beginning of its destruction—if this statute is upheld."[36]

V

Equally as difficult of solution as the problems of classification, because of a like necessity of fine balancing of competitive interests, are cases in which it is contended that an exercise of police power offends the Due Process Clause. To the courts is entrusted the difficult task of fixing the limits beyond which the power of the state must not be employed in touching persons and property. Judge Cardozo, like Mr. Justice Holmes, would give latitude to the legislature in fixing these limits in the first instance. He has not interpreted the prohibition of that clause to mean a denial of wide discretion in enacting measures for the health, safety, morals and welfare of the inhabitants of the state. Whether questioned legislation is

[36]Smith v. Loughman, 245 N. Y. 486, 491, 492, 496, 497, 157 N. E. 753, 755, 757 (1927).

invalid for lack of "due process"[37] frequently depends upon the degree of severity manifested by the legislature and, we are reminded, "in such matters, differences of degree are vital."[38] Where the police power is used to ensure the trustworthiness of brokers of real estate, by requiring that they secure licences before beginning to sell, Judge Cardozo finds no constitutional barrier in the way:

> "The sole question in this court is whether the requirement of a license is a constitutional exercise of legislative power.
>
> "The Legislature has a wide discretion in determining whether a business or occupation shall be barred to the dishonest or incompetent . . . Callings, it is said, there are so inveterate and basic, so elementary and innocent, that they must be left open to all alike, whether virtuous or vicious. If this be assumed, that of broker is not one of them. The intrinsic nature of the business combines with practice and tradition to attest the need of regulation. The real estate broker is brought by his calling into a relation of trust and confidence. Constant are the opportunities by concealment and collusion to extract illicit gains. We know from our judicial records that the opportunities have not been lost. With temptation so aggressive, the dishonest or untrustworthy may not reasonably complain if they are told to stand aside. . . . "[39]

Nor is he able to find any due process objection to an ordinance of a municipal Board of Health which prohibits the sale of patent medicine unless the names of the ingredients, having therapeutic effect, are registered, if the ordinance's operation is confined to drugs acquired after its passage:

> "A danger exists, and the only question is whether the means of correction are appropriate. We cannot say that the means have no relation to the end. The public health is safe-guarded by disclosure to public officers charged by law with its protection. We are not called upon to approve the wisdom of the ordinance. We stop when we satisfy ourselves that it has a reasonable relation to the end to be attained."[40]

As to existing stores of drugs, Judge Cardozo holds otherwise:

> "It would be different if only noxious merchandise were affected. But the ordinance is not so limited. It strikes the good and the bad alike. The board of health is a subordinate agency

[37]The quotation marks are used by Judge Cardozo, for example, see *supra* note 12 at 375, 152 N. E. at 120.

[38]People ex rel. Price v. Sheffield Farms Co., *supra* note 13 at 32, 121 N. E. at 477.

[39]Roman v. Lobe, 243 N. Y. 51, 52, 53, 54, 152 N. E. 461, 462 (1926).

[40]Fougera & Co. v. City of New York, 224 N. Y. 269, 278, 120 N. E. 642, 643 (1918).

of local government. Wide powers of regulation it doubtless has . . . But the power to regulate is not always equivalent to the power to destroy . . . Authority more specific must be found before a great mass of property, commonly reputed useful, may be declared contraband altogether, and excluded from the field of commerce."[41]

It is the due process-police power decision which evokes the designations "liberal" and "conservative" as applied to judges. If we use "liberal" to mean tolerant of legislative judgment, kindly disposed toward the economic and social viewpoints of others, the adjective fits Judge Cardozo neatly. And if we may redefine "conservatism" to mean solicitude for the preservation of the essential import of our constitutional guarantees, he displays that quality as well. We suspect, however, that to some "liberal" means "radical", that to others "conservative" is synonymous with "reactionary." Judge Cardozo is neither of these, as his opinions bear witness. But within our suggested definitions of the labels he is justly entitled to both.

Judge Cardozo's tolerance inevitably leads him to give real meaning to the canon that the wisdom of legislation is a matter for the legislature to decide. His liberalism will not permit him to confuse a question of wisdom with one of power. For him "the presumption of validity which attaches to every act of legislation" is a presumption, not a mere inference. A presumption it was, to the majority of the Supreme Court in *O'Gorman & Young v. Hartford Fire Ins. Co.*[42] A majority yet will function. Judge Cardozo says:

"This statute must be obeyed unless it is in conflict with some command of the constitution, either of the state or of the nation. It is not enough that it may seem to us to be impolitic or even oppressive. It is not enough that in its making, great and historic traditions of generosity have been ignored. We do not assume to pass judgment upon the wisdom of the legislature. Our duty is done when we ascertain that it has kept within its power. . . . 'It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' (Holmes, J. . . .) If doubt exists whether there is a conflict between the statute and the constitution, the statute must prevail. . . . These guiding principles are not to be honored by lip service only. Mischief and hardship, it is said, will follow the enforcement of this law. If that is so, we cannot help it. To correct those evils, if they shall develop, will be the province of legislation. The statute

[41] *Supra* note 40 at 282, 120 N. E. at 645.

[42] 282 U. S. 251, 51 Sup. Ct. 130 (1931). See Frankfurter and Landis, *The Business of the Supreme Court at October Term, 1930.* (1931) 45 HARV. L. REV. 271, 305.

does not withhold from the alien the rights secured to him by the constitution; and we must enforce it as the law."[43]

The Constitution itself furnishes no yardstick by which the judge can measure the constitutionality of a police statute. Certainly the Due Process Clause sets up no clear standard. The judges have adopted several adjectives to express their disapproval of the legislative judgment: "unjust", "unreasonable", "arbitrary", "oppressive", "despotic", to mention some. These adjectives express but do not control the result which an individual judge has reached. They are symbols. Remembering this, we are happy in anticipating an addition to the symbolism of the Supreme Court cases:

"But the existence of a power is not refuted by demonstrating the opportunity for its abuse. The abuse must be dealt with when it arises . . . We may not nullify a statute from mere mistrust of the capacity of legislature and people to use their power wisely. I am persuaded that hundreds of thousands of earnest men and women believe that justice and equity demand the payment of this bonus. They may be wrong. I do not know. It is enough that I cannot characterize their belief as a vagary of the mind, an idle dream or phantasy, an irrational pretense."[44]

Although the sentences quoted do not come from a due process opinion, Judge Cardozo apparently will employ the terms: "vagarious", "phantastic", "irrational", to express his due process[45] results:

"Again there is significance in practice and decision. If the Legislatures in so many States have 'deemed it wise to invite and secure voluntary local co-operation' before applying a plan 'to a given area' . . ., we may suspect that in a choice so general there is something more substantial than a vagary of the will."[46]

Reliance on legislative practice in other states to sustain the legislative judgment of the home state is part and parcel of Judge Cardozo's liberalism. In a due process case often the debatable ground consists of a matter of fact.[47] With Mr. Justice Brewer, Judge Cardozo believes that "a widespread and long-continued belief concerning it is worthy of consideration:"[48]

"Enlightening is the course of legislation in States other than our own. There as here experience has shown that the most

[43]People v. Crane, *supra* note 33 at 172, 173, 108 N. E. at 433.

[44]People v. Westchester Co. Nat. Bank, *supra* note 14 at 491, 132 N. E. at 250, 251.

[45]And equal protection.

[46]People v. Teuscher, *supra* note 34 at 462, 162 N. E. at 486.

[47]See Bikle, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action* (1924) 38 HARV. L. REV. 6.

[48]Muller v. Oregon, 208 U. S. 412, 419, 28 Sup. Ct. 324, 326, (1908). See Frankfurter, *Mr. Justice Brandeis and the Constitution.* (1931) 45 HARV. L. REV. 33, 37.

effective method of attack is by division into units, established, not merely by coercion, but with the willing co-operation of the persons most affected."[49]

Cumulative evidence of Judge Cardozo's affirmative tolerance is found in his use of the separability principle. He will sustain the valid parts of a partially unconstitutional statute, if "a workable system would be left,"[50] and if he thinks that the legislature would have desired that the remainder be enforced:

"In this state, we have gone far in subdividing statutes, and sustaining them so far as valid . . . The tendency is, I think, a wholesome one. Severance does not depend upon the separation of the good from the bad by paragraphs or sentences in the text of the enactment . . . The principle of division is not a principle of form. It is a principle of function. The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots."[51]

And again:

"The statute is not void as a whole though some of its penalties may be excessive. The good is to be severed from the bad. The valid penalties remain."[52]

But there are limits to the application of the principle:

"The defect is so far reaching, it is so deeply wrought into the substance of the law, that there is no opportunity to sever the good from the bad . . . To do that, we should have to rewrite the ordinance. It does not classify or except or excuse. . . It touches all who sell. It does not err in some minor incident or in its effect upon a few. Its fault is inherent in its scheme and extends to many. . . . There can be no severance here that does not mutilate and destroy."[53]

VI

No review, however fragmentary, of a judge's constitutional opinions would be complete without reference to his handling of precedents. Elsewhere, Judge Cardozo has written at some length

[49]People v. Teuscher, *supra* note 34 at 460, 162 N. E. at 485.

[50]Roman v. Lobe, *supra* note 39 at 57, 152 N. E. at 464.

[51]People ex rel. Alpha P. C. Co. v. Knapp, 230 N. Y. 48, 60, 129 N. E. 202, 207 (1920).

[52]People ex rel. Price v. Sheffield Farms Co., *supra* note 13 at 33, 121 N. E. at 477.

[53]Fougera & Co. v. City of New York, 224 N. Y. 269, 282, 283, 120 N. E. 642, 645 (1918).

and helpfully on adherence to precedent.[54] No less helpful are his opinions, which caution us to differentiate the things done as judge from the things said as jurist. The former are the *decisa* of *stare decisis*.

> "The courts below classified the function as judicial. They did so believing that two opinions of this court dictated that conclusion . . . No doubt there was much said in each of these opinions to give support to this belief. If we separate, however, things said from those decided, the question, supposed to be foreclosed, is seen to be open."[55]

> "The case circumscribes the judgment. We hold that the Legislature acts within its lawful powers when it establishes a system of licenses for real estate brokers with annual renewals. Farther than that we do not have to go to decide the controversy before us."[56]

> "Precedents will be misleading if separated from the statutes they interpret. Opinions get their color and significance from the subject of the controversy."[57]

But what was said and done in older cases is not lightly to be ignored in the new:

> "What was said and assumed in that case has been confirmed by years of acquiescence too many and too uniform to permit us to disturb it now upon any nicely balanced arguments."[58]

Where former decisions have been overruled or superseded by constitutional amendment, Judge Cardozo, while consigning them to the limbo of bad law, has a hopeful word to say for their reasoning:

> "The earlier cases are no longer authorities, therefore, for any proposition actually decided. Their reasoning may still instruct, but can no longer control us. They were decided in nearly every instance by a bare majority. In at least one instance a majority did not unite in anything more than the result. It would serve no useful purpose to review the varying opinions at this time. It is enough to say that they are not decisive of the case at hand."[59]

The phenomena of decision by a bare majority and of agreement by a majority upon results only have their counterparts in the decisions of the Court to which Judge Cardozo now belongs. Is it too much to

[54] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) p. 142 *et seq.*

[55] People ex rel. Desiderio v. Connolly, 238 N. Y. 326, 331, 144 N. E. 629, 630 (1924).

[56] Roman v. Lobe, *supra* note 39 at 56, 57, 152 N. E. at 463.

[57] Cott v. Erie R. R. Co., 231 N. Y. 67, 73, 131 N. E. 737, 739 (1921).

[58] Doyle v. Hofstader, *supra* note 26 at 244, 177 N. E. at 489, 491.

[59] People v. Crane, *supra* note 33 at 172, 108 N. E. at 433.

hope that both, but especially the latter, will become rarer with his accession?

To alter the familiar syllogism beginning "all men are mortal," perhaps beyond recognition, by defining mortal to mean fallible, and by substituting judges for Socrates in the minor premise giving us "judges are men,"[60] produces the conclusion, "judges are mortal." Which is but to say that judges sometimes err when they decide that a statute is unconstitutional. The error may not be recognized by the judge who committed it. Usually it is a successor who is the discoveror. What is he to do? Suppose that in a past year a majority of the judges decided that a statute making the transfer in bulk of a stock of goods fraudulent as against creditors was unconstitutional. What is the duty of the judge of a later day? Judge Cardozo answers in no uncertain words:

> "This case makes it necessary for us to say whether the so-called sales in bulk law is a constitutional enactment . . . A very similar law was enacted in 1904 . . . In *Wright v. Hart* ([1905] 182 N. Y. 330) we held it to be unconstitutional. We said that it violated the federal constitution in denying to merchants the equal protection of the laws. We said that it violated both federal and state constitution in imposing arbitrary restrictions upon liberty of contract. That decision was reached by a closely divided court. Three judges dissented. There were strong dissenting opinions by Judge Vann and Chief Judge Cullen.
>
> "Since *Wright v. Hart* was decided, the validity of like statutes has been upheld in two cases by the United States Supreme Court . . . Objection to this statute on the ground of conflict with the federal constitution has thus been removed. We have still to determine, however, whether there is any conflict with our state constitution; and that requires us to say whether we shall adhere to our decision in *Wright v. Hart.*
>
> "We think it is our duty to hold that the decision in *Wright v. Hart* is wrong. The unanimous or all but unanimous voice of the judges of the land, in federal and state courts alike, has upheld the constitutionality of these laws. At the time of our decision in *Wright v. Hart,* such laws were new and strange. They were thought in the prevailing opinion to represent the fitful prejudices of the hour. . . The fact is that they have come to stay, and like laws may be found on the statute books of every state. . . .
>
> "In such circumstances we can no longer say, whatever past views may have been, that the prohibitions of this statute are arbitrary and purposeless restrictions upon liberty of contract. . . The needs of successive generations may make restrictions imperative to-day which were vain and capricious to the vision

[60]No discourtesy to Ohio's Supreme Court Judge Florence E. Allen is intended, since "men" is used generically. Whether Judge Allen would wish to be excepted from the syllogism's conclusion, we are unable to say.

of times past . . . Back of this legislation, which to a majority of the judges who decided *Wright v. Hart* seemed arbitrary and purposeless, there must have been a real need. We can see this now, even though it may have been obscure before. Our past decision ought not to stand in opposition to the uniform convictions of the entire judiciary of the land. Least of all should it stand when rendered by a closely divided court against the earnest protest of distinguished judges. . . . "[61]

VII

To the virtues attributed to man by the ancients: prudence, courage, temperance, justice, the theologians added: faith, hope and charity, the seven cardinal virtues all told. The opinions of Judge Cardozo which have been reviewed portray qualities the same in number and similar in kind: vision, firmness, tolerance, humaneness, candor, tact, felicity of expression.

Clarity of vision, ability to distinguish between form and substance, between matters that differ only in degree, is an indispensable attribute of the judge. The vision of the realist Judge Cardozo possesses. His opinions display that "shrewd appreciation of the necessities of government"[62] which he once attributed to others:

"The state . . . has given to any laborer employed by a contractor in the construction of a public improvement, a lien for the value of his labor upon the moneys of the state applicable to that improvement. The state has thus defined the channels through which the payment must be made. It has assumed a direct obligation not only to its own employees, but also to the employees of contractors on its works. To say that the latter class of employees receive, not the state's moneys, but those of the contractors, is to put form above substance. The great problems of public law do not turn upon these nice distinctions. The fundamental powers of the state and the fundamental rights of man are built upon a broader basis. The truth and substance of the situation is that the contractor's employees are doing the state's work, and are paid out of the state's moneys; and this truth ought not to be obscured by distinctions between contractors and servants established to fix the gradations of civil liability.

". . . It is now perceived that all persons engaged on the public works, from the highest officers to the lowest laborers, through all the gradations of contractors and subcontractors, are, in a very vital sense, in the service of the state. . . . Whether they are called officers or employees does not matter. The power of the legislature depends upon the substance of things, and not upon names and labels."[63]

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[61]Klein v. Maravelas, 219 N. Y. 383, 384, 385, 386, 114 N. E. 809, 810, 811 (1916). [62]People v. Chiagles, *supra* note 25 at 197, 142 N. E. at 584.

[63]People v. Crane, *supra* note 33 at 166, 167, 108 N. E. at 431.

And in another case he writes:

> "We close our eyes to realities if we do not see in this act the marks of legislation that is special and local in terms and in effect. This group of conditions so unusual and particular is precisely fitted to the claimant's case, and only by a most singular coincidence could be fitted to any other. If we may not say of such a coincidence that it is literally impossible, at least we may say that one would be surprising, and several would be marvelous."[64]

Taking a realist's view, Judge Cardozo sees nothing to fear in the administrative officer wielding extensive powers:

> "The powers devolved by the charter upon the Commissioner of Accounts are of great importance for the efficient administration of the huge machinery of government in the city of New York. They will be rendered to a large extent abortive if his subpoenas are to be quashed in advance of any hearing at the instance of unwilling witnesses upon forecasts of the testimony and nicely balanced arguments as to its probable importance. Very often the bearing of information is not susceptible of intelligent estimate until it is placed in its setting, a tile in the mosaic. Investigation will be paralyzed if arguments as to materiality or relevance, however appropriate at the hearing, are to be transferred upon a doubtful showing to the stage of a preliminary contest as to the obligation of the writ. Prophecy in such circumstances will step into the place that description and analysis may occupy more safely. Only where the futility of the process to uncover anything legitimate is inevitable or obvious must there be a halt upon the threshold."[65]

Firmness in the face of opposition to his own carefully formed constitutional views, Judge Cardozo displayed in his dissenting opinion in the *Bonus Case:*

> "We are warned that the recognition of this equity may be followed by the recognition of others still weaker and more rarefied. All sorts of hypothetical situations are suggested in the briefs of counsel, and held before us *in terrorem*. I am not swerved by these forebodings. I do not know the equity that is incapable of being reduced to an absurdity when extended by some process of analogy to varying conditions. Here, as often in the law, the difference between right and wrong is a difference of degree."[66]

Firmness we have seen him display in upholding the historic immunities from compulsory self-incrimination and unreasonable searches when their integrity was threatened by the righteous

[64]Matter of Mayor etc., of New York (Elm St.), *supra* note 17 at 77, 78, 158 N. E. at 26.

[65]Matter of Edge Ho Holding Corp., 256 N. Y. 374, 381, 382, 176 N. E. 537, 539 (1931).

[66]People v. Westchester Co. Nat Bank, *supra* note 14 at 490, 132 N. E. at 250.

indignations of the hour. And in the less appealing situation where the legislature barred alien labor from the public works he refused to read into the constitution of the state a prohibition, even though the purpose of the legislation was selfish.

Tolerance, liberality, respect for the opinion of the legislators of his own and of other states is perhaps the most pronounced characteristic of Judge Cardozo's opinions. We have referred to it before. We are content merely to mention it in this catalogue of attributes. It would prove helpful leaven for any supreme court.

Throughout his opinions we are conscious of the humane spirit motivating Judge Cardozo. It showed itself in the kindly references to the police lieutenant's plodding virtues and pedestrian merit, while denying him special promotion;[67] in the charitable remarks upon overruled decisions.[68]

An attribute concurrent with clear vision is candor. Particularly is this quality welcome in the judge. Without overstatement, it can be styled almost indispensable. Given a candid treatment of the controlling facts in a case, we may admire the judge's method even while we disagree with his results. The tendency, however, it to agree with results which are reached as a result of frankness in the handling of the facts.

> "We cannot say to-day in the face of such overwhelming authority, that the presumption of validity which attaches to every act of legislation has been overcome. The present statute is similar in essentials to the one condemned in 1905. In details it may be distinguished from the earlier one, but the details are in reality trifling. We cannot without a sacrifice of candor rest our judgment upon them. We think we ought not to do so. We should adopt the argument and the conclusion of the dissenting judges in *Wright v. Hart*, and affirm the validity of the statute on which the plaintiff builds his rights."[69]

Another instance:

> "The prohibition of alien labor in this statute is, however, unrestricted. It applies to the most temporary and occasional service, and to the lowest grades of labor. Even in those cases, it is for the legislature, according to the People's claim, to determine whether some relation exists between efficiency and citizenship; between loyalty in service, and service by the loyal. Such tests of fitness have a fair relation to permanent positions where a spirit of allegiance to the employer may be cultivated. It seems far fetched, however, to apply them to the task of day laborers excavating for sewers or digging trenches for a subway.

[67]Barlow v. Berry, *supra* note 35 at 503, 504, 157 N. E. at 835.

[68]People v. Crane, *supra* note 33 at 172, 108 N. E. at 433.

[69]Klein v. Maravelas, *supra* note 61 at 387, 114 N. E. at 811.

The relation in such circumstances is so remote that we may consider it illusory."[70]

Tact in his conduct which touches upon the domain of the legislator is not always an outstanding characteristic even of the able judge. It is unusual to find expressed in judicial opinions approbation of the legislative course. Yet certainly such expression would make for a smoother working of the governmental machine. Judge Cardozo seems spontaneously to be aware of this.

"The Legislature might have said that every farmer in every township must submit his cattle to the test . . . It chose to adopt a rule less general and oppressive. . . . The safest thing was to leave the choice to the enlightened self-interest of those within the industry. They would inspect their own herds, not intermittently and casually, but with the solicitude of ownership. Better than mere officials, they would know what should be done. "[71]

From a judge known to be sympathetic, a tactful plea to the legislature for better draftsmanship in statutes might not go unheeded.

"The task of judicial construction would be easier if statutes were invariably drafted with unity of plan and precision of expression. Indeed, adherence to the same standards would be useful also in opinions. The ideal being unattainable, we must not exaggerate the significance of deviations from the perfect norm."[72]

Finally, Judge Cardozo's opinions are marked by an unusual felicity of expression. The litigant disappointed by his decision could truthfully have joined in the tribute once paid a distinguished opponent by an attorney who remarked, that even though his opponent's arguments keenly resembled a stiletto in the hand of the expert, yet he was happy to say that the pain of the thrust was forgotten in the pleasure of the association. From this characteristic of grace in the expression of ideas arises danger of mistaking for agreement with what the judge has said, approbation of how he has said it. If such danger there be, it cannot be other than welcome to those whose lives are spent in reading judicial opinions. That the literature of the Supreme Court will so soon be enriched by the opinions of Mr. Justice Cardozo is a thought which cheers. That the body of our law will draw strength from his "wisdom, uprightness, and learning"—to use the words of the Commission—is a conviction which fortifies.†

[70]People v. Crane, *supra* note 33 at 163, 108 N. E. at 430.

[71]People v. Teuscher, *supra* note 34 at 462, 162 N. E. at 486.

[72]Finsilver, Still & Moss v. Goldberg, M. & Co., 253 N. Y. 382, 392, 171 N. E. 579, 582 (1930).

†Ed. Note: Professor Light plans to write a second article on Mr. Justice Cardozo for the CORNELL LAW QUARTERLY next year, when he will discuss how the decisions rendered by the former New York judge conform to the prophecy herein made.